



Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 18 December 2014¹

Case C-601/13

Ambisig — Ambiente e Sistemas de Informação Geográfica SA

v

Nersant — Associação Empresarial da Região de Santarém

(Request for a preliminary ruling from the Supremo Tribunal Administrativo (Portugal))

(Request for a preliminary ruling — Directive 2004/18/EC — Contract for services — Award of contract — Most economically advantageous tender — Contract award criteria — Evaluation of the team assigned to performance of the contract)

1. This case, which was received at the Court on 25 November 2013, concerns the interpretation 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.² The request for a preliminary ruling was submitted in connection with a pre-contractual administrative appeal lodged by Ambisig — Ambiente e Sistemas de Informação Geográfica SA ('Ambisig') against the decision of 14 February 2012 of the Chairman of the Executive Committee of Nersant — Associação Empresarial de Região de Santarém ('Nersant') to award to Iberscal a contract for the purchase of training and consultancy services for the execution of the project 'Move PME, Médio Tejo area of quality, environment, safety and health at work, food safety — SME'.

I – The facts of the dispute in the main proceedings and the question referred for a preliminary ruling

2. On 24 November 2011,³ the contracting authority Nersant published an invitation to tender for the purchase of training and consultancy services for the execution of the project 'MOVE PME, Médio Tejo area of quality, environment, safety and health at work, food safety — SME'.

3. Article 5 of the contract notice stated that the contract would be awarded to the economically most advantageous tender, determined on the basis of the following factors:

'A. Evaluation of the team – 40%

- (i) This factor will be arrived at by taking into account the composition of the team, its proven experience and an analysis of the academic and professional background of its members.

¹ — Original language: French.

² — OJ 2004 L 134, p. 114.

³ — *Diário da República*, Series 2, No 226.

B. Quality and merits of the service proposed – 55%

- (i) Overall assessment of the proposed structure including the work programme – 0 to 20%
- (ii) Description of the technical methods to be used and the implementing methodologies – 0 to 15%
- (iii) Description of the methods for checking and monitoring the quality of the work in the various spheres of activity – 0 to 20%

C. Overall price – 5%

Preference will be given to the tender achieving the highest number of points.'

4. In its preliminary report, the selection board ranked Iberscal in first place.

5. On 3 January 2012, Ambisig, which had submitted a tender, exercised its right to a prior hearing, claiming that Factor A, which formed part of the award criteria, namely evaluation of the team, was unlawful.

6. The board added an addendum dated 14 February 2012 to its final report adopted on 4 January 2012, in which it rejected the arguments put forward by Ambisig at the prior hearing. In the board's opinion, what is assessed by Factor A is 'the specific technical team which the tenderer proposes assigning to the work to be carried out. The experience of the proposed technical team is, in this specific case, an intrinsic characteristic of the tender and not a characteristic of the tenderer'.

7. By decision of 14 February 2012, on the basis of the board's conclusions, the Chairman of the Executive Committee of Nersant awarded the contract for services to Iberscal and approved the draft contract for the provision of services.

8. Ambisig lodged a pre-contractual administrative appeal before the Tribunal Administrativo e Fiscal de Leiria (Administrative and Tax Court, Leiria) (Portugal) seeking both the annulment of the decision awarding the contract and the broadening of the subject-matter of the proceedings to include the annulment of that contract.

9. Since the Tribunal Administrativo e Fiscal de Leiria dismissed the appeal in its entirety, Ambisig lodged an appeal before the Tribunal Central Administrativo Sul (South Central Administrative Court).

10. In upholding the judgment delivered by the court of first instance, the appeal court held that the factor contained in Article 5(A) of the contract notice, which had been challenged as an award criterion, was permissible under Article 75(1) of the Código dos Contratos Públicos (Public Procurement Code, 'the CCP') inasmuch as it related to 'the team proposed for the performance of the contract for the provision of services put out to tender and not directly or indirectly to situations, qualities or characteristics or other factual aspects of the tenderers'.

11. Ambisig lodged an appeal against that judgment before the Supremo Tribunal Administrativo (Supreme Administrative Court), claiming in essence that the contested award criterion was not only unlawful under Article 75(1) of the CCP but also incompatible with the provisions of Directive 2004/18.

12. According to the order for reference from the Supremo Tribunal Administrativo, the point of law to be settled is whether criteria such as those contained in Article 5(A) of the contract notice at issue are permissible as award criteria in public procurement procedures for the purchase of services and consultancy.

13. The Supremo Tribunal Administrativo notes that a new factor has arisen in relation to the case-law of the Court involving the directives on public procurement, in that the Commission has submitted a proposal for a directive which might alter the light in which that question would be examined.⁴

14. It was in those circumstances that the national court decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

‘With regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, is it compatible with Directive 2004/18 ..., as amended, to lay down, among the factors making up the award criterion in relation to tenders in a public tendering procedure, a factor enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract, taking into consideration the composition of the respective teams, their proven experience and an analysis of their academic and professional background?’

II – Analysis

15. First of all, it is worth noting that, *Nersant*, all the Member States that submitted observations in this case, namely the Portuguese, Greek and Polish Governments, and also the Commission, in essence propose that the question referred for a preliminary ruling should be answered in the affirmative. *Ambisig* for its part has not submitted written observations, but presented oral argument at the hearing held on 6 November 2014.

A – Preliminary observations

16. First, my reasoning will be based solely on the provisions of Directive 2004/18, which are the only ones that are relevant *ratione temporis*, since the new directive is in no way applicable to the present case.⁵

17. Second, with regard to the principles at issue, it is important to differentiate between selection criteria and award criteria. Whilst selection of a tenderer concerns its personal situation and its ability to engage in the professional activity in question, the contract is awarded to the tenderer which submitted the tender that is most economically advantageous from the point of view of the contracting authority (Article 53(1)(a) of Directive 2004/18) or which offers the lowest price (paragraph 1(b) of that same article).

18. In other words, it is logical that, when it comes to awarding the contract, it is not (or it is no longer) the tenderer that is evaluated but the tender that it has submitted.

4 — After this case file was received by the Court, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65) was adopted, which came into force in April of the same year.

5 — See judgments in *Commission v France* (C-337/98, EU:C:2000:543, paragraphs 38 to 40) and *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627). Directive 2014/24 was not yet in force at the time of the events in the main proceedings.

19. Furthermore, according to the case-law of the Court on public procurement procedures, the examination of the suitability of contractors to perform the contracts to be awarded and the awarding of those contracts are two different operations. Even though the relevant directives do not rule out the possibility that examination of the tenderers' suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules⁶ and pursue different aims.

20. In that context, Article 44(1) of Directive 2004/18 provides that contracts will be awarded *after* the suitability of the economic operators has been checked in accordance with the criteria of economic and financial standing and of professional and technical knowledge or ability.

21. Although it is true that Directive 2004/18 leaves it open to the authorities awarding contracts to choose the criteria on which they propose to base their award of the contract, nevertheless their choice is limited to criteria aimed at identifying the offer which is economically the most advantageous,⁷ and therefore that which offers the best value for money.

B – *The case-law*

22. In connection with Directive 92/50/EEC,⁸ the Court has ruled previously on whether, in a procedure for the award of a contract, that directive precludes the contracting authority from taking account of tenderers' experience, manpower and equipment and also their ability to perform the contract by the anticipated deadline, not as qualitative selection criteria but as award criteria.

23. In the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40)⁹ the Court held:

'30 ... "award criteria" do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' ability to perform the contract in question.

31 In the case in the main proceedings, however, the criteria selected as "award criteria" by the contracting authority relate principally to the experience, qualifications and means of ensuring proper performance of the contract in question. Those are criteria which concern the tenderers' suitability to perform the contract and which therefore do not have the status of "award criteria" for the purposes of Article 36(1) of Directive 92/50.

32 Consequently, the conclusion must be that, in a tendering procedure, a contracting authority is precluded by Articles 23(1), 32 and 36(1) of Directive 92/50 from taking into account as "award criteria" rather than as "qualitative selection criteria" the tenderers' experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline.'

24. In so holding, the Court confirmed its case-law¹⁰ according to which, in public procurement procedures, evaluation of tenderers' suitability to carry out the works to be awarded and the award of the contract are two different operations and are governed by different rules.

6 — See, to that effect, the judgments in *Beentjes* (31/87, EU:C:1988:422, paragraphs 15 and 16) and *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraph 26).

7 — Judgments in *Beentjes* (31/87, EU:C:1988:422, paragraph 19); *Concordia Bus Finland* (C-513/99, EU:C:2002:495, paragraphs 54 and 59); *GAT* (C-315/01, EU:C:2003:360, paragraphs 63 and 64); and *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraph 29).

8 — Council Directive of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1) ('Directive 92/50').

9 — I note that that judgment was delivered by a Chamber of five judges, without an Opinion.

10 — See judgment in *Beentjes* (31/87, EU:C:1988:422).

25. Moreover, the absence of any distinction between the qualitative selection criteria and the award criteria led the Court to a finding of failure to fulfil obligations in *Commission v Greece* (C-199/07, EU:C:2009:693).¹¹

26. In that context, it is worth noting that the wording of Article 36(1)(a) of Directive 92/50, entitled ‘Criteria for the award of contracts’, is in essence identical to the wording of Article 53(1)(a) of Directive 2004/18 (apart from the fact that that directive introduces three new criteria relating to environmental characteristics, running costs and cost effectiveness).¹²

27. However, compared with Directive 92/50, Directive 2004/18 seems to attach greater importance to the qualitative criteria, inasmuch as the third paragraph of recital 46 in the preamble thereto states that ‘[w]here the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract, since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.’¹³

28. Moreover, (like the Commission) I think that the fact that Article 53(1)(a) of Directive 2004/18 makes no express mention of the academic or professional qualifications of the members of the proposed team or of the relevance of their experience to the performance of the contract cannot be considered decisive, since the award criteria contained in that provision are listed simply as examples. Consequently, it is clear that Article 53(1)(a) of Directive 2004/18¹⁴ leaves it open to the contracting authority to choose the criteria on which it intends to base its award of the contract, provided that they are aimed at identifying the most economically advantageous offer. In addition, it follows from the case-law, and also from the wording of Article 53(1)(a) of Directive 2004/18, that only award criteria linked to the subject-matter of the contract¹⁵ may be used as a basis for awarding the contract in question.

29. The examples cited in Article 53(1)(a) of Directive 2004/18, where ‘the award is made to the tender most economically advantageous’ are: quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.

11 — In that context, see also the judgment in *Spain v Commission* (C-641/13 P, EU:C:2014:2264).

12 — In that context, some authors have, however, emphasised that, in other articles, the two directives differ somewhat regarding this matter. See, for example, M. Burgi and B. Brandmeier, ‘Quality as an interacting award criterion under current and future EU law’, *European Procurement & Public Private Partnership Law Review*, 2014, vol. 9, No 1, p. 23: ‘Taking a close look at the background of these judgments [*Beentjes* (31/87, EU:C:1988:422), *Lianakis and Others* (C-532/06, EU:C:2008:40) and *Commission v Greece* (C-199/07, EU:C:2009:693)], ... the wording of the previous provisions in Directive 92/50/EC, on which the court based its decision, provided for a much stricter differentiation between the selection and the award stage. ... Article 20 stated that selection criteria had to be evaluated before entering the award phase. Apart from the fact that this chronological order never was interpreted in a strict way ..., the legal base for such an assumption was replaced. A provision according to Article 20 of Directive 92/50 no longer exists under current EU law.’

13 — M. Burgi and B. Brandmeier, *op. cit.*, in the same article emphasise that ‘among the non-exhaustive list of possible award criteria in Article 53(1)(a) of Directive 2004/18/EC, the aspect of “delivery date and delivery period or period of completion” was introduced as concreti[s]ation of quality in this regard. ... Apart from this, it is striking that the court gave no further justification, in any of these rulings, for the necessity of such a strict differentiation, nor did it take into account the practical need of public entities to make certain tenderer-related aspects part of their awarding decision.’

14 — Which covers cases where ‘the award is made to the tender most economically advantageous from the point of view of the contracting authority’, whilst paragraph (1)(b) covers cases where the contracting authorities award the contract on the basis of ‘the lowest price only’.

15 — See, to that effect, judgments in *Concordia Bus Finland* (C-513/99, EU:C:2002:495, paragraph 59) and *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraph 29).

30. In that context, in my opinion, the technical team proposed by tenderers in an invitation to tender for the supply of services of an intellectual nature such as, in the present case, training and consultancy services, is an aspect intrinsically linked to the subject-matter of the contract, in particular its quality, inasmuch as that evaluation is not in any way intended to assess the abstract capacity or ability of the *tenderers* to perform the contract, but rather the *tender*, namely the resources (in this case human resources) actually assigned to the performance of the contract.

31. This is all the more relevant in the case of complex services where there is a close connection between inter alia the professional qualifications of the personnel and the economic value of the tenders.

32. In fact, (like the Commission) I think that, in certain cases, the contracting authority could state in the tender notice that the qualifications and experience of the personnel assigned to the performance of the contract may play a decisive role in the evaluation of the economic value of the tenders submitted.

33. That criterion concerning the technical and professional qualifications of the members of the team assigned to the performance of the contract could be applied where, first, the very nature of the contract justifies this and, secondly, the team assigned to perform the contract could be decisive in terms of the economic value that the contracting authority assigns to each tender. The qualifications and experience of the personnel in question would then be taken into account in evaluating the tenders and determining that which offers the best value for money.

34. This is what is indicated by the third paragraph of recital 46 in the preamble to Directive 2004/18, which permits the use of award criteria '[depending] on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, [¹⁶] as defined in the technical specifications, and the value for money of each tender to be measured'.

35. This means that, in so far as the characteristics and specific qualities of the personnel are a decisive factor in determining the economic value of the tender, the unauthorised replacement of any member of the proposed team during the performance of the contract would be likely to reduce that value *from the point of view of the contracting authority*. I would also point out that the European Union legislature added those words ('from the point of view of the contracting authority') in Article 53(1)(a) of Directive 2004/18 compared with Article 36(1)(a) of Directive 92/50, thus clearly emphasising the degree of discretion allowed to contracting authorities when choosing criteria.

36. In fact, as the Portuguese, Greek and Polish Governments have rightly pointed out, in the case of contracts for intellectual services, the professional experience of the personnel who will be performing the contract has a *direct influence* on the quality of the services provided by those personnel.

37. There can be no doubt that, in contracts for intellectual services, it is not only the tenderer's capacity that is being examined, but also the capacity (or professional experience) of the personnel who will be charged with providing those services, namely the 'key personnel' identified in the tender.

16 — See P. Lee, 'Implications of the *Lianakis* decision', *Public Procurement Law Review*, 2010, p. 52: 'The recitals in the old directives were silent regarding award criteria. This change clarifies that where criteria are relevant to assess the "performance offered" by each tenderer, it is an appropriate and valid award criteria. This provision changes the emphasis that might have existed in the old directives, and clarifies that criteria, where they assess the "level of performance", must be valid criteria regardless of whether it was also a selection criterion. How else is the anticipated level of performance in a services contract to be evaluated? Does not the experience of the specific personnel offered become a necessary evaluation criterion? Perhaps the anticipated level of performance and the mere ability to perform are different. A *League One* soccer player has the ability to "perform" in a soccer match, but the anticipated level of performance would be significantly different from that of a *premiership player*' (emphasis added).

38. The skills, experience and general effectiveness of the project team are therefore intrinsic characteristics of a tender for services such as those at issue in the main proceedings, in so far as they form part of the evaluation of the quality of the tender and not of the tenderer's economic, technical and professional ability to ensure the proper performance of the contract.

39. Consequently, I agree with the statements of the Portuguese, Greek and Polish Governments to the effect that the professional experience of the personnel effectively providing services of this kind may form part of the criteria used to select the most economically advantageous tender referred to in Article 53 of Directive 2004/18.

40. It is worth noting here that this problem was addressed in the request for a preliminary ruling in *Lianakis and Others* (C-532/06, EU:C:2008:40),¹⁷ again in the context of an award criterion and its evaluation. The referring court stated that '[f]urthermore, although the contract notice does require, on pain of disqualification, that a declaration be filed as to the type of contract of employment with staff, the fact that certain members of the project team are listed as permanent associates of the consultancy firm Planitiki does not constitute a shortcoming leading to disqualification, since such a statement adequately defines the relationship of the said members vis-à-vis the consultancy firm; *the question of whether or not it is legal to include the experience of mere associates who are not partners or employees of the consultancy firm or who are not assisting in the project being undertaken for the purpose of evaluating the experience of the consultancy firm is a different matter ...*'.

41. In the present case, it would appear from the documents before the Court that what was evaluated by Factor A 'Evaluation of the team proposed' was in effect the specific technical team that each of the tenderers proposed to assign to the performance of the contract — and the board analysed its composition and experience and the profile and scientific and technical competence of each member of that team — and that, consequently, the experience of the proposed technical team was, in the present case, an intrinsic characteristic *of the tender* and not a characteristic *of the tenderer*.

42. As Nersant explains, the quality of the services provided depended to a large extent on the persons charged with providing those services. In fact, I would point out that here, in the overall score used to determine the most economically advantageous tender, price accounted for only 5% compared with 40% for evaluation of the team and 55% for the qualities and merits of the service proposed (see point 3 of this Opinion). It is clear that quality was a very important criterion in the present case. Consequently, a distinction must be drawn between an abstract analysis of an undertaking's personnel, which may be considered as relating to a characteristic of the tenderer (which would be prohibited when evaluating tenders), and a specific analysis of the experience and skills of the personnel to be assigned to performing the contract in question, which would not be a characteristic of the tenderer, but rather a characteristic of the tender (which, in my opinion, would be perfectly acceptable when evaluating tenders).

43. I even think that this distinction between an abstract and a specific analysis of manpower is not incompatible with the judgments in *Lianakis and Others* (C-532/06, EU:C:2008:40) and *Commission v Greece* (C-199/07, EU:C:2009:693).

17 — See F. Pachner, 'Schafft die Entscheidung Lianakis des EuGH Probleme für die Vergabe geistiger Leistungen?', ZVB, 2008, p. 285 et seq.

44. In fact, already in the judgment in *Beentjes* (31/87, EU:C:1988:422), the Court did not rule out the possibility that it was appropriate, at the selection stage, to evaluate the *tenderer's* capacity and, at the award stage, to evaluate the specific competences of the members of the *project team*. In paragraph 30 of the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40), the Court stated that it was inappropriate to treat as an award criterion 'the evaluation of the *tenderers'* ability to perform the contract in question' (paragraph 30) (emphasis added).¹⁸

45. In any event, it can be argued that the factual circumstances giving rise to the judgments in *Lianakis and Others* (C-532/06, EU:C:2008:40) and *Commission v Greece* (C-199/07, EU:C:2009:693) are different from those underlying the present case.

46. In fact, in the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40), the contracting authority had laid down 'experience' as an award criterion, using as a reference the value of projects completed by the tenderer over the previous three years and also 'the firm's manpower and equipment', taking account of the consultancy firm's manpower.¹⁹

47. Those criteria were very general and related to the tenderer, without reference to the projects actually carried out, unlike the criterion used here, which is much more specific and relates to the technical team to be charged with performing the contract: '(A) Evaluation of the team – 40%. (i) This factor will be arrived at by taking into account the composition of *the team*, its proven experience and an analysis of the academic and professional background of its members' (paragraph 2.2.1. of the request for a preliminary ruling) (emphasis added).

48. On the contrary, regarding experience as an award criterion, in the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40) the contracting authority 'stipulated [that it] should be evaluated by reference to the value of completed projects. Thus, for experience on projects worth up to EUR 500 000, a tenderer would be awarded 0 points; between EUR 500 000 and EUR 1 000 000, 6 points; between EUR 1 000 000 and EUR 1 500 000, 12 points; and so on up to a maximum score of 60 points on projects worth over EUR 12 000 000' (paragraph 14 of that judgment). Only the total value of projects completed was decisive.

49. Regarding the second award criterion, namely the firm's manpower and equipment, the latter 'were to be assessed by reference to the size of the project team. A tenderer would therefore be awarded 2 points for a team of 1 to 5 persons, 4 points for a team of 6 to 10 persons, and so on up to a maximum score of 20 points for a team of more than 45 persons' (paragraph 15 of the judgment in *Lianakis and Others*, C-532/06, EU:C:2008:40). Once again, only the size (whatever its specific composition or experience) was decisive.

50. Lastly, regarding the third award criterion (the firm's ability to complete the project by the anticipated deadline), it 'should be assessed by reference to the value of the firm's commitments. Accordingly, a tenderer would be awarded the maximum score of 20 points for work worth less than EUR 15 000; 18 points for work worth between EUR 15 000 and EUR 60 000; 16 points for work worth between EUR 60 000 and EUR 100 000; and so on down to a minimum score of 0 points for work worth more than EUR 1 500 000' (paragraph 16 of that judgment). Once again, no specific qualitative factors were to be taken into account.

18 — For the same interpretation, see inter alia P. Lee, op. cit. As Lee rightly points out: (i) 'the facts of the case [in *Lianakis and Others*] go some way to undermine the contention that the municipality genuinely examined the project team rather than the firm's size'; (ii) 'there is nothing explicit or implicit in the wording of the directives that leads to the conclusion that the experience of the project team cannot be, or should not be, evaluated at the award stage', and (iii) 'more unfortunately neither in *Beentjes* nor in *Lianakis [and Others]* is there any rationale offered to explain the harm that could arise if "experience" were considered at both stages, in particular where at selection "experience" is of the entity and at award is of the project team'.

19 — 'The contract notice referred to the award criteria in order of priority: (1) the proven experience of the expert on projects carried out over the last three years; (2) the *firm's* manpower and equipment; and (3) the ability to complete the project by the anticipated deadline, together with the *firm's* commitments and its professional potential' (paragraph 10 of that judgment) (emphasis added).

51. It is therefore clear that, unlike in the present case, in the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40) the evaluation concerned the tenderer (and its general experience) and not the technical team to be assigned to the contract (and its specific experience).

52. Similarly, in the judgment in *Commission v Greece* (C-199/07, EU:C:2009:693), the award criterion was based on evaluation of *the tenderer's* general and specific experience, in particular design work on similar projects, and also on its ability to perform the contract by the anticipated deadline.

53. Like Nersant, I consider that, in both cases, the criteria defined concerned tenderers' *abstract* ability or capacity to perform the contract and not the ability or capacity of the *specific* technical teams to be assigned to perform it.

54. Thus, it is my understanding that it does not follow from the judgments in *Lianakis and Others* (C-532/06, EU:C:2008:40) and *Commission v Greece* (C-199/07, EU:C:2009:693) that the specific technical team to be assigned to a contract cannot be evaluated as part of the evaluation of tenders, but only that award of the contract cannot be based on a criterion concerned with the tenderer's ability to perform a contract (established on the basis of its capacity defined in abstract terms).

55. Likewise, the evaluation that the contracting authority must make of the team assigned by an economic operator to perform the contract in question, which relates to the provision of services of an intellectual nature, is intended to assess the quality offered by the economic operator of the services to be provided. It therefore relates to a criterion aimed at selecting the tender offering the best value for money.

56. As Hölzl and Friton²⁰ point out, the permissibility of an award criterion depends on whether it is concerned with evaluating the tenderer's ability to perform the contract in question or whether it is aimed at identifying the most economically advantageous tender. In the latter case, the experience of the team or the personnel assigned to the services that are the subject of the contract in question may in fact be taken into account.

57. The judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40) does not preclude such an interpretation.²¹ In fact, in that judgment, the Court held that criteria that are 'essentially linked' to or 'relate principally' to evaluation of the tenderers' ability to perform the contract in question must be excluded as award criteria. This therefore makes it possible to use criteria which, although also concerned with assessing the tenderer's ability to perform the contract, are *principally* aimed at identifying the most economically advantageous tender.

58. It could also be helpful to cite other judgments of the Court and, first of all, the judgment in *GAT* (C-315/01, EU:C:2003:360), delivered prior to the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40). In that case, an Austrian contracting authority had issued an invitation to tender for the supply of a special motor vehicle (a road sweeper) for the Motorway Authority. The invitation to tender stipulated that 'in order to evaluate the tenders so as to determine which offer was the most

20 — F.J. Hölzl and P. Friton, 'Entweder — Oder: Eignungs- sind keine Zuschlagskriterien', *Neue Zeitschrift für Baurecht und Vergaberecht*, 2008, pp. 307 and 308.

21 — See M. Orthmann, 'The experience of the bidder as award criterion in EU public procurement law', *Humboldt Forum Recht*, 2014, No 1, p. 4. He points out that 'throughout the EU, contracting authorities already seem to have adopted a flexible interpretation of the rule and to follow a pragmatic approach in dealing with the criterion "experience" ... In general, contracting authorities indeed encounter the problem of experience as an award criterion mostly in cases concerning services of a more complex nature ... National courts seem to have adopted a soft interpretation of the rule ... allowing the contracting authorities to take into account experience where it is linked to the subject-matter of the contract ... and has not been established as a selection criterion (Oberlandesgericht München, decision of February 10, 2011, File No Verg 24/10; Oberlandesgericht Düsseldorf, decision of May 5, 2008, File No Verg 5/08; Oberlandesgericht Düsseldorf, decision of April 28, File No Verg 1/08)'.

economically advantageous, the contracting authority had to take account of the number of references relating to the product offered by the tenderers to other customers', the Court making the important point here that this was 'without considering whether the [customers'] experiences of the products purchased had been good or bad' (paragraph 57).

59. In paragraph 64 of that judgment, the Court held that, although Article 26(1) of Directive 93/36/EEC²² left it to the contracting authority to choose the criteria on which it intended to base its award of the contract, that choice might relate only to criteria aimed at identifying the offer which was the most economically advantageous. However, 'the fact remains that the submission of a list of the principal deliveries effected in the past three years, stating the sums, dates and recipients, public or private, involved is expressly included amongst the references or evidence which, under Article 23(1)(a) of Directive 93/36, may be required to establish the suppliers' technical capacity' (paragraph 65).

60. Furthermore, 'a simple list of references, such as that called for in the invitation to tender at issue in the main proceedings, which contains only the names and number of the supplier's previous customers without other details relating to the deliveries effected to those customers cannot provide any information to identify the offer which is the most economically advantageous within the meaning of Article 26(1)(b) of Directive 93/36, and cannot therefore in any event constitute an award criterion within the meaning of that provision' (paragraph 66).

61. Consequently, the Court concluded that 'Directive 93/36 precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract' (paragraph 67).

62. In my opinion, it follows from the above that the Court did not in principle rule out the use of lists of references as an award criterion, but only in so far as they provide an indication regarding quality (for example indicating whether the customers' experiences with the products were good or bad (see paragraph 57 of that judgment)), in other words, an indication making it possible to identify the most economically advantageous offer.²³

63. Furthermore, in its judgment in *Evans Medical and Macfarlan Smith* (C-324/93, EU:C:1995:84), the Court did not require the selection criteria and the award criteria to be mutually exclusive and allowed a criterion focussed on the tenderer (namely its ability to guarantee reliability and continuity of supplies) to be taken into account in the award process.

64. Lastly, it is also worth noting that, although reliability is specifically mentioned in the public procurement directives as a selection criterion, in the judgment in *EVN and Wienstrom* (C-448/01, EU:C:2003:651, paragraph 70) the Court notes that 'reliability of supplies can, in principle, number amongst the award criteria used to determine the most economically advantageous tender'.

65. I would also mention the case-law of the General Court of the European Union in cases relating to public contracts awarded by EU institutions, which is of interest here because those contracts were awarded on the basis of provisions worded in exactly the same way as those of Directive 2004/18 which are applicable to the present case.

²² — Council Directive of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

²³ — See also point 51 of the Opinion of Advocate General Geelhoed in *GAT* (C-315/01, EU:C:2002:573): 'The list of references here in question may say something about the tenderer's experience and technical expertise, but a list of this kind is not suitable for determining the most advantageous offer. Such a list of references does not, after all, give any indication at all of the services provided, the running costs or other criteria capable of determining which tender will ultimately prove to be economically the most advantageous for the contracting authority'.

66. The judgment in *Evropaïki Dynamiki v Commission* (T-589/08, EU:T:2011:73) (examined after the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40); the appeal against the judgment of the General Court was dismissed by the Court in the order in *Evropaïki Dynamiki v Commission* (C-235/11 P, EU:C:2011:791)) was concerned with the number of days proposed for the performance of the works in connection with an invitation to tender. The General Court noted that ‘[i]n its report, the evaluation committee observed that “[t]he suggested number of days to execute the work of the tasks seem[ed] unrealistically low” and that “this raise[d] serious doubts as to whether the objectives [could] be delivered appropriately”’ (paragraph 40).

67. In that regard, the General Court recalled that ‘in its tender, the applicant had suggested 45 person-days for the management of the project, while the estimate in the tender specifications was 60 person-days. As the evaluation committee noted in its report, the number of person-days suggested by the applicant is therefore 25% lower than the indicative estimate provided in the invitation to tender at issue. The Court considers, and the applicant admitted at the hearing, that such a discrepancy requires a convincing explanation’ (paragraph 41). In the General Court’s view, the indication of the number of person-days provided for was ‘relevant, principally in order to assess the reliability of the applicant’s offer’ (paragraph 42).

68. What is of interest to us here is that the General Court rightly noted in paragraph 43 that ‘the alleged experience of the applicant’s experts is also unable to explain that discrepancy. In that regard however, *the Court does not share the Commission’s view that the applicant’s experience is irrelevant for the assessment of the award criteria. Although it is true, in general, that that factor is taken into account in order to assess whether the bid is able to satisfy the selection criteria and not in the assessment of the award criteria, it must be observed that the applicant does not rely on its experience as an award criterion in itself, but only in order to justify the reduced number of person-days provided for. In that context, more experience would, in principle, be able to explain such a difference between their estimates*’ (emphasis added).

69. As the General Court points out (paragraph 44), in the present case, the applicant had not established that its team had more experience. In those circumstances, the Commission was entitled to take the view that the experience relied on did not enable the team’s capacity to perform the required services in 45 days to be ascertained (paragraph 45).²⁴

70. In another judgment subsequent to the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40), namely the judgment in *Evropaïki Dynamiki v EFSA* (T-457/07, EU:T:2012:671), in connection with a dispute concerning the award of public contracts by a European Union body and in relation to an invitation to tender for the supply of services of a highly technical nature on the basis of a framework contract, the General Court rightly held that it could not be concluded either from the applicable legislation or from the case-law in *Beentjes* (31/87, EU:C:1988:422) and *Lianakis and Others* (C-532/06, EU:C:2008:40) that the use of CVs for evaluation purposes, both at the selection stage and at the award stage, should be ruled out in principle (see paragraph 80 et seq.).

71. In the opinion of the General Court, the use of those documents during the award stage could be justified if it served to identify the most economically advantageous tender and not the tenderers’ ability to perform the contract (paragraphs 81 and 82).

24 — See Petersen, Refining the rules on the distinction between selection and award criteria — *Evropaïki Dynamiki v Commission* (T-589/08), *Public Procurement Law Review*, 2011, p. NA246: ‘The present ruling ... interprets [the] case law [of the Court] in a flexible way, as it clearly approved the consideration of the experience and qualifications of the proposed team members when evaluating the relative advantages of the proposed project management within the third award criterion. For the purpose of that evaluation it expressly applied the test whether the applicant’s tender had shown the ability of its proposed team to properly deliver the objectives of the contract ... So it seems that the General Court considers the experience and qualifications of the team members offered to perform the specific contract to be admissible considerations for the award decision. The experience and qualifications of the team offered in the tender is, according to the General Court, relevant to establish the tenderer’s ability to properly deliver the contract, which clearly is a quality criterion relevant to identifying the most economically advantageous tender’.

72. The General Court particularly highlights the fact the use of a criterion consisting in evaluating the training strategy of a team proposed for the performance of a contract relating to complex services may serve to identify the tender offering the best value for money in so far as it clearly concerns services for which the quality of the tender and that of the team proposed are indisputably linked (paragraph 82).

73. In the judgment in *AWWW v Eurofound* (T-211/07, EU:T:2008:240, paragraphs 58 to 63), which is also subsequent to the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40), the General Court again rightly took the view that it was lawful to take account of previous experience as an award criterion in order to evaluate the quality of the services to be provided, inasmuch as it held that CVs from the selection procedure could be used and experience could be taken into account in evaluating the quality of the tenderer's ability to perform the specific areas of work covered by the contract. In the same vein, I would once again refer to the judgment in *Evropaïki Dynamiki v EMCDDA* (T-63/06, EU:T:2010:368).

74. Even before the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40), in the judgment in *Renco v Council* (T-4/01, EU:T:2003:37), the General Court had already accepted that an undertaking's experience could be used as an award criterion.²⁵

C – The legal literature

75. A large number of articles in the legal literature also support the view that evaluation of the technical team to be assigned to performing a contract may constitute an aspect of the tender and not a characteristic of the tenderer and that, therefore, that evaluation may be a factor to be taken into account when choosing the most economically advantageous tender.²⁶

76. For example, Lee²⁷ has rightly pointed out that '[e]valuating an entity's ability to perform the contract on the one hand and comparing the strengths of different teams proposed by tenderers are not the same thing. For example, an awarding authority seeking management consultancy services is likely to find that the global consultancy firms have the capacity and manpower to carry out almost any given management consultancy project. However, it is self-evident that the success of the project will depend not on the capacity of the firm but on the specific resources made available by that firm for the project'.

77. Next, as Rubach-Larsen²⁸ has rightly pointed out, 'the ECJ has opened up for the lawful choice of bidder-related criteria as award criteria, provided that these are not essentially linked to the selection of qualified tenderers, but instead to the evaluation of the offers, and *not principally related to the tenderer's experience, qualifications or means, but to the quality of the works, supplies or services they have offered*' (emphasis added).

78. As Arrowsmith²⁹ has also rightly pointed out, '*Lianakis* does not preclude considering either the abilities of the tenderer or the qualities of the individuals or team that will be working on the contract, *to the extent that these are actually relevant to the quality of the work that will be done under the contract i.e. to determining which offer is the most economically advantageous*. In this respect, it can be argued that on the facts of *Lianakis* the experience and manpower of the tenderer

25 — No appeals were brought against the judgments of the General Court in *Evropaïki Dynamiki v EFSA* (T-457/07, EU:T:2012:671); *AWWW v Eurofound* (T-211/07, EU:T:2008:240); *Evropaïki Dynamiki v EMCDDA* (T-63/06, EU:T:2010:368); and *Renco v Council* (T-4/01, EU:T:2003:37), cited in points 70, 73 and 74 of this Opinion.

26 — Several articles are referred to by Orthmann, op. cit.

27 — P. Lee, op. cit., pp. 47 and 48.

28 — A. Rubach-Larsen, 'Selection and award criteria from a German public procurement law perspective', *Public Procurement Law Review*, 2009, pp. 112, 119 and 120.

29 — S. Arrowsmith, 'EU Public Procurement Law: An Introduction', University of Nottingham, 2010, pp. 173 and 174.

was not actually used to assess the quality of the services but in an arbitrary fashion that had no relevance to that question — tenderers were given higher scores for different types and extent of experience without actually considering the relevance of this to the services to be performed (which were actually of relatively low value)’ (emphasis added).

79. Lastly, Treumer³⁰ pertinently cites a decision by the Danish Complaints Board for Public Procurement³¹ where ‘[t]he Board quoted a passage from [an] earlier ruling to the effect that according to the EC public procurement rules it is not excluded that an element can be considered both in the selection and in the award stage. However, according to the Board the condition is that the element according to its content is suited to function as the basis for selection but also — *owing to the character of the supply in question — is suited to assess the economically most advantageous tender*. The Board found that this condition was fulfilled in the concrete case, which concerned a service where an experienced service provider would be of particular value. The Board emphasised in this context that the reliability of supply was of special importance for the task in question, namely out of consideration for maritime safety. The Board therefore found it justified to consider the extent of the experience in the award phase while it at the same time stressed that this normally is to be considered as a selection criterion’ (emphasis added).

D – Conclusion

80. Although the distinction between the selection stage and the award stage precludes the use of an economic operator’s previous *general* experience as an award criterion, it is nonetheless true that the *specific* experience of the particular technical team proposed by that operator may for certain contracts be taken into account for the purpose of evaluating the tender at the award stage.

81. As the Polish Government has rightly pointed out, Article 53 of Directive 2004/18 expressly refers to the quality of the goods or services to be supplied as one of the criteria which the contracting authority may apply. In that regard, Article 53(1)(a) of Directive 2004/18 refers to the tender most economically advantageous *from the point of view of the contracting authority* and not the most advantageous tender based on abstract and objective criteria. In order to select the most economically advantageous tender, the contracting authority must therefore have the option of deciding on the factors that need to be taken into account which, if fulfilled, will enable it to choose the most advantageous tender in the light of its specific needs.

82. I also agree with the Portuguese Government where it emphasises that the option or even the necessity of assessing the technical value and the quality of the proposal in itself in order to award contracts for training and consultancy services of an intellectual nature, as in the present case, must be given concrete expression in the form of objective elements linked to the content of the tender. Moreover, one of those essential elements is precisely an indication of the specific human resources that the tenderers will assign to performance of the contract, such indication obviously constituting a quality or a characteristic not of the tenderers but of the tender itself.

83. It seems to me that that interpretation best conforms to the letter and the spirit of the provisions at issue and to the scheme of Directive 2004/18 (which, we should not forget, is intended to accord greater importance to qualitative criteria)³² in the case of contracts for the provision of training and consultancy services of an intellectual nature.

30 — See S. Treumer, ‘The distinction between selection and award criteria in EC public procurement law: the Danish approach’, *Public Procurement Law Review*, 2009, No 3, pp. 146 to 154.

31 — In *Iver C. Weilbach og CO A/S v Kort- og Matrikelstyrelsen*.

32 — See point 27 of this Opinion.

84. In the light of Directive 2004/18, the criterion for the award of a public contract may therefore include an evaluation of the technical teams objectively and specifically proposed by the tenderers for the performance of a contract for the supply of services of an intellectual nature, such as training and consultancy services.

85. Lastly, as the Polish Government has rightly pointed out, it would appear from the documents before the Court that, in the present case, the contracting authority met the other requirements laid down by Directive 2004/18 concerning the need to respect the principles of transparency and non-discrimination in the public procurement procedure in question.

86. The answer to the question referred for a preliminary ruling should therefore be that, with regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, under certain circumstances Directive 2004/18 does not preclude the contracting authorities from using, among the factors making up the criterion for awarding a public contract, a factor which enables evaluation of the teams specifically put forward by the tenderers for the performance of the contract, taking into consideration the composition of the teams, their proven experience and an analysis of their academic and other professional qualifications. However, the exercise of that option will be compatible with the objectives of Directive 2004/18 only where the characteristics and specific qualities of the members of the team are a decisive factor in determining the economic value of the tender submitted for evaluation to the contracting authority.

E – Post scriptum: the new Directive 2014/24

87. Even though the new Directive 2014/24 is not applicable to the present case *ratione temporis*,³³ I will mention it here for the sake of completeness.

88. It is apparent from Article 67(2)(b) of Directive 2014/24 that the EU legislature considered it necessary to clarify the rules discussed in this Opinion. According to that provision, the contract award criteria that the contracting authority may take into account in order to determine the most economically advantageous tender include: ‘organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract’.

89. That provision is clarified by recital 94 in the preamble to that directive, which is worded as follows:

‘Wherever the quality of the staff employed is relevant to the level of performance of the contract, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this can affect the quality of contract performance and, as a result, the economic value of the tender. This might be the case, for example, in contracts for intellectual services such as consultancy or architectural services. Contracting authorities which make use of this possibility should ensure, by appropriate contractual means, that the staff assigned to contract performance effectively fulfil the specified quality standards and that such staff can only be replaced with the consent of the contracting authority which verifies that the replacement staff affords an equivalent level of quality’.

³³ — See point 16 of this Opinion.

90. The intention to clarify the rules at issue in this case was already present in the Proposal for a directive of the European Parliament and of the Council on public procurement (COM(2011) 896 final). In fact, the Explanatory Memorandum states that ‘... [t]he distinction between selection of tenderers and award of the contract which is often a source of errors and misunderstandings has been made more flexible, allowing it for contracting authorities to decide on the most practical sequencing by examining award criteria before selection criteria and to take into account the organisation and quality of the staff assigned to performing the contract as an award criterion’.

III – Conclusion

91. Consequently, I propose that the Court answer the question referred by the Supremo Tribunal Administrativo for a preliminary ruling as follows:

With regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, under certain circumstances 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 preclude the contracting authorities from using, among the factors making up the criterion for awarding a public contract, a factor which enables evaluation of the teams specifically put forward by the tenderers for the performance of the contract, taking into consideration the composition of the teams, their proven experience and an analysis of their academic and other professional qualifications. However, the exercise of that option will be compatible with the objectives of Directive 2004/18 only where the characteristics and specific qualities of the members of the team are a decisive factor in determining the economic value of the tender submitted for evaluation to the contracting authority.