



Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

6 November 2014*

(Public procurement — Principles of equal treatment and transparency — Directive 2004/18/EC — Grounds for excluding a tenderer from participating — Article 45 — The personal situation of the candidate or tenderer — Compulsory statement concerning the person designated as ‘technical director’ — Statement not included with the tender — Exclusion from the contract without any possibility of remedying that omission)

In Case C-42/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 5 December 2012, received at the Court on 28 January 2013, in the proceedings

Cartiera dell’Adda SpA

v

CEM Ambiente SpA,

THE COURT (Tenth Chamber),

composed of C. Vajda (Rapporteur), President of the Chamber, E. Juhász and D. Šváby, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 15 May 2014,

after considering the observations submitted on behalf of:

- Cartiera dell’Adda SpA, by S. Soncini, avvocato,
- CEM Ambiente SpA, by E. Robaldo, P. Ferraris and F. Caliandro, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and S. Varone, avvocato dello Stato,
- the European Commission, by L. Pignataro-Nolin and A. Tokár, acting as Agents,

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

gives the following

* Language of the case: Italian.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 45 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), as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64) ('Directive 2004/18').
- 2 The request has been made in proceedings between Cartiera dell'Adda SpA ('Cartiera dell'Adda') and CEM Ambiente SpA ('CEM Ambiente') concerning a decision made by the latter, as contracting authority, to exclude the joint venture formed by Cartiera dell'Adda and Cartiera di Cologno Monzese SpA ('CCM') ('the joint venture') — the latter company acting as principal of the joint venture — from a selection procedure on the ground that a statement relating the person designated as CCM's technical director was not submitted with the joint venture's bid.

Legal context

European Union law

- 3 Article 1(2)(d) of Directive 2004/18 defines 'public service contracts', for the purpose of that directive, as public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II to the directive. In Annex IIA to that directive 'Sewage and refuse disposal services; sanitation and similar services' are listed as Category No 16.
- 4 Article 2 of Directive 2004/18, headed 'Principles of awarding contracts', provides as follows:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'
- 5 Article 45 of Directive 2004/18, headed 'Personal situation of the candidate or tenderer', provides in paragraphs 1 and 3 thereof as follows:

'1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

...

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

They may provide for a derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.

For the purposes of this paragraph, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned. Where the information concerns a candidate or tenderer established in a State other than that of the contracting authority, the contracting authority may seek the cooperation of the competent authorities. Having regard for the national laws of the Member

State where the candidates or tenderers are established, such requests shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer.

...

3. Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in paragraphs 1 or 2(a), (b), (c), (e) or (f) applies to the economic operator:

- (a) as regards paragraph 1 and paragraph 2(a), (b) and (c), the production of an extract from the “judicial record” or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes, showing that these requirements have been met;

...

Where the country in question does not issue such documents or certificates, or where these do not cover all the cases specified in paragraphs 1 and 2(a), (b) and (c), they may be replaced by a declaration on oath or, in Member States where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes.’

- 6 Article 51 of Directive 2004/18, headed ‘Additional documentation and information’, is worded as follows:

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

Italian law

- 7 Article 38(1) and (2) of Legislative Decree No 163 establishing the Public Works Contracts, Public Supply Contracts and Public Service Contracts Code implementing Directives 2004/17/EC and 2004/18/EC (decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE) of 12 April 2006 (GURI No 100 of 2 May 2006, ordinary supplement) (‘Legislative Decree No 163/2006’) provides as follows:

‘1. The following persons shall be excluded from participation in procedures for the award of concessions and public works contracts, supply contracts and service contracts and may not be awarded subcontracts or conclude any related contract:

...

- (b) any person against whom proceedings for the imposition of one of the preventive measures referred to in Article 3 of Law No 1423 of 27 December 1956 or one of the grounds for refusal set out in Article 10 of Law No 575 of 31 May 1965 are pending; the exclusion and prohibition shall apply if the pending proceedings concern the owner or technical director, if the case involves a sole trader; ...
- (c) any person who has been the subject of a conviction that has the force of *res judicata* or a penal order against which no appeal lies, or who has been the subject of a judgment imposing a penalty at the specific request of the parties, as provided for in Article 444 of the Code of Criminal Procedure, in respect of the commission of serious professional conduct offences to the

detriment of the State or the Community; the following constitute, in any event, grounds for exclusion: a conviction by a judgment which has the force of *res judicata* for one or more offences relating to participation in a criminal organisation, corruption, fraud or money laundering, as defined by the Community measures cited in Article 45(1) of Directive 2004/18/EC; the exclusion and prohibition shall apply if the judgment or order was made against: the owner or the technical director, in cases involving a sole trader; ...

...

2. The candidate or tenderer shall certify that he satisfies the relevant requirements by producing a sworn statement, in accordance with the conditions laid down in the consolidated statutory and regulatory provisions relating to administrative documents, as required by Decree No 445 of the President of the Republic of 28 December 2000, and shall set out in that statement all his previous convictions, including those which have not been entered in the judicial record. ...'

8 Article 46(1) of Legislative Decree No 163/2006 provides as follows:

'Within the limits laid down in Articles 38 to 45, the contracting authorities shall request the tenderers, where necessary, to expand upon or clarify the content of the certificates, documents or statements submitted.'

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

9 It is apparent from the order for reference that, by means of a public tender notice, CEM Ambiente launched a tendering procedure for the conclusion of a contract for the supply of paper and cardboard from separate municipal solid waste collections for the period running from 1 April 2011 to 31 March 2014. The contract was to be awarded to the tenderer offering to pay the highest price for removing the amounts of those materials specified, in accordance with the detailed requirements set out in the specifications for that procedure.

10 It should be noted that the specifications, a copy of which is included among the documents submitted to the Court, sets out, in Article 8 thereof, a series of grounds on which a tenderer may be excluded from participation in the procurement procedure. Those grounds include the fact that one of the documents and/or one of the sworn statements the purpose of which is to demonstrate that both the general and special requirements have been complied with is incomplete or irregular, except where any irregularity is of a purely formal nature and may be remedied but is not decisive for the assessment of the tender.

11 By decision of 21 December 2010, CEM Ambiente excluded the joint venture from the procurement procedure on the ground that its tender did not contain the statement relating to Mr Galbiati, described as CCM's technical director, and certifying that there were no criminal proceedings pending against him and that he had not been convicted of an offence by a judgment having the force of *res judicata*, as required under Article 38 of Legislative Decree No 163/2006. The only other tenderer having also been excluded from that selection procedure, CEM Ambiente declared the procedure void and launched a new tendering procedure.

12 Having learned of the decision to exclude the joint venture from the first selection procedure, CCM forwarded to CEM Ambiente a statement in which it indicated that none of the grounds for refusal laid down in Article 38 of Legislative Decree No 163/2006 applied to Mr Galbiati. Subsequently, the joint venture also indicated that Mr Galbiati had been identified as technical director in error, as he was simply a member of CCM's board of directors with no power of representation. As a consequence, no statement was required concerning Mr Galbiati under Article 38 of Legislative Decree No 163/2006.

- 13 In the absence of any reply from CEM Ambiente to that correspondence, Cartiera dell'Adda and CCM brought proceedings before the referring court seeking the annulment of the decision excluding the joint venture from the first award procedure and the withdrawal of the notice relating to the opening of a new procedure. By judgment of 25 May 2011, the referring court granted that application but rejected the request that the contract should be awarded to the joint venture.
- 14 On 23 June 2011, CEM Ambiente appealed against that judgment before the Consiglio di Stato (Council of State). The following day, Cartiera dell'Adda brought proceedings before the referring court seeking implementation of the judgment.
- 15 By judgment of 31 March 2012, the Consiglio di Stato upheld CEM Ambiente's appeal, taking the view that failure to produce a statement, such as that at issue, must lead to the exclusion of the tenderer from the selection procedure, at the very least where, as in the present case, the *lex specialis* provides that the penalty to be imposed for failure to produce such a statement is for the tenderer to be excluded from the procedure. The Consiglio di Stato considers that the central issue in the proceedings in question is not the requirement to expand upon or rectify a document that is incomplete or in some way defective, but the simple failure to produce a compulsory statement.
- 16 In the proceedings relating to the application for implementation of its judgment before the referring court, Cartiera dell'Adda lodged a pleading, on 26 June 2012, in which, first, it expressed the view that the status of *res judicata* of the judgment of the Consiglio di Stato was at odds with Article 45 of Directive 2004/18 and, second, it requested that the case be referred to the Court of Justice for a preliminary ruling.
- 17 By order of 28 June 2012, noting that a claim had also been brought before it for compensation on the ground of delay in implementing its judgment of 25 May 2011, the referring court decided that the proceedings were to be conducted in accordance with the rules of the ordinary procedure. The amount of damages claimed by Cartiera dell'Adda is in excess of EUR 9 million.
- 18 The Tribunale amministrativo regionale per la Lombardia entertains doubts, in essence, as to whether European Union law precludes an interpretation of a national provision intended to transpose Article 45 of Directive 2004/18 into domestic law to the effect that the contracting authority is obliged to exclude from an award procedure a tenderer who has failed to declare in his application for participation that a person designated as its technical director has not been the subject of criminal proceedings or convicted of an offence for the purpose of that national provision, even if the tenderer is in a position to prove, first, that that person had described as the technical director in error and, second, that that person fulfilled the conditions for making the statement required in any event.
- 19 In its order for reference, the referring court also points out that the possibility afforded the contracting authority in Article 46 of Legislative Decree No 163/2006 to seek, during the procedure, any clarifications or additional information it considers necessary is available only in the circumstances identified in that provision, so that the contracting authority in question does not have a free hand in conducting the procedure in cases in which statements are omitted.
- 20 Moreover, referring inter alia to the decisions in *Kühne & Heitz* (C-453/00, EU:C:2004:17), *Kapferer* (C-234/04, EU:C:2006:178), *Kempter* (C-2/06, EU:C:2008:78) and *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506), the referring court states that it is possible for a national decision which has the force of *res judicata*, such as the judgment of the Consiglio di Stato of 31 March 2012, not to be applied, in so far as it is contrary to European Union law. According to the Court of Justice's case-law, review of the conditions for participating in public procurement procedures must be based on the substance of the case — that is, it is necessary to verify that the conditions for participating in such procedures are fulfilled — not merely on whether the administrative documents accompanying the tenders submitted

within the period prescribed are formally complete. In conclusion, the referring court raises the question whether Article 38(1)(b) and (c) of Legislative Decree No 163/2006 is consistent with Article 45 of Directive 2004/18.

21 In those circumstances, the Tribunale amministrativo regionale per la Lombardia decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is it contrary to [European Union] law, when an undertaking participating in a tendering procedure has failed to declare, in its request for participation, that its technical director has not been the subject of any of the proceedings or convictions referred to in Article 38(1)(b) and (c) of [Legislative Decree No 163/2006], for an interpretation of that article to be given to the effect that the contracting authority must order the exclusion of that undertaking even when the undertaking has provided sufficient evidence that the use of the term "technical director" in its request was due to a mere clerical error?

(2) Is it contrary to [European Union] law, when an undertaking participating in a tendering procedure has provided relevant, sufficient evidence that the persons required to make the statements referred to in Article 38(1)(b) and (c) [of Legislative Decree No 163/2006] have not been the subject of any of the proceedings or convictions referred to in that provision, for an interpretation of that article to be given to the effect that the contracting authority must order the exclusion of that undertaking as a consequence of the failure to comply with a provision of the *lex specialis* under which the tendering procedure was launched?'

22 By order of the President of the Court of Justice of 18 July 2013, the application for a ruling to be given in this case under the accelerated procedure provided for in Article 105(1) of the Court's Rules of Procedure was dismissed.

Consideration of the questions referred

Admissibility

23 CEM Ambiente and the Italian Government state that the request for a preliminary ruling has been made in the context of proceedings for implementation of a judgment of the referring court — and a claim seeking compensation for the delay in that implementation — which was, however, varied by decision of the Consiglio di Stato of 31 March 2012, a decision having the force of *res judicata*, so that the question as to whether the decision to exclude the joint venture from the selection procedure in question is lawful may no longer be addressed by the referring court when examining those applications. CEM Ambiente and the Italian Government infer from this that the questions put by the referring court are hypothetical and, therefore, inadmissible.

24 CEM Ambiente and the Italian Government also contend that the questions referred are based on a different factual background from that established by the Consiglio di Stato in its judgment of 31 March 2012. Accordingly, the factual situation on which the first question is based, namely that the description of Mr Galbiati as technical director was a clerical error, does not correspond to the facts as established by the Consiglio di Stato. With regard to the second question, the referring court omitted to mention that the evidence that it refers to was produced out of time.

25 Moreover, the Italian Government is of the view that the purpose of the questions referred is not to obtain an interpretation of European Union law but an examination of the factual background of the case before the referring court. Indeed, the Court would have to ascertain whether the conditions under which an incomplete document may be rectified were met, the Consiglio di Stato having ruled out any such possibility.

- 26 It must be borne in mind, first, that, in accordance with settled case-law, Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of European Union law, or consideration of their validity, which are necessary for the resolution of the case before them. National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate (judgment in *Bericap Záródástechnikai*, C-180/11, EU:C:2012:717, paragraph 53 and the case-law cited).
- 27 The Court has thus concluded that a rule of national law pursuant to which courts that are not adjudicating at final instance are bound by legal rulings of a higher court cannot take away from those courts the discretion to refer to the Court questions of interpretation of the point of European Union law to which such rulings relate. The Court has held that a court which is not ruling at final instance must be free, if it considers that a higher court's legal ruling could lead it to give a judgment contrary to European Union law, to refer to the Court questions which concern it (see judgments in *Elchinov*, C-173/09, EU:C:2010:581, paragraphs 25 and 27, and *Interedil*, C-396/09, EU:C:2011:671, paragraph 35).
- 28 It follows that, even though it has the force of *res judicata* under national law, the judgment of the Consiglio di Stato of 31 March 2012 cannot preclude the referring court from making a reference to the Court of Justice for a preliminary ruling if it considers that that judgment may be contrary to European Union law.
- 29 With regard, second, to claim that the questions referred are hypothetical, it should be recalled that questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred 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 actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, judgment in *Genil 48 and Comercial Hostelera de Grandes Vinos*, C-604/11, EU:C:2013:344, paragraph 26).
- 30 In the present case, it cannot be found that the questions referred are hypothetical. They have been submitted in proceedings in which Cartiera dell'Adda seeks, inter alia, compensation for the delay in implementing the judgment delivered by the referring court on 25 May 2011 annulling CEM Ambiente's decision to exclude the joint venture from the selection procedure at issue in the main proceedings. It is therefore not apparent that those questions, which relate to whether such a decision to exclude a tenderer complies with European Union law, are irrelevant to the outcome of the dispute before the national court. Moreover, notwithstanding the existence of the judgment of the Consiglio di Stato of 31 March 2012, it cannot be concluded *a priori* that the dispute has become devoid of purpose.
- 31 Third, with regard to the claim that the summary of the facts in the main proceedings is inaccurate and deficient, it is sufficient to note, as is also apparent from paragraph 29 above, that it is for the national court alone to define the factual parameters of the dispute which gave rise to the questions and it is not the task of the Court of Justice to give a ruling on that court's assessment of the facts (see, to that effect, judgment in *van Delft and Others*, C-345/09, EU:C:2010:610, paragraph 114).
- 32 Finally, it is apparent from the very wording of the questions referred that the referring court is seeking from the Court of Justice not an examination of that factual background but an interpretation of EU law that will be of assistance in resolving the dispute before it.
- 33 It follows that the questions referred for a preliminary ruling are admissible.

Substance

- 34 As a preliminary observation, it should be noted, first, that while the referring court does not mention Article 45 of Directive 2004/18 in its questions, it is apparent from the order for reference itself, in particular the introductory paragraph of the questions referred, that that court is unsure whether Article 38(1)(b) and (c) of Legislative Decree No 163/2006 complies with Article 45 of that directive.
- 35 Second, only the second question refers to failure on the part of an economic operator participating in a tendering procedure to comply with a provision contained in the contract documentation, such as the contract notice or the specifications, relating to the award procedure at issue in the main proceedings. However, the ground for exclusion referred to in both questions is the same and is set out, as is apparent from paragraph 10 above, in Article 8 of the contract specifications.
- 36 Accordingly, the national court must be regarded as asking by its questions, which it is appropriate to examine together, whether Article 45 of Directive 2004/18 must be interpreted as precluding the exclusion of an economic operator from a tendering procedure on the ground that the operator has failed to comply with a requirement laid down in the contract documentation to annex to the tender, on pain of exclusion, a statement to the effect that the person designated in the tender as the operator's technical director has not been the subject of criminal proceedings or a conviction, where, at a date after the expiry of the deadline for submitting tenders, such a statement has been provided to the contracting authority or it is shown that the person in question was identified as the technical director in error.
- 37 As regards the question whether the contract at issue in the main proceedings falls within the scope of Directive 2004/18, the European Commission stated at the hearing that that contract is a public services contract, as defined in Article 1(2)(d) of the directive, and identified more specifically as Category 16 in Annex IIA to the directive.
- 38 On the other hand, CEM Ambiente is of the view that the object of the contract is an agreement for the sale and purchase of moveable goods or, in view of the requirement to process waste in the contract, that it is, at most, a service concession. Therefore, the contract does not, in any event, fall within the scope of Directive 2004/18.
- 39 In the first place, on the assumption that the contract at issue in the main proceedings falls within the scope of Directive 2004/18, which is a matter for the referring court to determine, it should be recalled that Article 45(1) and (2) of the directive sets out a series of grounds on which a tenderer may be excluded on the basis of his personal situation. Article 45(3) indicates which documents the contracting authorities are required to accept as sufficient evidence of the fact that none of the cases identified in Article 45(1) and (2) applies to the tenderer in question, with the exception of the situations referred to in Article 45(2)(d) and (g).
- 40 It is not apparent from the order for reference that the question whether the grounds for exclusion set out in Article 38(1)(b) and (c) of Legislative Decree No 163/2006 and the requirement to submit a 'sworn statement' laid down in Article 38(2) of that decree are compatible with those provisions of Directive 2004/18 is in issue in the main proceedings. Nor is it claimed in those proceedings that the exclusion of a tenderer from the contract on the ground that the tenderer has failed to comply with that requirement is, in itself, contrary to the directive. However, the referring court has doubts as to the compatibility with European Union law of the fact that it is impossible for such a tenderer, after submitting his bid, to remedy the fact that he failed to annex such a statement to his bid, whether by submitting such a statement to the contracting authority directly or by showing that the person concerned was identified as the technical director in error.

- 41 In that regard, it is common ground that it is apparent from the contract documentation in question in the main proceedings, first, that the 'sworn statement' referred to in Article 38 of Legislative Decree No 163/2006 concerning the person designated as technical director of the economic undertaking concerned had to be annexed to the bid submitted by the undertaking, on pain of exclusion from the tender procedure and, second, that it was possible to remedy *a posteriori* merely irregularities which were purely formal and not decisive for the assessment of the bid.
- 42 The Court has already held that the contracting authority must comply strictly with the criteria which it has itself established, so that it is required to exclude from the contract an economic operator who has failed to provide a document or information which he was required to produce under the terms laid down in the contract documentation, on pain of exclusion (see, to that effect, judgment in *Manova*, C-336/12, EU:C:2013:647, paragraph 40).
- 43 That strict requirement on the part of contracting authorities has its origins in the principle of equal treatment and the obligation of transparency deriving from that principle, to which those authorities are subject in accordance with Article 2 of Directive 2004/18.
- 44 First, the principle of equal treatment requires tenderers to be afforded equality of opportunity when formulating their bids, which therefore implies that the bids of all tenderers must be subject to the same conditions. Second, the obligation of transparency is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the bids submitted satisfy the criteria applying to the contract in question (see, to that effect, judgment in *Commission v CAS Succhi di frutta*, C-496/99 P, EU:C:2004:236, paragraphs 108 to 111).
- 45 It follows that, in circumstances such as those in the main proceedings, Article 45 of Directive 2004/18, read in conjunction with Article 2 of the directive, does not preclude the exclusion of a tenderer on the ground that he has omitted to annex to his bid a sworn statement relating to the person identified in the bid as technical director. In particular, in so far as the contracting authority takes the view that that omission is not a purely formal irregularity, it cannot allow the tenderer subsequently to remedy the omission in any way after the expiry of the deadline for submitting bids.
- 46 Furthermore, in such circumstances, Article 51 of Directive 2004/18, which provides that the contracting authority may invite operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50 of the directive, cannot be interpreted as permitting that authority to accept any rectification of omissions which, as expressly provided for in the contract documentation, must result in the exclusion of the bid.
- 47 In the second place, on the assumption that the contract in question in the proceedings before the national court is a services concession, it should be noted that, if, at the material time, service concession contracts were not governed by any of the directives by which the EU legislature regulated public procurement, the public authorities which concluded such contracts were nevertheless required to comply with the fundamental rules of the FEU Treaty, in particular the principles of equal treatment and transparency (see, to that effect, judgments in *Parking Brixen*, C-458/03, EU:C:2005:605, paragraphs 46 to 49, and *Wall*, C-91/08, EU:C:2010:182, paragraph 33), where the services concession concerned has a certain cross-border interest in the light, inter alia, of its value and the place where it is carried out (see, to that effect, judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:187, paragraph 23 and the case-law cited).

- 48 In so far as the contract in question in the main proceedings has such an interest, which is a matter to be verified by the referring court, the principle of equal treatment and the obligation of transparency deriving from that principle require the contracting authority, as is apparent from paragraphs 42 and 44 above, to comply with the criteria which it has itself established, so that it will be required to exclude from the contract an economic operator who has failed to provide a document or information which he was under an obligation to produce under the terms laid down in the contract documentation, on pain of exclusion.
- 49 Accordingly, the exclusion of a tenderer such as Cartiera dell'Adda from a contract such as that at issue in the main proceedings must be regarded as consistent with the principle of equal treatment and the obligation of transparency, as fundamental rules of the FEU Treaty.
- 50 In the light of the foregoing, the answer to the questions referred is that Article 45 of Directive 2004/18, read in conjunction with Article 2 of the directive, and the principle of equal treatment and the obligation of transparency must be interpreted as not precluding the exclusion of an economic operator from a procurement procedure on the ground that the operator has failed to comply with the requirement laid down in the contract documentation to annex to his bid, on pain of exclusion, a statement to the effect that the person designated in the bid as the operator's technical director has not been the subject of criminal proceedings or a conviction, even where, at a date after the expiry of the deadline for submitting bids, such a statement has been provided to the contracting authority or it is shown that the person in question was identified as the technical director in error.

Costs

- 51 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 (Tenth Chamber) hereby rules:

Article 45 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, as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009, read in conjunction with Article 2 of the directive, and the principle of equal treatment and the obligation of transparency must be interpreted as not precluding the exclusion of an economic operator from a procurement procedure on the ground that the operator has failed to comply with the requirement laid down in the contract documentation to annex to his bid, on pain of exclusion, a statement to the effect that the person designated in the bid as the operator's technical director has not been the subject of criminal proceedings or a conviction, even where, at a date after the expiry of the deadline for submitting bids, such a statement has been provided to the contracting authority or it is shown that the person in question was identified as the technical director in error.

[Signatures]