Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

7 September 2016*

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Article 2 — Principle of equal treatment — Obligation of transparency — Contract for the supply of a complex communications system — Difficulties in performance of the contract — Disagreement of the parties in regard to areas of responsibility — Settlement — Reduction in the scope of the contract — Transformation of a rental of equipment into a sale of equipment — Material amendment to a contract — Justification by the objective expediency of achieving a settlement agreement)

In Case C-549/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Højesteret (Supreme Court, Denmark), made by decision of 27 November 2014, received at the Court on 2 December 2014, in the proceedings

Finn Frogne A/S

v

Rigspolitiet ved Center for Beredskabskommunikation,

THE COURT (Eighth Chamber),

composed of D. Šváby (Rapporteur), President of the Chamber, J. Malenovský and M. Vilaras, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Finn Frogne A/S, by K. Dyekjær, C. Bonde, P. Gjørtler, H.B. Andersen and S. Stenderup Jensen, advokater, and J. Grayston, Solicitor,

— the Danish Government, by C. Thorning, acting as Agent, and P. Hedegaard Madsen, advokat,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Grasso, avvocato dello Stato,

— the Austrian Government, by M. Fruhmann, acting as Agent,

— the European Commission, by L. Grønfeldt and A. Tokár, acting as Agents,

* Language of the case: Danish.

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum, OJ 2004 L 351, p. 44).

2 The request has been made in proceedings between Finn Frogne A/S ('Frogne') and Rigspolitiet ved Center for Beredskabskommunikation (Centre for Emergency Communication of the National Police, Denmark; 'CFB') concerning the propriety of a settlement agreement concluded by CFB, in its capacity as the contracting authority, and Terma A/S, the successful tenderer for a public contract, in connection with the performance of that contract.

Legal context

EU law

3 According to recital 2 of Directive 2004/18:

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.'

4 Article 2 of Directive 2004/18, entitled 'Principles of awarding contracts', provides:

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

5 Article 28 of that directive provides:

'In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award these public contracts by applying the open or restricted procedure. … In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice.'

6 Article 31 of Directive 2004/18 is worded as follows:

‘Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the following cases:

(1) for public works contracts, public supply contracts and public service contracts:

…

(c) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice as referred to in Article 30 cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority;

…

(4) for public works contracts and public service contracts:

(a) for additional works or services not included in the project initially considered or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services:

— when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities,

or

— when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.

However, the aggregate value of contracts awarded for additional works or services may not exceed 50% of the amount of the original contract;

…’

7 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) (‘Directive 89/665’), includes an Article 2d, entitled ‘Ineffectiveness’. According to that article:

‘1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/18/EC;

…

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

— the contracting authority considers that the award of a contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/18/EC,

— the contracting authority has published in the *Official Journal of the European Union* a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and,

— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

…'

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

8 In 2007, the Danish State initiated a procedure for the award of a public contract, in the form of a competitive dialogue, for the supply of a global communications system common to all emergency response services and for the maintenance of that system for several years. CFB subsequently became the competent public authority for that contract.

9 That contract was awarded to Terma. The contract with Terma, concluded on 4 February 2008, involved a total amount of 527 million Danish kroner (DKK) (approximately EUR 70 629 800), DKK 299 854 699 (approximately EUR 40 187 000) of which related to a minimum solution which was described in the tender specifications, with the remainder relating to options and services which would not necessarily be subject to a request for performance.

10 In the course of the performance of that contract, difficulties arose in meeting delivery deadlines, with CFB and Terma both disagreeing as to which party was responsible for making it impossible to perform the contract as stipulated.

11 Following negotiations, the parties agreed to a settlement under which the scope of the contract was to be reduced to the supply of a radio communications system for regional police forces, worth approximately DKK 35 million (approximately EUR 4.69 million), while CFB would acquire two central server farms, worth approximately DKK 50 million (approximately EUR 6.7 million), which Terma had itself acquired with a view to leasing them to CFB in performance of the original contract. As part of that settlement, each party intended to waive all rights arising from the original contract other than those resulting from the settlement.

12 Before finalising that settlement, CFB published on 19 October 2010, in the *Official Journal of the European Union*, a notice for voluntary ex ante transparency regarding the settlement agreement which it intended to conclude with Terma, pursuant to Article 2d(4) of Directive 89/665.

13 Frogne, which had not applied for pre-selection to participate in the tendering procedure for the original contract, brought an action before the Klagenævnet for Udbud (Complaints Board for Public Procurement, Denmark) (the 'Complaints Board'). Before ruling on the merits, the latter, by decision of 10 December 2010, refused to allow that action to have suspensive effect.

14 The settlement was concluded on 17 December 2010.

15 Frogne's action before the Complaints Board was dismissed by decision of 3 November 2011.

16 The legal action brought by Frogne following this decision was also dismissed by a decision of the Østre Landsret (Eastern Regional Court, Denmark) of 20 December 2013.

17 In the first place, the Østre Landsret (Eastern Regional Court) held that the amendment of the original contract as put in place by the settlement concluded between CFB and Terma constituted a material amendment to that contract, as defined in the case-law of the Court of Justice.

18 In the second place, the Østre Landsret (Eastern Regional Court) took the view, however, first, that that settlement had not been the result of an intention on the part of Terma and CFB to renegotiate the material terms of the original contract in order to optimise their subsequent collaborative effort under materially altered terms, but had rather been a settlement of the dispute between the parties in place of a termination of that contract in circumstances where the performance of that contract appeared impossible, a settlement in which each party agreed to significant waivers with a view to achieving an acceptable solution, of an order of magnitude significantly smaller in comparison with that contract, while allowing each of them to avoid the risk of what were likely to be disproportionate losses. Second, there was no basis on which to assume that the intention of CFB or Terma had been to circumvent the public procurement rules.

19 In those circumstances, the Østre Landsret (Eastern Regional Court) took the view that the principles of equal treatment and transparency did not preclude the conclusion of this settlement provided that there was a close link between the original contract and the services provided in connection with it. This was the case with regard to the provision of a radio communications system for regional police forces, but not with regard to the sale of the two central server farms. In respect of the latter aspect, that court held that CFB's decision to resort to the settlement agreement at issue and the conclusion of that agreement were contrary to the principle of equal treatment and the obligation of transparency. The fact that the conclusion of that agreement allowed the contracting authority to address risks related to a situation of conflict was deemed irrelevant to the legality of that conclusion.

20 However, the Østre Landsret (Eastern Regional Court) ruled that CFB's assessment to the effect that the conclusion of the settlement agreement with Terma was permitted without prior publication of a notice of contract under the EU rules was not manifestly wrong. Taking into consideration the notice for voluntary ex ante transparency which the contracting authority had published in the *Official Journal of the European Union* regarding the settlement the conclusion of which was envisaged under Article 2d(4) of Directive 89/665, and the fact that, before concluding it, it had waited not only for the expiry of the 10-day period provided for in that provision, but also for the Complaints Board's ruling on the possible suspensive effect of Frogne's action before it, the Østre Landsret (Eastern Regional Court) found that that agreement could not be declared invalid, with the result that the action before it should not be upheld.

21 Before the Højesteret (Supreme Court, Denmark), to which it has appealed, Frogne argues that the question as to whether a public contract intended as part of a settlement relating to an original public contract must be the subject of a tendering procedure depends solely on whether or not such an amendment to the original contract is material. In the present case, it submits, the change is material, whether it relates to the subject matter of the contract as amended or to the contract's significantly reduced value, since the amended contract was likely to interest smaller undertakings. Furthermore, it submits, neither economic considerations nor the protection of the situation of the successful tenderer may be relied on to justify an infringement of the principle of equal treatment and of the obligation of transparency.

22 CFB considers the two aspects of the settlement. With respect, first, to the limitation of the contract's scope to the supply of a radio communications system for the regional police forces alone, it draws attention to the importance of the fact that the amendment consisted in a significant reduction in the services to be supplied, a situation which, it claims, is not governed by EU law. As regards, second, the

acquisition of the central server farms, only the lease of which was provided for in the original contract, it considers, in essence, that the fact that such equipment was sold rather than leased did not constitute a material change in that contract.

23 More generally, CFB believes that where the performance of a contract gives rise to difficulties — which, it submits, is not unusual in certain types of contracts, such as those relating to the development of IT systems — the contracting authority must be allowed a broad discretion to enable it to reach a reasonable solution in the event of difficulties in performance. Otherwise, the contracting authority would be obliged either to refrain from making reasonable adjustments or to terminate the contract, with the risks and losses which this would entail. Interpreting Directive 2004/18 as meaning that a new tendering procedure is required in such a case would, in practice, prevent a settlement from being concluded, thus amounting to an interference with the law of obligations which is not permitted by the Treaties.

24 The Højesteret (Supreme Court) is unsure as to the scope of Article 2 of Directive 2004/18, in particular as to whether the principle of equal treatment and the obligation of transparency imply that a contracting authority cannot consider entering into a settlement to resolve the difficulties arising from the performance of a public contract without this automatically giving rise to the obligation to organise a new tendering procedure relating to the terms of that settlement.

25 According to the Højesteret (Supreme Court), the new element in comparison with the situations previously examined by the Court lies in those difficulties in performing the contract, the attribution of fault for which to one or other of the parties being disputed, and, ultimately, the relevant question is whether it is possible to have recourse to a settlement in order to bring an end to those difficulties without having to organise a new tendering procedure.

26 In those circumstances, the Højesteret (Supreme Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is Article 2 of Directive 2004/18, read in conjunction with the judgments of the Court of Justice of the European Union of 19 June 2008, *pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:351), and of 13 April 2010, *Wall* (C-91/08, EU:C:2010:182), to be interpreted as meaning that a settlement agreement which introduces limitations on and amendments to the services to be provided as originally agreed by the parties under a contract previously put out to tender and also mutual agreement to waive the application of remedies for breach in order to avoid subsequent litigation constitutes a contract which in itself requires a tendering procedure, in a situation where performance of the original contract has encountered difficulties?’

The question referred for a preliminary ruling

27 By its question, the referring court asks, in essence, whether Article 2 of Directive 2004/18 must be interpreted as meaning that, following the award of a public contract, a material amendment cannot be made to it without a new tendering procedure being initiated, even in the case where the amendment is, objectively, a type of settlement agreement, with both parties agreeing to mutual waivers, designed to bring an end to a dispute with an uncertain outcome, which arose from the difficulties encountered in the performance of that contract.

28 It follows from the Court’s case-law that the principle of equal treatment and the obligation of transparency resulting therefrom preclude, following the award of a public contract, the contracting authority and the successful tenderer from amending the provisions of that contract in such a way that those provisions differ materially in character from those of the original contract. Such will be the case if the proposed amendments would either extend the scope of the contract considerably to encompass elements not initially covered or to change the economic balance of the contract in favour

of the successful tenderer, or if those changes are liable to call into question the award of the contract, in the sense that, had such amendments been incorporated in the documents which had governed the original contract award procedure, either another tender would have been accepted or other tenderers might have been admitted to that procedure (see, to that effect, inter alia, judgment of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraphs 34 to 37).

29 As regards the latter case, it must be noted that an amendment of the elements of a contract consisting in a reduction in the scope of that contract's subject matter may result in it being brought within reach of a greater number of economic operators. Provided that the original scope of the contract meant that only certain undertakings were capable of presenting an application or submitting a tender, any reduction in the scope of that contract may result in that contract being of interest also to smaller economic operators. Moreover, since the minimum levels of ability required for a specific contract must, pursuant to the second subparagraph of Article 44(2) of Directive 2004/18, be related and proportionate to the subject matter of the contract, a reduction in that contract's scope is capable of resulting in a proportional reduction of the level of the abilities required of the candidates or tenderers.

30 In principle, a substantial amendment of a contract after it has been awarded cannot be effected by direct agreement between the contracting authority and the successful tenderer, but must give rise to a new award procedure for the contract so amended (see, by analogy, judgment of 13 April 2010, *Wall*, C-91/08, EU:C:2010:182, paragraph 42). The position would be otherwise only if that amendment had been provided for by the terms of the original contract (see, to that effect, judgment of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraphs 37, 40, 60, 68 and 69).

31 However, it follows from the order for reference that, according to the analysis of the Østre Landsret (Eastern Regional Court), to which the Højesteret (Supreme Court) refers, the particular aspect of the situation at issue in the main proceedings lies in the fact that the amendment of the contract, described as material, arose not out of the desire of the parties to renegotiate the essential terms of the contract by which they were originally bound, as defined in the abovementioned case-law of the Court, but out of objective difficulties, with unpredictable consequences, encountered in the performance of that contract, difficulties which certain interested parties who submitted observations to the Court also state are unpredictable where complex contracts are concerned, such as contracts involving the development of IT systems, as is the case here.

32 However, it must be held that neither (i) the fact that a material amendment of the terms of a contract results not from the deliberate intention of the contracting authority and the successful tenderer to renegotiate the terms of that contract, but from their intention to reach a settlement in order to resolve objective difficulties encountered in the performance of the contract nor (ii) the objectively unpredictable nature of the performance of certain aspects of the contract can provide justification for the decision to carry out that amendment without respecting the principle of equal treatment from which all operators potentially interested in a public contract must benefit.

33 As regards, first, the reasons that may lead the contracting authority and the successful tenderer to contemplate a substantial amendment to that contract involving the initiation of a new award procedure, it must be noted, first, that the reference to the deliberate intention of the parties to renegotiate the terms of that contract is not a decisive factor. It is true that the Court refers to such an intention in paragraph 44 of the judgment of 5 October 2000, *Commission* v *France* (C-337/98, EU:C:2000:543), the first judgment in which the Court examined this issue. However, as is clear from paragraphs 42 to 44 of that judgment, that formulation related to the specific factual context of the case giving rise to that judgment. On the other hand, the question whether there has been a material amendment must be analysed from an objective point of view, on the basis of the criteria set out in paragraph 28 above.

34 Second, it follows from paragraph 40 of the judgment of 14 November 2013, *Belgacom* (C-221/12, EU:C:2013:736) that the principles of equal treatment and non-discrimination and the obligation of transparency which is to be inferred from those principles, arising from the FEU Treaty, cannot be disregarded where there is an intention to modify substantially a service concession contract or grant exclusive rights with the aim of providing for a reasonable solution designed to bring an end to a dispute which has arisen between public entities and an economic operator, for reasons outside their control, as to the scope of the agreement by which they are bound. Since those principles and that obligation form the basis of Article 2 of Directive 2004/18, as is apparent from a reading of recital 2 of that directive, that standard also applies in the context of the application of that directive.

35 As regards, second, the objectively unpredictable nature of certain matters which may form the subject matter of a public contract, it must, admittedly, be recalled that, in accordance with Article 31 of Directive 2004/18, contracting authorities can opt for a direct award of a contract, that is to say, negotiating the terms of the contract with a selected economic operator without prior publication of a contract notice, in various cases, many of which are characterised by the unforeseeability of certain circumstances. However, as is clear from the wording of the last sentence of the second paragraph of Article 28 of that directive, Article 28 may be applied only in the specific cases and circumstances referred to expressly in Article 31, with the result that the list of exceptions concerned must be regarded as exhaustive. It does not, however, appear that the situation at issue in the main proceedings corresponds to one of those situations.

36 Furthermore, the very fact that, because of their subject matter, certain public contracts may immediately be categorised as being unpredictable in nature means that there is a foreseeable risk that difficulties may occur at the implementation stage. Accordingly, in respect of such a contract, it is for the contracting authority not only to use the most appropriate procurement procedures, but also to take care when defining the subject matter of that contract. Furthermore, as is clear from paragraph 30 above, the contracting authority may retain the possibility of making amendments, even material ones, to the contract, after it has been awarded, on condition that this is provided for in the documents which governed the award procedure.

37 Although the principle of equal treatment and the obligation of transparency must be guaranteed even in regard to specific public contracts, this does not mean that the particular aspects of those contracts cannot be taken into account. That legal imperative and that practical necessity are reconciled, first, through strict compliance with the conditions of a contract as they were laid down in the contract documents up to the end of the implementation phase of that contract, but also, second, through the possibility of making express provision, in those documents, for the option for the contracting authority to adjust certain conditions, even material ones, of that contract after it has been awarded. By expressly providing for that option and setting the rules for the application thereof in those documents, the contracting authority ensures that all economic operators interested in participating in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders (see, by analogy, judgment of 29 April 2004, *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraphs 112, 115, 117 and 118).

38 By contrast, where such contingencies are not provided for in the contract documents, the requirement to apply, in respect of a given public contract, the same conditions to all economic operators makes it necessary, in the case of a material amendment to that contract, to initiate a new tendering procedure (see, by analogy, judgment of 29 April 2004, *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 127).

39 Lastly, it is necessary to make it clear that all of those developments are without prejudice to the potential consequences of the notice for voluntary ex ante transparency which has been published in connection with the contract at issue in the main proceedings.

40 In the light of the foregoing, the answer to the question is that Article 2 of Directive 2004/18 must be interpreted as meaning that, following the award of a public contract, a material amendment cannot be made to that contract without a new tendering procedure being initiated even in the case where that amendment is, objectively, a type of settlement agreement, with both parties agreeing to mutual waivers, designed to bring an end to a dispute the outcome of which is uncertain, which arose from the difficulties encountered in the performance of that contract. The position would be different only if the contract documents provided for the possibility of adjusting certain conditions, even material ones, after the contract had been awarded and fixed the detailed rules for the application of that possibility.

Costs

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

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

Article 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that, following the award of a public contract, a material amendment cannot be made to that contract without a new tendering procedure being initiated even in the case where that amendment is, objectively, a type of settlement agreement, with both parties agreeing to mutual waivers, designed to bring an end to a dispute the outcome of which is uncertain, which arose from the difficulties encountered in the performance of that contract. The position would be different only if the contract documents provided for the possibility of adjusting certain conditions, even material ones, after the contract had been awarded and fixed the detailed rules for the application of that possibility.

[Signatures]