



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

14 July 2016*

(Reference for a preliminary ruling — Public supply contracts — Directive 2004/18/EC — Article 53(2) — Award criteria — Most economically advantageous tender — Method of evaluation — Weighting rules — Obligation for the contracting authority to specify in the call for tenders the weighting of the award criteria — Scope of the obligation)

In Case C-6/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Belgium), made by decision of 6 January 2015, received at the Court on 12 January 2015, in the proceedings

TNS Dimarso NV

v

Vlaams Gewest,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Lycourgos, E. Juhász (Rapporteur), C. Vajda and K. Jürimäe, Judges,

Advocate General: P. Mengozzi,

Registrar: I. Illéssy, administrator,

having regard to the written procedure and further to the hearing on 13 January 2016,

after considering the observations submitted on behalf of:

- TNS Dimarso NV, by P. Flamey, G. Verhelst and A. Lippens, advocaaten,
- the Belgian Government, by J.-C. Halleux, N. Zimmer and C. Pochet, acting as Agents, and R. Vander Hulst, D. D'Hooghe and N. Kiekens, advocaten,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,
- the European Commission, by E. Manhaeve and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 March 2016,

* Language of the case: Dutch.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 53(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), read in the light of the principle of equal treatment of tenderers and of the ensuing obligation of transparency.
- 2 That request was made in the context of a dispute between TNS Dimarso NV ('Dimarso') and the Vlaams Gewest (Flemish Region) concerning the lawfulness of the method used to evaluate bids submitted by tenderers in a procedure for the award of a public service contract organised by the Flemish Region.

Legal context

EU law

- 3 Recital 46 of Directive 2004/18 states:

'Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: "the lowest price" and "the most economically advantageous tender".

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting authorities may derogate from indicating the weighting of the criteria for the award in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria.

Where 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.

...'

4 Article 2 of Directive 2004/18 provides:

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

5 Article 53 of that directive, entitled ‘Contract award criteria’, provides:

‘1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject matter of the public contract in question, for example, 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;

(b) the lowest price only.

2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.’

Belgian law

6 Article 16 of the Law of 24 December 1993 on public procurement and certain contracts for works, supplies and services, in the version in force at the material time, provides:

‘In a restricted or public call for tenders, the contract must be awarded to the tenderer which submitted the lawful tender presenting the best value for money, taking into account the award criteria which have to be set out in the special tender specifications or, if appropriate, in the contract notice. The contract must be awarded to the tenderer who submitted the most advantageous lawful tender, taking account of the award criteria set out in the tender specifications or, if appropriate, in the contract notice. The award criteria must relate to the subject matter of the contract, for example, the quality of the goods or services, price, technical merit, aesthetic and functional characteristics, environmental characteristics, social and ethical considerations, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion. ...’

7 Article 115 of the Royal Decree of 8 January 1996 on public works, supply and service contracts and on public works concessions, in the version in force at the material time, provides:

‘The contracting authority shall choose the lawful tender which it deems to present the best value for money, on the basis of various criteria depending on the contract. ... Without prejudice to the laws, regulations or administrative provisions on the remuneration of certain services, the contracting

authority shall set out in the special tender specifications and, where necessary, in the contract notice, all the award criteria, if possible in descending order of the importance attributed to them, which shall in that case be made clear in the special tender specifications. Otherwise, the award criteria shall be of equal value.

...'

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

8 By a notice published in the *Official Journal of the European Union* of 31 January 2012, the Flemish Region launched a tendering procedure for the conclusion of a service contract, entitled 'Woonsurvey 2012: survey naar de woning en de woonconsument in Vlaanderen', for the performance of a large-scale survey of housing and housing consumers in Flanders (Belgium). The estimated value of that contract was EUR 1 400 000, including value added tax (VAT).

9 The call for tenders relating to that procedure referred to the following two award criteria:

'1 Quality of the tender (50/100) Quality of the preparation, organisation and execution of the work on the ground, and of the encryption and initial data processing. The services proposed must be described in as much detail as possible. It must be clear from the tender that the tenderer is capable of taking on the whole contract (minimum 7 000 samples / maximum 10 000 samples) within the prescribed 12-month delivery deadline.

2 Price (50/100) Cost of delivering the contract in relation to the basic sample (7 000 samples) and cost per additional batch of 500 addresses supplied (amounts inclusive of VAT).'

10 Four tenderers submitted tenders, which, according to the report on the qualitative selection, met the minimum requirements in regard to technical competence. The method used to evaluate the tenders was set out as follows in the award report of 23 March 2012:

'The committee then evaluated the tenders.

The four tenders were evaluated and compared with each other on the basis of the criteria set out above. First, the tenders were examined and evaluated on the basis of the "quality" criterion. For this, each tender was unanimously assigned a given score (high — satisfactory — low). Then, the price criterion was applied.

On the basis of those scores, a final ranking was then established.'

It is apparent from the award report that, as regards the first criterion, namely the quality of the tenders, Dimarso and two other tenderers were awarded a ‘high’ score, while the fourth tenderer was assessed as ‘low’. With respect to the second criterion, namely price, the award report contains the following indications:

‘Overview:

The following overview replicates prices for, on the one hand, the implementation of the basic contract (7 000 samples) and, on the other, the carrying out of interviews in batches of 500 (price including VAT):

Tender	Criterion 2(a) — Price (including VAT) base sample (N= 7 000)	Criterion 2(b) — Price (including VAT) batch of 500 additional samples
[Dimarso]	[EUR] 987360.00	[EUR] 69575.00
Ipsos Belgium NV	[EUR] 913570.00	[EUR] 55457.00
New Information & Data NV	[EUR] 842607.70	[EUR] 53240.00
Significant GfK NV	[EUR] 975520.15	[EUR] 57765.40

12 Pursuant to those two criteria, the final ranking of the tenderers in the award report was as follows:

Ranking	Tender	Criterion 1	Criterion 2(a)	Criterion 2(b)
1	Ipsos Belgium NV	high	[EUR] 913,570.00	[EUR] 55,457.00
2	Significant GfK NV	high	[EUR] 975520.15	[EUR] 57765.40
3	[Dimarso]	high	[EUR] 987360.00	[EUR] 69575.00
4	New Information & Data NV	low	[EUR] 842607.70	[EUR] 53240.00

13 By decision of the Flemish Region of 11 April 2012, the contract was awarded, by the Flemish Minister for Energy, Housing, Urban Policy and the Social Economy, to Ipsos Belgium. Dimarso’s action, brought on 14 June 2012, seeks the annulment of that decision. According to the applicant, the contested decision appears to have assessed the tenders on the basis of the weighting ‘high — satisfactory — low’ not mentioned in the call for tenders with respect to the criterion of the quality of the tenders, and on the basis of the ‘price’ components stated with respect to the price criterion, without conducting a sufficient examination, comparison and final assessment of the tenders taking account of the award criteria as set out in the tender specification, including the weighting of ‘50/100’ for each of the award criteria as specified in the tender specifications.

14 The Raad van State (Council of State, Belgium) notes that both recital 46 and Article 53(2) of Directive 2004/18 refer only to the ‘criteria’ and the ‘relative weighting’ given to each of them, and that the method of evaluation and weighting rules are not expressly mentioned anywhere. The referring court states that the choice of method of evaluation is not neutral and may, on the contrary, play a decisive role in the outcome of the evaluation of the tenders on the basis of the award criteria. It refers, in that regard, to the example of the price award criterion, under which the contracting authority may opt, for example, either to apply the principle of proportionality, or to award the maximum score to the lowest-priced tender or a zero score to the highest-priced tender and apply a linear interpolation to intermediate tenders, or to look most favourably on the tender with the median price.

- 15 According to the referring court, in the judgment of 24 January 2008 in *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraphs 38, 44 and 45), the Court held that Article 36(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), which provision is essentially similar to Article 53(2) of Directive 2004/18, precludes the contracting authority from setting, subsequently to the publication of the tender specifications or the contract notice, the weighting rules and factors and sub-criteria for the award criteria set out in either of those documents, where those weighting rules and factors and sub-criteria were not previously notified to the tenderers. The Court thus held that it is the *ex post* determination not only of the ‘weighting factors’, but also of the ‘sub-criteria’ which is incompatible with EU law.
- 16 The Raad van State (Council of State) observes that the question in the present case is whether the Court, by that additional reference to ‘sub-criteria’, was also referring to the manner in which the award criteria were assessed, which would be akin to weighting rules. Consequently, it is not easy to dismiss the argument that the Court, by using the term ‘sub-criteria’, was also referring to the method of evaluation. However, it is not clear that it follows from the judgment of 24 January 2008 in *Lianakis and Others* (C-532/06, EU:C:2008:40) that the assessment method itself should also be notified to the tenderers, and still less that that method should always be established in advance. In any event, it is possible to conclude that the question which was raised in the case giving rise to that judgment did not specifically concern the establishment a posteriori of a method of evaluation and that therefore it did not have the same scope as the question that arises in the present case.
- 17 According to the referring court, the Court did not explicitly address that point in its judgment of 21 July 2011 in *Evropaïki Dynamiki v EMSA* (C-252/10 P, not published, EU:C:2011:512), in which, referring to the judgment of 24 January 2008 in *Lianakis and Others* (C-532/06, EU:C:2008:40), the Court stressed that the lawfulness of the use of sub-criteria and their corresponding weighting should always be considered in the light of the principle of equal treatment and the consequent obligation of transparency. Accordingly, in the referring court’s opinion, those judgments do not provide an answer, or at least no decisive answer, to the question which arises in the case in the main proceedings, namely whether the method of evaluation of the tenders, namely the actual method which will be used by the contracting authority to assess those tenders, must also be notified in advance to the tenderers.
- 18 In the light of those considerations, the Raad van State (Council of State) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

‘Must Article 53(2) of Directive 2004/18 ..., both in isolation and in conjunction with the scope of the principles laid down by European law concerning equality and transparency in the field of public procurement, be interpreted as meaning that, if the contract is awarded to the tenderer who submits the most economically advantageous tender from the point of view of the contracting authority, the contracting authority is always required to establish in advance, and indicate in the contract notice or contract documents, the method of assessment or the weighting rules, irrespective of their scope, predictability or commonness, in the light of which the tenders will be assessed in accordance with the award criteria or sub-criteria,

or,

if no such general obligation exists, that there are circumstances, such as, *inter alia*, the scope, unpredictability or uncommonness of these weighting rules, in which this obligation does apply?’

Consideration of the question referred

- 19 By its question, the referring court asks, in essence, whether Article 53(2) of Directive 2004/18, read in the light of the principle of equal treatment and of the consequent obligation of transparency, must be interpreted as meaning that, in the case of a public service contract to be awarded pursuant to the criterion of the most economically advantageous tender in the opinion of the contracting authority, that authority is always required to bring to the attention of potential tenderers, in the contract notice or the tender specifications relating to the contract at issue, the method of evaluation or the weighting rules on the basis of which tenders will be assessed in the light of the award criteria published in those documents or, where no such general obligation exists, if the specific circumstances of the relevant contract may impose such an obligation.
- 20 In order to answer that question, it should be noted that where the contracting authority decides to award a contract to the most economically advantageous tender, under Article 53(2) of Directive 2004/18, it must specify in the contract notice or the tender specification the relative weighting it gives to each of the award criteria chosen in order to determine the most economically advantageous tender. That weighting may be expressed by providing for a range with an appropriate maximum spread. Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or tender specifications or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.
- 21 As stated in recital 46 of Directive 2004/18, the purpose of those requirements is to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. In addition, they reflect the duty of the contracting authorities under Article 2 of the directive to treat economic operators equally and non-discriminatorily and to act in a transparent way.
- 22 According to settled case-law, the principle of equal treatment and the obligation of transparency entail, in particular, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority (see, to that effect, judgments of 24 November 2005 in *ATI EAC e Viaggi di Maio and Others*, C-331/04, EU:C:2005:718, paragraph 22, and 24 May 2016 in *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 37 and the case-law cited).
- 23 Thus, the Court has held that the subject matter of each contract and the criteria governing its award must be clearly defined from the beginning of the award procedure (judgment of 10 May 2012 in *Commission v Netherlands*, C-368/10, EU:C:2012:284, paragraph 56) and that a contracting authority cannot apply, by way of award criteria, sub-criteria which it has not previously brought to the tenderers' attention (judgment of 21 July 2011 in *Evropaiki Dynamiki v EMSA*, C-252/10 P, not published, EU:C:2011:512, paragraph 31). Similarly, the contracting authority must interpret the award criteria in the same way throughout the procedure (judgment of 18 October 2001 in *SIAC Construction*, C-19/00, EU:C:2001:553, paragraph 43 and the case-law cited).
- 24 Those requirements apply, in principle, *mutatis mutandis* to contracting authorities' obligation to indicate, in the contract notice or the tender specifications, the 'relative weighting' of each of the award criteria. Thus, the Court has held that a contracting authority may not, in principle, apply weighting rules which it has not previously brought to the tenderers' attention (see, to that effect, judgment of 24 January 2008 in *Lianakis and Others*, C-532/06, EU:C:2008:40, paragraphs 38 and 42).

- 25 In particular, the relative weighting of each of the award criteria must, subject to the third subparagraph of Article 53(2) of Directive 2004/18, be clearly defined from the beginning of the award procedure, thus enabling tenderers to establish objectively the actual importance given to an award criterion relative to another during their subsequent evaluation by the contracting authority. Similarly, the relative weighting of each of the award criteria cannot be changed throughout the procedure.
- 26 Nonetheless, the Court has accepted that it is possible for a contracting authority to determine, after expiry of the time limit for submitting tenders, weighting factors for the sub-criteria which correspond in essence to the criteria previously brought to the tenderers' attention, provided that three conditions are met, namely that that subsequent determination, first, does not alter the criteria for the award of the contract set out in the tender specifications or contract notice; secondly, does not contain elements which, if they had been known at the time the tenders were prepared, could have affected their preparation; and, thirdly, was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers (see judgment of 21 July 2011 in *Evropaiki Dynamiki v EMSA*, C-252/10 P, not published, EU:C:2011:512, paragraph 33 and the case-law cited).
- 27 However, neither Article 53(2) of Directive 2004/18 nor any other provision thereof lays down an obligation on the contracting authority to bring to the attention of potential tenderers, by publication in the contract notice or in the tender specifications, the method of evaluation applied by the contracting authority in order to effectively evaluate and assess the tenders in the light of the award criteria of the contract and of their relative weighting established in advance in the documentation relating to the contract in question.
- 28 Nor is such a general obligation apparent from the case-law of the Court.
- 29 The Court has held that an evaluation committee must be able to have some leeway in carrying out its task and, thus, it may, without amending the contract award criteria set out in the tender specifications or the contract notice, structure its own work of examining and analysing the submitted tenders (see judgment of 21 July 2011 in *Evropaiki Dynamiki v EMSA*, C-252/10 P, not published, EU:C:2011:512, paragraph 35).
- 30 That leeway is also justified by practical considerations. The contracting authority must be able to adapt the method of evaluation that it will apply in order to assess and rank the tenders in accordance with the circumstances of the case.
- 31 In accordance with the principles governing the award of contracts provided for in Article 2 of Directive 2004/18 and in order to avoid any risk of favouritism, the method of evaluation applied by the contracting authority in order to specifically evaluate and rank the tenders cannot, in principle, be determined after the opening of the tenders by the contracting authority. However, in the event that the determination of that method is not possible for demonstrable reasons before the opening of the tenders, as noted by the Belgian Government, the contracting authority cannot be criticised for having established it only after that authority, or its evaluation committee, reviewed the content of the tenders.
- 32 In any event, pursuant to the principles governing the award of contracts and what has been found in paragraphs 24 and 25 of the present judgment, the determination by the contracting authority of the method of evaluation after the publication of the contract notice or the tender specifications cannot have the effect of altering the award criteria or their relative weighting.
- 33 In the present case, the question arises whether the award procedure at issue complied with the obligations under Article 53(2) of Directive 2004/18, given that, on the one hand, the contracting authority only indicated, in the call for tenders, two award criteria, namely quality and price, with the indication '(50/100)' in respect of each criteria and that, on the other, the evaluation committee used a scale ranging from 'high' to 'low' through 'satisfactory' for the evaluation of the criterion of the quality of the tenders without a scale for the price award criterion.

- 34 In that regard, it should be noted that the two '(50/100)' indications mean, according to the statements of the referring court, that the two award criteria are of equal importance.
- 35 It appears that that procedure did not make it possible to reflect, when ranking the tenderers in order to identify the most economically advantageous tender, differences in the quality of their tenders relative to their price, while taking account of the relative weighting of the award criteria resulting from the indication '(50/100)'. In particular, it appears that that procedure was capable of affecting the price criterion by giving it decisive weight relative to the tenders ranked in the scale of quality referred to in paragraph 33 of the present judgment. It is for the referring court to ascertain whether the relative weighting of each of the award criteria published in the contract notice was in fact complied with by the contracting authority during the evaluation of the tenders.
- 36 While the contracting authority may use a scale for the evaluation of one of the award criteria without it being published in the call for tenders or the tender specifications, that scale may not, however, as was noted in paragraph 32 of the present judgment, have the effect of altering the relative weighting of the award criteria published in those documents.
- 37 Consequently, in the light of all the foregoing considerations, the answer to the question referred for a preliminary ruling is that Article 53(2) of Directive 2004/18, read in the light of the principle of equal treatment and of the consequent obligation of transparency, must be interpreted as meaning that, in the case of a public service contract to be awarded pursuant to the criterion of the most economically advantageous tender in the opinion of the contracting authority, that authority is not required to bring to the attention of potential tenderers, in the contract notice or the tender specifications relating to the contract at issue, the method of evaluation used by the contracting authority in order to specifically evaluate and rank the tenders. However, that method may not have the effect of altering the award criteria and their relative weighting.

Costs

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

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

Article 53(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, read in the light of the principle of equal treatment and of the consequent obligation of transparency, must be interpreted as meaning that, in the case of a public service contract to be awarded pursuant to the criterion of the most economically advantageous tender in the opinion of the contracting authority, that authority is not required to bring to the attention of potential tenderers, in the contract notice or the tender specifications relating to the contract at issue, the method of evaluation used by the contracting authority in order to specifically evaluate and rank the tenders. However, that method may not have the effect of altering the award criteria and their relative weighting.

[Signatures]