



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

6 October 2016 *

(Reference for a preliminary ruling — Public works contracts — Directive 2004/18/EC — Article 7(c) — Threshold amount for public contracts — Threshold not reached — Abnormally low tenders — Automatic exclusion — Discretion of the contracting authority — Obligations of the contracting authority arising from freedom of establishment, freedom to provide services and the general principle of non-discrimination — Contracts which may be of certain cross-border interest)

In Case C-318/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Piemonte (Piedmont Regional Administrative Court, Italy), made by decision of 29 April 2015, received at the Court on 26 June 2015, in the proceedings

Tecnoedi Costruzioni Srl

v

Comune di Fossano,

other parties to the proceedings:

Ge.Co. Italia SpA,

Niccoli Costruzioni Srl,

Selva Mercurio Srl,

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: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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

* Language of the case: Italian.

after considering the observations submitted on behalf of:

- the Italian Government, by G. Palmieri, acting as Agent, and C. Colelli, avvocato dello Stato,
- the European Commission, by G. Gattinara and A. Tokár, acting as Agents,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 49 and 56 TFEU concerning freedom of establishment and freedom to provide services, respectively, and the general principles of equal treatment, non-discrimination and proportionality.
- 2 This request has been made in proceedings between Tecnoedi Costruzioni Srl and the Comune di Fossano (municipality of Fossano, Italy) concerning the lawfulness of the definitive award by that municipality of a public works contract to Ge.Co. Italia SpA.

Legal context

EU law

- 3 Recital 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) states as follows:

‘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, is subject to the respect of the principles of the [FEU] 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 ...’

- 4 In accordance with Article 7(c) of Directive 2004/18, entitled ‘Threshold amounts for public contracts’, as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319, p. 43), which is applicable *ratione temporis* to the main proceedings, that directive applies to public works contracts which have a value exclusive of value added tax (‘VAT’) estimated to be equal to or greater than EUR 5 000 000.

Italian law

- 5 Article 122(9) of Legislative Decree No 163/2006 of 12 April 2006 establishing the public works contracts, public service contracts and public supply contracts code implementing Directive 2004/18 (ordinary supplement to GURI No 100 of 2 May 2006), entitled ‘Specific system for public works contracts whose value is below the threshold’, states:

‘For works with a value of EUR 1 million or less where the award criterion is the lowest price, the contracting authority may provide in the contract notice for the automatic exclusion of tenders having a percentage discount equal to or greater than the anomaly threshold established in accordance with

Article 86, in which case Article 87(1) shall not apply. However, that discretion in respect of automatic exclusion may not be used where the number of tenders admitted is less than ten, in which case Article 86(3) shall apply.’

- 6 Article 86(3) of that legislative decree provides as follows:

‘In all cases, the contracting authorities may assess the suitability of any tender which, on the basis of specific evidence, appears to be abnormally low.’

- 7 Article 87(1) of that legislative decree provides as follows:

‘Where a tender appears to be abnormally low, the contracting authority shall request that the tenderer provide justification concerning the component elements of the price which form the overall basic value of the contract, and in the event of an award on the basis of the most economically advantageous tender, concerning other factors relevant to the assessment of the tender, in accordance with Article 88. A decision as to exclusion may be made only following that additional verification, after both parties have had an opportunity to express their views.’

- 8 The anomaly threshold to which Article 122(9) of Legislative Decree No 163/2006 refers, which confers on contracting authorities discretion to exclude certain tenders considered to be abnormally low, is determined in accordance with a mathematical calculation set out in Article 86(1) of the legislative decree.

- 9 Article 253(20 bis) of Legislative Decree No 163/2006 provides as follows:

‘Up to 31 December 2015, contracting authorities may apply the provisions set out in Article 122(9) and Article 124(8) to contracts involving an amount below the thresholds established in Article 28 [the thresholds provided for in Article 7 of Directive 2004/18 for the purposes of its implementation].’

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

- 10 By a notice published on 26 June 2013, the municipality of Fossano (Cuneo province, Italy) launched an open tender procedure for the award of a works contract for the extension and upgrading the energy efficiency of the ‘Gianni Rodari’ nursery school, with an overall basic value of EUR 1158899.97. The award criterion for that contract was the lowest price. The tendering rules for that contract provided that ‘abnormally low offers shall be identified automatically’, pursuant to Article 122(9) of Legislative Decree No 163/2006, where the number of valid tenders was 10 or more.
- 11 The award committee received 101 tenders and admitted 86 of them. At the first public session of 24 July 2013, that committee automatically excluded the tenders with a discount above the anomaly threshold calculated in accordance with Article 86(1) of Legislative Decree No 163/2006.
- 12 The contract was provisionally awarded to Tecnoedi Costruzioni, with a discount of 25.397%. Then, at the second public session of 30 July 2013, the award committee reviewed of its own motion the position of two tenderers which had been incorrectly excluded, namely the temporary groups of undertakings Niccoli Costruzioni Srl and Selva Mercurio Srl and decided to admit them. Furthermore, it provisionally awarded the contract to Ge.Co. Italia. Next, by decision of 5 September 2013, the award committee definitively awarded the contract to that company, which had submitted a tender with a discount of 25.427%.
- 13 By its action, Tecnoedi Costruzioni sought annulment of the decision of 5 September 2013 definitively awarding the contract to Ge. Co. Italia and annulment of the minutes of the public session of 30 July 2013 readmitting to the award procedure the temporary groups of undertakings Selva Mercurio and

Niccoli Costruzioni and provisionally awarding the contract to Ge.Co. Italia. In the alternative, the applicant in the main proceedings sought the annulment of the tendering rules on the ground of infringement of Article 122(9) of Legislative Decree No 163/2006, in so far as, under that article, the automatic exclusion of abnormally low tenders is not permitted for works with a value in excess of EUR 1 million, as is the case in respect of the contract at issue in the main proceedings.

- 14 With regard to the latter plea in law raised by Tecnoedi Costruzioni, the referring court considers that it is necessary to refer a question to the Court of Justice of the European Union for a preliminary ruling. Referring to the judgment of 15 May 2008, *SECAP and Santorso* (C-147/06 and C-148/06, EU:C:2008:277), the referring court observes that under Italian law contracting authorities have unlimited discretion to provide in the contract notice for the automatic exclusion of abnormally low tenders, including in respect of an amount close to the threshold provided for under EU law and where the number of tenders admitted is low (that is to say, from 10 upwards), they are not required to take into consideration specific factors which may indicate that there is certain cross-border interest.
- 15 It is argued that that national legislation does not require contracting authorities specifically to assess whether a contract has certain cross-border interest in the light of its characteristics. In accordance with the Court's case-law, a contract may have a certain cross-border interest not only as a result of the financial value of the contract to which it relates, but also as a result of the technical characteristics of the work and the place where the work is to be carried out.
- 16 The referring court notes that, notwithstanding the fact that the works contract at issue in the main proceedings is for an estimated value of EUR 1158899.97, it cannot be ruled out that the contract does not have certain cross-border interest as Fossano is located within 200 km of the border between France and Italy and several of the tenderers admitted to the tender procedure are Italian companies which are established in regions which are not neighbouring, such as Lazio, at a distance of approximately 600 km, or Campania, at a distance of approximately 800 km from Fossano. Furthermore, in accordance with the Court's case-law, there may be certain cross-border interest, without its being necessary that an economic operator has actually manifested its interest (judgment of 14 November 2013, *Belgacom*, C-221/12, EU:C:2013:736, paragraph 31 and the case-law cited).
- 17 The referring court adds that Article 253(20 bis) of Legislative Decree No 163/2006 allows automatic exclusion of abnormally low tenders even for contracts whose value is slightly below the threshold provided for under EU law without any plausible justification concerning the need for such an extended period of transitional rules.
- 18 In the light of the foregoing considerations, the Tribunale amministrativo regionale per il Piemonte (Piedmont Regional Administrative Court, Italy) has decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Articles 49 and 56 TFEU and the principles of freedom of establishment, freedom to provide services, equal treatment, non-discrimination and proportionality be interpreted as precluding legislative provisions such as those currently in force in Italy, namely Articles 122(9) and 253(20-bis) of Legislative Decree No 163/2006, [which provide for] the automatic exclusion of abnormally low tenders in procedures for the award of works contracts with a value below the threshold [provided for in Article 7(c) of Directive 2004/18] which may be of cross-border interest?'

The question referred for a preliminary ruling

- 19 In accordance with the Court's settled case-law, the award of contracts which, in view of their value, do not fall within the scope of the directives on the award of public contracts is nonetheless subject to the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal

treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency, provided that those contracts are of certain cross-border interest (see, to that effect, judgments of 15 May 2008, *SECAP and Santorso*, C-147/06 and C-148/06, EU:C:2008:277, paragraphs 20 and 21; of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraphs 45 and 46; of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 32; and of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 16).

- 20 As regards the objective criteria which may indicate certain cross-border interest, the Court has previously held that such criteria may be, in particular, the fact that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out or the technical characteristics of the contract and the specific characteristics of the products concerned. In that context, it is also possible to take account of the existence of complaints brought by operators situated in other Member States, provided that it is determined that those complaints are real and not fictitious (see, to that effect, judgments of 15 May 2008, *SECAP and Santorso*, C-147/06 and C-148/06, EU:C:2008:277, paragraph 31, and of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 20 and the case-law cited).
- 21 The referring court appears to consider, as regards the contract at issue in the main proceedings, that certain cross-border interest cannot be ruled out, as suggested by the fact that Fossano is located within 200 km of the border between France and Italy and several of the tenderers admitted to the tender procedure are Italian companies established in regions located at a distance of approximately 600 km or even 800 km from the place where the work is to be carried out.
- 22 It must be stressed, in that regard, that a conclusion that there is certain cross-border interest cannot be inferred hypothetically from certain factors which, considered in the abstract, could constitute evidence to that effect, but must be the positive outcome of a specific assessment of the circumstances of the contract at issue. More particularly, the referring court may not merely submit to the Court of Justice evidence showing that certain cross-border interest cannot be ruled out but must, on the contrary provide information capable of proving that it exists.
- 23 It must be held that, in its request for a preliminary ruling, the referring court has submitted no evidence providing the Court with information of that kind.
- 24 In that regard, it may not be argued that a works contract such as that at issue in the main proceedings for an amount which does not equate even to a quarter of the threshold laid down by EU law and whose place of performance is located 200 km away from the border with another Member State can be of certain cross-border interest solely because a certain number of tenders were submitted by undertakings established in the Member State in question, which are located at a considerable distance from the place where the work at issue is to be carried out.
- 25 That evidence is clearly insufficient having regard to the circumstances of the case in the main proceedings, and, in any event, cannot be the only evidence which must be taken into account, in so far as potential tenderers from other Member States may face additional constraints and burdens relating, inter alia, to the obligation to adapt to the legal and administrative framework of the Member State of where the work is to be carried out, as well as to language requirements.
- 26 Under those circumstances, the Court cannot provide a useful answer to the question asked by the referring court for the purposes of resolving the dispute before it, which constitutes the objective of the cooperation established in Article 267 TFEU.
- 27 The request for a preliminary ruling is therefore inadmissible.

Costs

- 28 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:

The request for a preliminary ruling made by the Tribunale amministrativo regionale per il Piemonte (Piedmont Regional Administrative Court, Italy) by decision of 29 April 2015 is inadmissible.

[Signatures]