



## Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

24 March 2021\*

(Reference for a preliminary ruling – Procurement contracts in the water, energy, transport and telecommunications sectors – Directive 92/13/EEC – Review procedures – Pre-contractual stage – Assessment of bids – Rejection of a technical bid and acceptance of the bid of a competitor – Suspension of the implementation of that measure – Legitimate interest of the unsuccessful tenderer in challenging the legality of the bid of the successful tenderer)

In Case C-771/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Symvoulio tis Epikrateias (Epitropi Anastolon) (Council of State (Suspension Chamber), Greece), made by decision of 12 September 2019, received at the Court on 21 October 2019, in the proceedings

**NAMA Symvouloi Michanikoi kai Meletites AE – LDK Symvouloi Michanikoi AE,**

**NAMA Symvouloi Michanikoi kai Meletites AE,**

**LDK Symvouloi Michanikoi AE**

v

**Archi Exetasis Prodikastikon Prosfigon (AEPP),**

**Attiko Metro AE,**

intervening parties:

**SALFO kai Synergates Anonymi Etairia Meletitikon Ypiresion Technikon Ergon – Grafeio Doxiadi Symvouloi gia Anaptyxi kai Oikistiki AE – TPF Getinsa Euroestudios SL,**

**SALFO kai Synergates Anonymi Etairia Meletitikon Ypiresion Technikon Ergon,**

**Grafeio Doxiadi Symvouloi gia Anaptyxi kai Oikistiki AE,**

**TPF Getinsa Euroestudios SL,**

THE COURT (Tenth Chamber),

\* Language of the case: Greek.

composed of M. Ilešič, President of the Chamber, E. Juhász (Rapporteur) and C. Lycourgos, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- NAMA Symvouloi Michanikoi kai Meletites AE – LDK Symvouloi Michanikoi AE, LDK Symvouloi Michanikoi AE and NAMA Symvouloi Michanikoi kai Meletites AE, by S. Vlachopoulos and N. Gountza, dikigoroi,
- Archi Exetasis Prodikastikon Prosfigon (AEPP), by S. Karatza and F. Katsigianni, dikigoroi,
- Attiko Metro AE, by G. Arvanitis and E. Christofilopoulos, dikigoroi,
- SALFO kai Synergates Anonymi Etairia Meletitikon Ypiresion Technikon Ergon, Grafeio Doxiadi Symvouloi gia Anaptyxi kai Oikistiki AE and TPF Getinsa Euroestudios SL, by K. Vrettos, dikigoros,
- the Greek Government, by K. Georgiadis, Z. Chatzipavlou and O. Patsopoulou, acting as Agents,
- the European Commission, by A. Bouchagiar, P. Ondrůšek and L. Haasbeek, acting as Agents,

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 1(3), Article 2(1)(a) and (b), and Article 2a(2) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1), ('Directive 92/13'), interpreted in the light of the case-law of the Court relating to those provisions.
- 2 The request has been made in the context of a suspension procedure brought by a business association and its constituent companies ('NAMA') against the Archi Exetasis Prodikastikon Prosfigon (Public Procurement Review Authority (AEPP), Greece) and Attiko Metro AE concerning the lawfulness of a decision taken by the latter, as contracting authority, in connection with the review of technical bids submitted in the context of a public procurement procedure in the field of transport.

## Legal context

### *EU law*

3 The second recital of Directive 92/13 states that ‘the existing arrangements at both national and Community levels for ensuring [the effective application of the rules governing public procurement] are not always adequate’.

4 Article 1 of Directive 92/13, which is entitled ‘Scope and availability of review procedures’, provides as follows in paragraphs 1 and 3:

‘1. This Directive applies to contracts referred to in Directive 2014/25/EU of the European Parliament and of the Council [of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243)], unless such contracts are excluded in accordance with Articles 18 to 24, 27 to 30, 34 or 55 of that directive.

...

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/25/EU or Directive 2014/23/EU, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of procurement or national rules transposing that law.

...

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.’

5 Article 2 of that directive, entitled ‘Requirements for review procedures’, states:

‘1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:

either

(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity;

and

(b) to set aside or ensure the setting-aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

(d) and, in both the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting entity, reviews a contract award decision, Member States shall ensure that the contracting entity cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

...

9. Whereas bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [267 TFEU] and independent of both the contracting authority and the review body.

...'

6 Article 2a of that directive, entitled 'Standstill period', provides:

'1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting entities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2014/25/EU or Directive 2014/23/EU before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting entity has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

...'

### *Greek law*

7 Law 4412/2016 on public works contracts, public supply contracts and public service contracts (FEK A' 147/8.8.2016), as amended ('Law 4412/2016') reorganised the system of judicial protection in the field of public procurement in the pre-contractual stage, in particular by creating an independent central administrative authority, namely the AEPP, tasked with the administrative review of the measures adopted by the contracting authorities and contracting bodies, and by introducing the possibility of requesting the suspension and setting-aside of decisions adopted by that authority.

8 Article 346(1) and (2) of Law 4412/2016 states:

'1. Every interested party who has or has had an interest in obtaining a contract referred to in Article 1(2)(a) or (b), and who has been harmed or risks being harmed by an enforceable measure or by the omission of the contracting authority, contrary to national legislation or to that of the European Union, may bring proceedings before the [AEPP] under the special conditions set out in Article 360 and request interim protection measures under Article 366, the setting-aside of an unlawful measure or the omission of the contracting authority under Article 367 or the setting-aside of an unlawfully concluded contract under Article 368.

2. Any interested party who has been harmed or risks being harmed by a decision of the AEPP relating to an application for review coming within the scope of Article 360 may bring an action seeking the suspension and annulment of that decision before the competent courts, in accordance with Article 372. The right to bring those actions shall be available to the contracting authority if the application for review is accepted by the AEPP.'

9 Article 347 of Law 4412/2016 provides:

'1. The [AEPP] shall be established, the mission of which shall be to resolve disputes arising from the stage of the procedure prior to the award of public works contracts, public supply contracts

and public service contracts, where an application for review is brought before it, in accordance with the provisions of section II of the present title. ...

2. The AEPP shall have functional independence and administrative and financial autonomy, and shall not be subject to control or supervision by government bodies or other administrative authorities. It shall be subject exclusively to control by Parliament, in accordance with its rules.’

10 Article 360 of Law 4412/2016 provides:

‘1. Every interested party who has or has had an interest in obtaining a specific contract covered by the present law who is harmed, has been harmed or risks being harmed by an enforceable measure or by an omission of the contracting authority, contrary to national legislation or to that of the European Union, shall be required, prior to bringing actions under Title 3, to submit an application for administrative review to the AEPP against that measure or that omission of the contracting authority.

2. The act of bringing an application for administrative review shall be a prerequisite for the introduction of actions under Title 3 against enforceable measures or omissions of contracting authorities.

3. Enforceable measures or omissions of contracting authorities in the public procurement procedure cannot be the subject of applications for administrative review other than that referred to in paragraph (1).’

11 Under Article 372 of Law 4412/2016, any person who can establish a legitimate interest may request a suspension and annulment of the decision of the AEPP before the *Symvoulio tis Epikrateias* (Council of State) in cases concerning a public procurement contract which comes within the scope of Directive 2014/25.

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

12 By a contract notice published on 24 January 2018, Attico Metro launched an open procurement procedure for technical consultancy services for the project for the extension of the Metro in Athens (Greece), to the value of approximately EUR 21.5 million. The award criterion was the most financially advantageous bid based on an optimum quality/price ratio. According to the contract notice, the first stage of the procedure was to consist in the review of supporting documents and of candidates’ technical bids, while the second was to consist in the opening of bids and general assessment.

13 Four economic operators each submitted a bid. In the first stage of the procedure, the assessment committee of the contracting body, on the one hand, proposed the rejection of the bid of one of those candidates at the supporting document review stage, and the rejection of those of two other candidates, including NAMA, at the technical bid review stage. It also proposed admitting the business association SALFO and its three constituent companies (‘SALFO’) to the second stage of the procedure. Prior to the issue of a definitive decision in that regard, the contracting body requested details on the experience of the team proposed by NAMA.

- 14 By a decision of the contracting body's board of directors of 6 March 2019, the committee's aforementioned proposals were approved. In particular, NAMA's bid was excluded from the remainder of the procedure on the ground that the experience of certain members of its team with regard to construction works did not meet the requirements of the contract notice. On 26 March 2019, NAMA brought an application for review before the AEPP against that decision, by which it contested both the rejection of its technical bid and the acceptance of SALFO's bid.
- 15 By decision of 21 May 2019, the AEPP upheld NAMA's application only in so far as it contested the grounds of the contracting body's decision concerning the proof of experience of one of the members of the proposed team. It dismissed that application as to the remainder.
- 16 Following the partial dismissal of its administrative application, NAMA brought an action before the Symvoulío tis Epikrateias (Epitropi Anastolon) (Council of State (Suspension Chamber), Greece), the referring court in the present case, by which it requested that that court order, on the one hand, the suspension of the AEPP's decision of 21 May 2019 and the suspension of the decision of 6 March 2019 of the board of directors of the contracting body Attico Metro and, on the other hand, every relevant measure designed to ensure the interim protection of its interests in the context of pursuing the procurement procedure at issue. The Symvoulío tis Epikrateias (Epitropi Anastolon) (Council of State (Suspension Chamber)) held to be inadmissible or unfounded the pleas put forward by NAMA alleging, on the one hand, that its exclusion from that procedure was unlawful on the ground that the contracting body had wrongly evaluated the experience of some of its experts and, on the other hand, that the principle of equality in the review of technical bids of tenderers had been infringed on the ground that the contracting body had assessed them differently.
- 17 The referring court observes that it has consistently held that a tenderer which has been excluded from the tendering procedure cannot show an interest in bringing proceedings in order to contest the legality of the participation of another tenderer in that procedure, except on grounds relating to an infringement of the principle of equality in the assessment of bids. That court is, however, uncertain to what extent the approach resulting in particular from the judgment of 11 May 2017, *Archus and Gama* (C-131/16, EU:C:2017:358), also applies in the case of a request for suspension brought by a tenderer which was not disqualified at the final stage of the award of the public contract, but at an earlier stage of the procurement procedure for that contract, such as the stage of review of supporting documents for participation or of assessment and review of technical bids. That question, the referring court notes, has not yet been resolved by the Court of Justice and has given rise to differences of interpretation within the Suspension Chamber of the Symvoulío tis Epikrateias (Council of State), which ultimately caused the case in the main proceedings to be brought before a full panel of five judges.
- 18 The referring court explains that that Suspension Chamber takes the view that a tenderer excluded from a procurement procedure for the award of public contracts must be regarded as being definitively excluded in the case where that tenderer did not contest the decision to exclude it or where that decision has become definitive. By contrast, that tenderer cannot be regarded as having been definitively excluded in the case where its application for review was dismissed by a decision of the AEPP, but where the period for bringing an action for annulment or a request for suspension under Law 4412/2016 has not yet expired. Likewise, a tenderer whose request for suspension brought against the AEPP's dismissal of its application for review is dismissed is not to be definitively excluded, provided that that tenderer has the right to bring an action for annulment of that rejection decision, or provided that the decision to dismiss the action for annulment which that tenderer has brought has not become definitive. Furthermore,

the referring court specifies that the recognition of an excluded tenderer's interest in bringing proceedings against the decision to accept the bid of one of its competitors and to award that competitor the contract is dependent on whether the action leads to the definitive annulment of the procurement procedure in question, that is to say, whether it makes the procedure impossible to relaunch. It is immaterial in that context at which stage of the procurement procedure the tenderer at issue was excluded, since the interest in bringing proceedings exists at all stages of that procedure. Therefore, NAMA has in principle an interest in bringing proceedings in order to put forward the other complaints which it brought against SALFO, in addition to those relating to the infringement of the principle of equality of assessment.

- 19 Finally, the referring court states that it rejected the request for suspension in the main proceedings, in so far as NAMA contested the legality of its exclusion from the procurement procedure and the acceptance of SALFO's bid by submitting that the contested decisions infringed the principle of equality of assessment. By contrast, the referring court is uncertain as to whether NAMA can put forward, in support of its request for suspension, arguments directed against the decision to accept SALFO's bid on the basis of the failure to comply with the conditions set out in the contract notice, the provisions of Law 4412/2016, and the principles of equal treatment of tenderers and of transparency.
- 20 In those circumstances, the Symvoulío tis Epikrateias (Epitropi Anastolon) (Council of State (Suspension Chamber)) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- '(1) (a) Do Articles 1(3), 2(1)(a) and (b) and 2a(2) of Council Directive 92/13/EEC, interpreted in the light of the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199), of 11 May 2017, *Archus and Gama* (C-131/16, EU:C:2017:358), and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675), conflict with national judicial practice whereby if, by decision of the contracting body, one competitor is excluded from, and another interested party (competitor) is admitted to, a stage of the procurement procedure prior to the final contract award stage (for example, the stage for the examination of technical bids) and the court with jurisdiction dismisses the part of its application for suspension contesting its exclusion, the excluded competitor retains a legal interest in contesting the admission of the other competitor, by the same application for suspension, only if the other competitor was admitted in breach of the same criterion?
- (b) If the answer to Question 1(a) is in the affirmative, do the above provisions mean that the tenderer excluded as described above may, by its application for suspension, raise any complaint against the participation of its competitor in the procurement procedure; in other words, may it also complain of other, separate, shortcomings in the competitor's bid which have no bearing on the shortcomings for which its bid was excluded, in order to obtain suspension of the competition and of the award of the contract to its competitor in a decision to be adopted at a later stage of the procedure, so that if the main remedy (application for annulment) is subsequently upheld, its competitor will be excluded, the contract award will be cancelled and the only remaining possibility will be to launch a new contract award procedure in which the excluded applicant will participate?



- (2) In the light also of the judgment of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich* (C-355/15, EU:C:2016:988), is the answer to the previous question affected by the fact that provisional (or even final) judicial protection depends on an application for review having previously been dismissed by an independent national review board?
- (3) Is the answer to the first question affected by (a) the finding that, if the excluded tenderer's complaints against its competitor's participation in the competition are upheld, it will not be possible to issue a new notice of competition or (b) the fact that the reason the applicant was excluded will make it impossible for it to participate if a new competition is announced?
- 21 By decision of the President of the Court of 19 October 2019, the request made by the Symvoulio tis Epikrateias (Epitropi Anastolon) (Council of State (Suspension Chamber)) that the present case be dealt with under the expedited procedure was rejected.

## Consideration of the questions referred

### *Admissibility of the questions referred*

- 22 The Commission is of the opinion that the second and third questions bear no relation to the subject matter of the dispute in the main proceedings and must, therefore, be considered inadmissible. NAMA, in essence, makes an identical claim of inadmissibility with regard to the third question.
- 23 According to settled case-law, although questions on the interpretation of EU 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 of Justice to determine, enjoy a presumption of relevance, the fact nonetheless remains that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they require in order to resolve the disputes before them. The justification for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute. As is apparent from the actual wording of Article 267 TFEU, the question referred for a preliminary ruling must be 'necessary' to enable the referring court to 'give judgment' in the case before it. Furthermore, under Article 94(c) of the Rules of Procedure of the Court, the referring court must set out precisely the reasons for its uncertainty as to the interpretation of EU law (judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 167 and 168).
- 24 In the present case, contrary to what the Commission argues, it is apparent from the order for reference that, by its second question, the referring court seeks to determine whether the fact that the exclusion of NAMA's bid by the contracting entity was partially validated by the AEPP, following a mandatory application for administrative review, is a factor which must be taken into account in order to determine whether that tenderer may also contest, before the referring court, the decision of the contracting body to admit the bid of that tenderer's competitor. That question is therefore admissible.

- 25 By contrast, the order for reference does not set out the reasons why the answer to the third question would be necessary in order to resolve the case in the main proceedings, and the referring court has not established in what way the circumstances of the case in the main proceedings corresponds to one of the two cases envisaged by the third question.
- 26 It follows from the foregoing that the third question submitted by the referring court for a preliminary ruling must be declared inadmissible.

### *Substance*

- 27 By the first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1(3), Article 2(1)(a) and (b) and Article 2a(2) of Directive 92/13, interpreted in the light of the case-law of the Court, must be interpreted as meaning that they preclude a national practice under which a tenderer who has been excluded from a procurement procedure for the award of a public contract at a stage of the procurement procedure prior to the final contract award stage and whose request for a suspension of the decision to exclude it from that procedure has been refused, may not, in the absence of any interest in bringing proceedings, advance, in its request for suspension of the decision to admit the bid of another tenderer, introduced simultaneously, pleas with no connection to the shortcomings for which its own bid was excluded, with the exception of a plea that the decision to admit that bid infringes the principle of equality in the assessment of bids. Furthermore, that court is uncertain whether an unsuccessful tenderer's interest in bringing proceedings is affected by the fact that the application for administrative review of the decision to exclude it, which it was required to bring, under national law, before an independent national body, was dismissed.
- 28 Under Article 1(3) of Directive 92/13, Member States must ensure that review procedures are available, in accordance with detailed rules which they themselves may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.
- 29 Article 2(1)(a) and (b) of that directive sets out the requirements which national measures taken to ensure the review procedures referred to in Article 1 thereof must respect, which include the fact that those review procedures must allow Member States, on the one hand, to take interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned and, on the other hand, to set aside or ensure the setting-aside of decisions which have been taken unlawfully.
- 30 Article 2a of that directive establishes rules on the standstill periods which the persons referred to in Article 1(3) of that directive must have in order to seek an effective review of decisions to award contracts taken by the contracting bodies. Article 2a(2) thus provides that, following the decision to award a contract, that contract may not be concluded before the expiry of a period calculated on the basis of the means by which the decision to award the contract was communicated to the tenderers and to the candidates concerned, and it specifies, inter alia, the conditions under which a tenderer or a candidate is considered to be concerned. As regards tenderers, the second subparagraph of that provision indicates that they are deemed to be concerned if they have not yet been definitively excluded and that an exclusion is definitive if it has been communicated to the tenderers concerned and has either been deemed lawful by an independent review body or can no longer be subject to a review procedure.

- 31 Tasked with interpreting the provisions of Article 1(3) of 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), the Court has ruled that, in the context of a procurement procedure for the award of public contracts, tenderers whose exclusion is requested have an equivalent legitimate interest in the exclusion of the bids submitted by the other tenderers with a view to obtaining the contract (see, to that effect, judgment of 4 July 2013, *Fastweb*, C-100/12, EU:C:2013:448, paragraph 33). In paragraph 27 of the judgment of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199), the Court held that, on the one hand, the exclusion of one tenderer may lead to another tenderer directly being awarded the contract in the same procedure and, on the other hand, if both tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly. Furthermore, in paragraph 29 of the same judgment, the Court specified that the number of participants in the public procurement procedure concerned as well as the number of participants who have instigated review procedures and the differing legal grounds relied on by those participants are irrelevant to the question of the applicability of the principle of the case-law established by the judgment of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448).
- 32 The case-law principle set out in the preceding paragraph, which was developed at a time when Directive 89/665 was in force, can be transposed to the system of judicial protection established by Directive 92/13 (see, to that effect, judgment of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraphs 50 to 53).
- 33 It is, however, necessary to consider whether that case-law principle can also be applied where the legality of a decision admitting the bid of a tenderer is contested at a stage of the procurement procedure prior to the final contract award stage by a tenderer whose bid has been excluded.
- 34 In that regard, it should be noted that Directive 92/13 does not specify the stage at which an action against such a decision of a contracting body may be brought by a tenderer.
- 35 Furthermore, as follows from the second recital of Directive 92/13, that directive is intended to strengthen the existing mechanisms, both at national and EU levels, to ensure the effective application of the directives relating to public procurement. To that end, the fourth subparagraph of Article 1(1) of that directive requires Member States ‘to ensure that ... decisions taken by the contracting bodies may be reviewed effectively and, in particular, as rapidly as possible’ (see, by analogy, judgment of 5 April 2017, *Marina de Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraph 30).
- 36 The objective of effective and rapid judicial protection, in particular by interim measures, pursued by that directive does not therefore authorise the Member States to make the exercise of the right to apply for review conditional on the fact that the public procurement procedure in question has formally reached a particular stage (see, by analogy, judgment of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 38, and judgment of 5 April 2017, *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraph 31).
- 37 More specifically, a national law which requires, in any event, a tenderer to wait for a decision awarding the contract in question before it may apply for a review of a decision allowing another tenderer to participate in that procurement procedure would infringe the provisions of Directive 92/13 (see, by analogy, judgment of 5 April 2017, *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraph 34).

- 38 It follows, first, that an unsuccessful tenderer may bring an action against the decision of the contracting body which admits the bid of one of its competitors, regardless of the stage of the procurement procedure for the award of a public contract at which that decision was taken and, secondly, that, in the context of such an action, the case-law principle recalled in paragraph 31 above may be applied.
- 39 As regards the pleas which an unsuccessful tenderer may advance in the context of such an action, it should be noted that Directive 92/13 does not set out any requirement other than that established in Article 1(1) thereof, namely that that tenderer may rely on pleas based on the infringement of EU law concerning public procurement or of national laws transposing that directive.
- 40 Moreover, in paragraph 29 of the judgment of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199), the Court noted that the fact that differing pleas have been advanced by the tenderers who were excluded from the procurement procedure at issue is not relevant for the application of the case-law principle recalled in paragraph 31 above.
- 41 It follows that the unsuccessful tenderer is entitled to advance any plea against the decision allowing another tenderer to participate, including those which do not have any connection with the shortcomings for which its own bid was excluded.
- 42 That being so, the case-law principle recalled in paragraph 31 above applies only on condition that the exclusion of the tenderer was not confirmed by a decision which has become definitive (see, to that effect, judgments of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraphs 57 and 58, and of 5 September 2019, *Lombardi*, C-333/18, EU:C:2019:675, paragraphs 31 and 32).
- 43 It is thus for the referring court to determine whether, in the present case, NAMA's exclusion must be regarded as final and conclusive on the ground that it has been confirmed by a decision which has become definitive. As was recalled in paragraph 18 above, it is, however, not apparent from the order for reference that that is the case.
- 44 Subject to that reservation, the fact that the national law requires an unsuccessful tenderer to apply for review before being able to bring an action before the referring court is immaterial to the interpretation set out in paragraphs 38 and 41 above. Article 2(9) of Directive 92/13 expressly authorises the Member States to confer on non-judicial authorities the power to rule, at first instance, on actions provided for by that directive, in so far as any allegedly illegal measure taken by that authority or any alleged defect in the exercise of the powers conferred on it can be the subject of a judicial action or of an action before another body which is a court or tribunal within the meaning of Article 267 TFEU which is independent of the contracting body and of the non-judicial authority which ruled at first instance.
- 45 Such an interpretation is not invalidated by the judgment of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich* (C-355/15, EU:C:2016:988), mentioned by the referring court in that context. Although it is true that it follows from paragraphs 13 to 16, 31 and 36 of that judgment that the tenderer whose bid had been excluded by the contracting authority from a procurement procedure for the award of public contracts could be refused access to a review of the decision awarding the public contract, in the case giving rise to that judgment, which did not concern an application before a national review authority, the decision to exclude that tenderer had been confirmed by a decision which

had become definitive before the court hearing the review of the contract award decision delivered its decision, with the result that that tenderer had to be regarded as having been definitively excluded from the public procurement procedure at issue (see, to that effect, judgment of 5 September 2019, *Lombardi*, C-333/18, EU:C:2019:675, paragraph 31).

- 46 In the light of all of the foregoing, the answer to the questions referred is that Article 1(1) and (3), Article 2(1)(a) and (b) and Article 2a(2) of Directive 92/13 must be interpreted as meaning that a tenderer who has been excluded from a procurement procedure for the award of a public contract at a stage prior to the final contract award stage and whose request for suspension of the decision to exclude it from that procedure has been refused, may advance, in its request for suspension of the decision to admit the bid of another tenderer, introduced simultaneously, any plea based on the infringement of EU law concerning public procurement or of national rules transposing that law, including pleas which have no connection with the shortcomings for which its own bid was excluded. That option is not affected by the fact that the application for an administrative review before an independent national authority, which must, under national law, first be brought by the tenderer against the decision to exclude it, has been rejected, provided that that rejection has not become definitive.

### Costs

- 47 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 1(1) and (3), Article 2(1)(a) and (b) and Article 2a(2) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, must be interpreted as meaning that a tenderer who has been excluded from a procurement procedure for the award of a public contract at a stage prior to the final contract award stage and whose request for suspension of the decision to exclude it from the procedure has been refused, may advance, in its request for suspension of the decision to admit the bid of another tenderer, introduced simultaneously, any plea based on the infringement of EU law concerning public procurement or of national rules transposing that law, including pleas which have no connection with the shortcomings for which its own bid was excluded. That option is not affected by the fact that the application for an administrative review before an independent national authority, which must, under national law, first be brought by the tenderer against the decision to exclude it, has been rejected, provided that that rejection has not become definitive.**

[Signatures]