



Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

2 June 2016*

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Participation in a call for tenders — Possibility of relying on the capacities of other undertakings in order to satisfy the necessary criteria — Failure to pay a fee not expressly provided for — Exclusion from the contract without the possibility of rectifying that omission)

In Case C-27/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily, Italy), made by decision of 10 December 2014, received at the Court on 22 January 2015, in the proceedings

Pippo Pizzo

v

CRGT Srl,

Interested parties and interveners:

Autorità Portuale di Messina,

Messina Sud Srl,

Francesco Todaro,

Myleco Sas,

THE COURT (Sixth Chamber),

composed of A. Arabadjiev, President of the Chamber, S. Rodin (Rapporteur) and E. Regan, 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:

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

* Language of the case: Italian

— the European Commission, by L. Cappelletti and A. Tokár, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 21 January 2016,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 47 and 48 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 of principles of EU law concerning public procurement.
- 2 The request has been made in proceedings between Mr Pippo Pizzo, acting in his capacity as owner of the undertaking Pizzo and as the authorised representative of the temporary joint venture formed with Onofaro Antonino ('Pizzo'), and CRGT Srl concerning the exclusion of a tenderer from a tendering procedure for the award of a public service contract for the management of waste and cargo residues on board ships.

Legal context

EU law

- 3 Article 2 of Directive 2004/18 provides:

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

- 4 Article 47(2) of that directive provides:

'An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.'

- 5 Article 48(3) of Directive 2004/18 provides:

'An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.'

- 6 Article 63(1), first and third subparagraphs, and Article 63(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, pp. 65 to 242), which are referred to by the referring court, state:

'1. With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. ...

Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

...

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

...

2. In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 19(2), by a participant in that group.'

Italian law

- 7 Article 49 of decreto legislativo No 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 on the Code on public works contracts, public service contracts and public supply contracts in implementation of Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006), as amended by decreto legislativo No 152 (Legislative Decree No 152) of 11 September 2008 (Ordinary Supplement to GURI No 231 of 2 October 2008) ('Legislative Decree No 163/2006'), entitled 'Reliance on the capacities of third parties', transposes Articles 47 and 48 of Directive 2004/18 into Italian law.

- 8 Article 49(1) of Legislative Decree No 163/2006 provides:

'The tenderer, whether an individual or a member of a consortium or group within the meaning of Article 34, in a specific tendering procedure for a public works, services or supply contract, may fulfil the requirements relating to the economic, financial, technical and organisational criteria, that is to say, obtain an SOA certificate, by relying on the capacities of another entity or the SOA certificate of another entity.'

- 9 Article 49(6) of Legislative Decree No 163/2006 provides:

'Reliance on several auxiliary undertakings shall be permitted, subject to the prohibition on the divided use by the tenderer of the individual economic-financial and technical-organisational criteria referred to in Article 40(3)(b), on the basis of which the certificate for that category was issued.'

- 10 Under the first subparagraph of Article 1(67) of the Legge finanziaria 2006 (2006 Finance Law No 266, Ordinary Supplement to GURI No 211 of 29 December 2005) of 23 December 2005 ('Law No 266/2005'):

'... [t]he Supervisory Authority on Public Works ... shall determine, on an annual basis, the amount of the fees payable to it by the public and private persons which are subject to its supervision and the fee collection procedures, including the obligation of economic operators to pay the fee as a condition for tenders to be admissible to procedures for the carrying out of public works.'

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

- 11 In November 2012, the Autorità Portuale di Messina (Port Authority of Messina, Italy) launched an open tendering procedure, of EU interest, for the award of a four-year public service contract for the management of waste and cargo residues, produced on board ships calling at ports within the Port Authority of Messina's territorial jurisdiction. That service was previously run by CRGT.
- 12 On 16 May 2013, the tender assessment committee of the Port Authority of Messina took note that four tenders had been submitted.
- 13 On 4 June 2013, CRGT, which had signed with RIAL Srl a contract of reliance upon RIAL Srl's capacities, and two other tenderers learned that they had been excluded from that tendering procedure on account of the fact that they had not paid to the Autorità per la vigilanza sui contratti pubblici (the Supervisory Authority on Public Procurement) ('the AVCP') the fee required by Law No 266/2005.
- 14 The contract was therefore awarded to Pizzo, the sole remaining tenderer in the tendering procedure.
- 15 CRGT brought an action before the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court for Sicily, Italy) seeking the annulment of that decision to exclude it from the procedure and compensation for the damage suffered as a result of that exclusion.
- 16 Pizzo filed a counterclaim in which it submitted that CRGT should also have been excluded from that tendering procedure for having failed to submit two separate bank references in order to prove its economic and financial standing.
- 17 The Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court for Sicily), by judgment No 1781/2014, held that CRGT's action was admissible and well founded and that that company had been wrongly excluded from the tendering procedure at issue. It held in that regard that the documents relating to that procedure did not provide for the tendering undertakings to pay a mandatory fee to the AVCP because the payment of such a fee, which is provided for by Law No 266/2005, applies expressly to public works contracts but not to service contracts. Furthermore, that court stated that the imposition of the payment of that fee on undertakings tendering for the award of a service contract is the result of a broad interpretation, first, of Law No 266/2005 by the AVCP, and, secondly, of the administrative case-law, according to which the necessity of that payment condition implies, by operation of the mechanism by which provisions are automatically incorporated in administrative measures, that all undertakings tendering for the award of public contracts should be required to pay that fee.
- 18 In addition, the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court for Sicily) dismissed the counterclaim filed by Pizzo, on the ground that CRGT could, as it had done, rely on the economic and financial standing of a third-party undertaking with which it had concluded a contract to that effect.
- 19 Pizzo brought an appeal before the referring court.
- 20 In those circumstances the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily, Italy) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Articles 47 and 48 of Directive [2004/18] be interpreted as precluding national legislation, like [that] described [in the order for reference], which allows divided reliance upon the capacities of other entities, on the terms set out above, in respect of services?

- (2) Do the principles of EU law, and, in particular, those of protection of legitimate expectations, legal certainty and proportionality, preclude a legal rule of a Member State which permits the exclusion from a public tendering procedure of an undertaking which did not understand, because this was not expressly provided in the tender documents, that it was obliged, on pain of exclusion from that procedure, to fulfil the obligation to pay a sum in order to participate in that procedure, even though the existence of that obligation cannot be clearly deduced from the wording of the law in force in the Member State, but can nevertheless be inferred, by means of a twofold legal operation, which involves, first, interpreting extensively certain provisions of that Member State's positive law and, then, incorporating — in accordance with the outcome of that broad interpretation — the mandatory provisions in the tendering documents?'

Consideration of the questions referred

The first question

- 21 By its first question the referring court asks, in essence, whether Articles 47 and 48 of Directive 2004/18 are to be interpreted as precluding national legislation which allows an economic operator to rely on the capacities of one or more third-party entities for the purpose of satisfying the minimum requirements for participating in a tendering procedure which are only partially satisfied by that operator.
- 22 Article 47(2) and Article 48(3) of Directive 2004/18 expressly provide, in almost identical terms, that 'an economic operator may ... rely on the capacities of other entities' in order to establish that it satisfies the requirements with regard to economic and financial standing and technical and professional ability required by the contract in question.
- 23 The Court has held that EU law does not require that, in order to be classified as an economic operator qualifying for tendering, a person wishing to enter into a contract with a contracting authority must be capable of direct performance using his own resources (see, to that effect, judgment of 23 December 2009 in *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 41).
- 24 The Court has held, in that respect, that Article 47(2) and Article 48(3) of Directive 2004/18 does not lay down any general prohibition regarding a candidate or tenderer's reliance on the capacities of one or more third-party entities in addition to its own capacities in order to fulfil the criteria set by a contracting authority (see judgment of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 30).
- 25 According to that same case-law, those provisions recognise the right of every economic operator to rely, for a particular contract, upon the capacities of other entities, 'regardless of the nature of the links which it has with them', provided that it proves to the contracting authority that it will have at its disposal the resources necessary for the performance of the contract (see judgment of 14 January 2016 in *Ostas celtnieks*, C-234/14, EU:C:2016:6, paragraph 23).
- 26 It must therefore be held that Directive 2004/18 permits the combining of the capacities of more than one economic operator for the purpose of satisfying the minimum capacity requirements set by the contracting authority, provided that the candidate or tenderer relying on the capacities of one or more other entities proves to that authority that it will actually have at its disposal the resources of those entities necessary for the execution of the contract (see judgment of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 33).

- 27 Such an interpretation is consistent with the objective pursued by the directives in this area of attaining the widest possible opening-up of public contracts to competition to the benefit not only of economic operators but also contracting authorities (see, to that effect, judgment of 23 December 2009 in *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 37 and the case-law cited). In addition, that interpretation also facilitates the involvement of small- and medium-sized undertakings in the contracts procurement market, an aim also pursued by Directive 2004/18, as stated in recital 32 thereof (see judgment of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 34).
- 28 The Court has, however, pointed out that there may be works the special requirements of which necessitate a certain capacity which cannot be obtained by combining the capacities of more than one operator, which, individually, would be inadequate. It has thus acknowledged that, in such circumstances, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or by relying on a limited number of economic operators as long as that requirement is related and proportionate to the subject matter of the contract at issue. The Court has, however, stated that since those circumstances represent an exception, the requirements in question cannot be made general rules under national law (see, to that effect, judgment of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraphs 35 and 36).
- 29 It is apparent from the order for reference that, according to Pizzo, CRGT could not rely on the capacities of another operator in order to fulfil the criteria for the award of the contract as issue in the main proceedings. However, it is apparent from Article 47(2) and Article 48(3) of Directive 2004/18 that they expressly provide for the possibility for a tenderer to rely on the capacities of other entities. It is, however, for the referring court to ascertain whether the call for tenders and the contract documents in respect of the contract at issue expressly stipulated that, in the light of the special requirements of the services forming the subject matter of that contract, a minimum capacity level should have been achieved by a single economic operator.
- 30 As regards Pizzo's argument that CRGT should have proved its economic and financial standing by the provision of references from at least two banking institutions, it must be pointed out that to preclude the possibility for an undertaking which relies on the capacities of a third-party undertaking to use the bank reference of that undertaking would manifestly result in rendering ineffective the possibility afforded by Article 47(2) and Article 48(3) of Directive 2004/18 of relying on the capacities of third parties. Those provisions must therefore be interpreted as meaning that economic operators may, with regard to a particular contract, rely on the capacities of other entities, and that includes the use of their bank references.
- 31 The referring court also raises the question of whether Article 63(1), third subparagraph, and Article 63(2) of Directive 2014/24 introduce limits on the possibility of relying on the capacity of other undertakings. It must, however, be stated that, under Article 90 of that directive, Member States had to comply with the provisions of that directive by 18 April 2016. Consequently, the provisions of that directive are not applicable *ratione temporis* to the case in the main proceedings.
- 32 Although the case-law of the Court requires Member States to refrain, during the period prescribed for transposition of a directive, from taking any measures liable seriously to compromise the result prescribed by that directive (see judgment of 18 December 1997 in *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628, paragraph 45), that case-law does not make it possible to impose on a tenderer, before that period has expired, constraints which do not derive from EU law as interpreted by the case-law of the Court.
- 33 Furthermore, it must be pointed out that the specific provisions referred to by the referring court provide that it is possible for the contracting authority to require that the entity which is relied on to satisfy the conditions laid down with regard to economic and financial standing is to be jointly liable

(Article 63(1), third subparagraph, of Directive 2014/24) or to require that, with regard to certain types of contracts, certain critical tasks are to be performed directly by the tenderer (Article 63(2) of that directive). Those provisions do not therefore impose specific limits on the possibility of divided reliance on the capacities of third-party undertakings and, in any event, such limits should have been expressly set out for in the call for tenders in respect of the contract at issue, which is not the case in the main proceedings.

- 34 In the light of the foregoing, the answer to the first question is that Articles 47 and 48 of Directive 2004/18 must be interpreted as not precluding national legislation which allows an economic operator to rely on the capacities of one or more third-party entities for the purpose of satisfying the minimum requirements for participating in a tendering procedure which are only partially satisfied by that operator.

The second question

- 35 By its second question, the referring court asks, in essence, whether the principle of equal treatment and the obligation of transparency are to be interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator's non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and from the incorporation of provisions into those documents by the national authorities or administrative courts.
- 36 In that regard, it must be borne in mind, first, that the principle of equal treatment requires tenderers to be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all tenderers must be subject to the same conditions. Second, the obligation of transparency, which is its corollary, is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (see, to that effect, judgment of 6 November 2014 in *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44 and the case-law cited).
- 37 The Court has also held that the principles of transparency and equal treatment which govern all procedures for the award of public contracts require the substantive and procedural conditions concerning participation in a contract to be clearly defined in advance and made public, in particular the obligations of tenderers, in order that those tenderers may know exactly the procedural requirements and be sure that the same requirements apply to all candidates (see, to that effect, judgment of 9 February 2006 in *La Cascina and Others*, C-226/04 and C-228/04, EU:C:2006:94, paragraph 32).
- 38 Furthermore, it is apparent from point 17 of the section relating to 'Contract notices' in Annex VII A to Directive 2004/18, relating to information which must be included in public contract notices, that '[s]election criteria regarding the personal situation of economic operators that may lead to their exclusion' from the procedure for the award of the contract in question must be set out in the contract notice.
- 39 Consequently, in accordance with the settled case-law of the Court, pursuant to Article 2 of Directive 2004/18, a contracting authority must comply strictly with the criteria which it has itself established (see, inter alia, judgment of 10 October 2013 in *Manova*, C-336/12, EU:C:2013:647, paragraph 40, and judgment of 6 November 2014 in *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraphs 42 and 43).

- 40 It is apparent from the file submitted to the Court that the documents relating to the procedure for the award of the contract at issue in the main proceedings did not expressly require tenderers, on pain of exclusion from that procedure, to pay a fee to the AVCP.
- 41 As the referring court points out, the existence of that obligation is inferred from the AVCP's broad interpretation of Law No 266/2005 and from the national administrative case-law. It states that the AVCP takes the view that failure to pay that fee results in the exclusion of the tenderer from the public procurement procedure, regardless of the type of contract which forms the subject matter of the call for tenders. That court also states that it is apparent from the national administrative case-law that an undertaking may be excluded from a public tendering procedure if it does not prove that it satisfies a condition which is not expressly required by the tendering procedure rules, if the necessity of that condition may be inferred from the 'mechanism by which mandatory provisions are automatically inserted into administrative measures'.
- 42 As has been pointed out in paragraph 39 of the present judgment, a contracting authority must comply strictly with the criteria which it has itself established. That consideration applies *a fortiori* where an exclusion from the procedure is concerned.
- 43 It must be pointed out that, although Article 27(1) of Directive 2004/18 does not require the contract documents to specify in detail all the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State, those obligations, unlike the fee at issue in the case in the main proceedings, do not automatically result in exclusion from the procedure with regard to the admissibility of the tender.
- 44 In view of the principle of equal treatment and the obligation of transparency, which is its corollary, to which contracting authorities are subject pursuant to Article 2 of Directive 2004/18, Article 27 of that directive cannot be interpreted as meaning that it allows those contracting authorities to derogate from the strict obligation to comply with the criteria which they have themselves established.
- 45 However, in the case in the main proceedings, the alleged obligation to pay a fee to the AVCP can be identified only by the interaction between the 2006 Finance Law, the AVCP's decision-making practice and the judicial practice of the Italian administrative courts in applying and interpreting Law No 266/2005.
- 46 As the Advocate General points out, in essence, at point 65 of his Opinion, a condition governing the right to participate in a public procurement procedure which arises out of the interpretation of national law and the practice of an authority, such as that at issue in the main proceedings, would be particularly disadvantageous for tenderers established in other Member States, inasmuch as their level of knowledge of national law and the interpretation thereof and of the practice of the national authorities cannot be compared to that of national tenderers.
- 47 As regards the argument that CRGT had previously already provided the services forming the subject matter of the call for tenders and could therefore be aware of the existence of the fee at issue in the main proceedings, it is sufficient to state that the principle of equal treatment and the obligation of transparency, which is its corollary, would clearly not be complied with if such an operator were subject to criteria which are not established by the call for tenders and would not be applicable to new operators.
- 48 Furthermore, it is apparent from the order for reference that there is no possibility of rectifying non-compliance with that condition that a fee must be paid.

- 49 According to paragraph 46 of the judgment of the Court of 6 November 2014 in *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345), the contracting authority may not accept any rectification of omissions which, as expressly provided for in the contract documentation, must result in the exclusion of the bid. The Court stated, in paragraph 48 of that judgment, that the obligation concerned was clearly laid down in the contract documentation, on pain of exclusion.
- 50 However, in a situation where, as in the case in the main proceedings, a condition for participating in a procedure for the award of a contract, on pain of exclusion from that procedure, is not expressly laid down in the contract documentation and that condition can be identified only by a judicial interpretation of national law, the contracting authority may grant the excluded tenderer a sufficient period of time in order to rectify its omission.
- 51 In the light of all of those considerations, the answer to the second question is that the principle of equal treatment and the obligation of transparency must be interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator's non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and those documents and from the incorporation of provisions into those documents by the national authorities or administrative courts. Accordingly, the principles of equal treatment and of proportionality must be interpreted as not precluding an economic operator from being allowed to regularise its position and comply with that obligation within a period of time set by the contracting authority.

Costs

- 52 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 (Sixth Chamber) hereby rules:

1. **Articles 47 and 48 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 not precluding national legislation which allows an economic operator to rely on the capacities of one or more third-party entities for the purpose of satisfying the minimum requirements for participating in a tendering procedure which are only partially satisfied by that operator.**
2. **The principle of equal treatment and the obligation of transparency must be interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator's non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and those documents and from the incorporation of provisions into those documents by the national authorities or administrative courts. Accordingly, the principles of equal treatment and of proportionality must be interpreted as not precluding an economic operator from being allowed to regularise its position and comply with that obligation within a period of time set by the contracting authority.**

[Signatures]