



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

12 July 2018*

(Reference for a preliminary ruling — Public procurement — Directive 2004/17/EC — Article 34 — Supply of spare parts for buses and trolley-buses — Technical specifications — Equivalent products — Whether proof of equivalence may be provided after the contract has been awarded)

In Case C-14/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 17 November 2016, received at the Court on 11 January 2017, in the proceedings

VAR Srl,

Azienda Trasporti Milanesi SpA (ATM)

v

Iveco Orecchia SpA,

THE COURT (Fourth Chamber),

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

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 6 December 2017,

after considering the observations submitted on behalf of:

- VAR Srl, by M. Gorla and S.E. Viscio, avvocati,
- Azienda Trasporti Milanesi SpA (ATM), by M. Zoppolato and A. Rho, avvocati,
- Iveco Orecchia SpA, by F. Brunetti and F. Scanzano, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli and C. Pluchino, avvocati dello Stato,
- the European Commission, by G. Gattinara and A. Tokár, acting as Agents,

* Language of the case: Italian.

after hearing the Opinion of the Advocate General at the sitting on 28 February 2018,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 34 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).
- 2 The request has been made in proceedings between, on the one hand, VAR Srl and Azienda Trasporti Milanesi SpA ('ATM') and, on the other, Iveco Orecchia SpA concerning the award of a contract for the supply of original or equivalent spare parts for buses and trolley-buses bearing the IVECO mark.

Legal context

EU law

- 3 Recital 42 of Directive 2004/17 states:

'The technical specifications drawn up by purchasers should allow public procurement to be opened up to competition. To this end, it should be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it should be possible to draw up the technical specifications in terms of functional performance and requirements and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety should be considered by the contracting entities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting entities should be able to provide a reason for any decision that equivalence does not exist in a given case. ...'

- 4 Article 10 of that directive, entitled 'Principles of awarding contracts', provides:

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

- 5 Article 34 of the directive, entitled 'Technical specifications', provides:

'1. Technical specifications as defined in point 1 of Annex XXI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. Whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening-up of public procurement to competition.

3. Without prejudice to legally binding national technical rules, to the extent that they are compatible with [EU] law, the technical specifications shall be formulated:

- (a) either by reference to technical specifications defined in Annex XXI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by

the European standardisation bodies or — when these do not exist — national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words “or equivalent”;

- (b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow contracting entities to award the contract;
- (c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;
- (d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

4. Where a contracting entity makes use of the option of referring to the specifications mentioned in paragraph 3(a), it cannot reject a tender on the ground that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in his tender to the satisfaction of the contracting entity, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

5. Where a contracting entity uses the option provided for in paragraph 3 of laying down performance or functional requirements, it may not reject a tender for products, services or works which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard, or a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down.

In his tender, the tenderer shall prove to the satisfaction of the contracting entity and by any appropriate means that the product, service or work in compliance with the standard meets the performance or functional requirements of the contracting entity.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

...

7. “Recognised bodies”, within the meaning of this Article, are test and calibration laboratories, and certification and inspection bodies which comply with applicable European standards.

Contracting entities shall accept certificates from recognised bodies established in other Member States.

8. Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or to a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain

products. Such reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words “or equivalent.”

- 6 Article 49 of Directive 2004/17, entitled ‘Information to applicants for qualification, candidates and tenderers’, provides, in the second indent of its paragraph 2:

‘On request from the party concerned, contracting entities shall, as soon as possible, inform:

...

- any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 34(4) and (5), the reasons for their decision of non-equivalence or their decision that the works, supplies or services do not meet the performance or functional requirements.’

- 7 Paragraph 3 of Article 51 of the directive, entitled ‘General provisions’, provides:

‘Contracting entities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in Articles 55 and 57.’

Italian law

- 8 Article 68 of decreto legislativo n. 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, establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (GURI No 100 of 2 May 2006), in the version in force at the time of the facts in the main proceedings, (‘Legislative Decree No 163/2006’) provides:

‘1. Technical specifications as defined in point 1 of Annex VIII shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. Whenever possible these technical specifications must be defined so as to take into account accessibility criteria for people with disabilities or design for all users and the protection of the environment.

2. Technical specifications must afford equal access for tenderers and must not have the effect of creating unjustified obstacles to the opening-up of public procurement to competition.

3. Without prejudice to legally binding national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:

- (a) either by reference to technical specifications defined in Annex VIII and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when these do not exist — to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words “or equivalent”;

...

4. Where a contracting authority makes use of the option of referring to the specifications mentioned in paragraph 3(a), it cannot reject a tender on the ground that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in its tender to the satisfaction of the contracting authority, by whatever appropriate means, that the solutions which it proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

5. An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognised body.

6. An economic operator proposing equivalent solutions to the requirements defined by the technical specifications shall make this known by a separate declaration, which it shall attach to its tender.

...

13. Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraphs 3 and 4 is not possible and on condition that such reference shall be accompanied by the words “or equivalent.”

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

- 9 By a contract notice published in the *Official Journal of the European Union* on 25 February 2015, ATM launched an open public procurement procedure for the award of a contract for the ‘supply of original spare parts and/or original equipment and/or equivalent for buses and trolley-buses manufactured by Iveco’.
- 10 The value of the contract was estimated at EUR 3 350 000 plus value added tax (VAT). The tenders were to be assessed according to the criterion of the lowest price, with the possibility of a further bid after the initial tenders, the basis for reopening the competition being the best tender submitted.
- 11 The spare parts to be supplied were set out in a list drawn up by ATM. That list referred expressly to parts of a specific make (FIAT/IVECO). The number of distinct spare parts to be offered in the tender was approximately 2 200.
- 12 According to the specifications in the contract documentation, ‘original spare parts’ meant parts made by the vehicle manufacturer itself, but also those made by the vehicle manufacturer’s suppliers in a position to certify that the parts had been made in compliance with the specifications and manufacturing standards defined by the vehicle manufacturer. ‘Equivalent spare parts’ were defined as spare parts made by any undertaking which certifies that the quality of those parts matches that of components used for the assembly of the vehicle and the spare parts supplied by the vehicle manufacturer.
- 13 So far as the detailed rules governing the tender are concerned, the contract documentation specified that each product tendered as an ‘equivalent’ to IVECO’s spare part had to be designated by the tenderer by the acronym ‘EQ’.
- 14 The contract documents also specified that, in the event of the contract being awarded, the supply of equivalent parts would be accepted by ATM only if those parts were the subject of certifications or certificates of equivalence to the originals of the products tendered.

- 15 Two undertakings participated in the procedure: Iveco Orecchia, which, as the exclusive concessionaire of the group manufacturing the spare parts concerned for north-west Italy, was in a position to offer original spare parts, and VAR. At the end of the tendering procedure, VAR was placed first in the ranking.
- 16 Iveco Orecchia brought an action for annulment of the decision awarding the contract to VAR before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy), which upheld the action. That court thereby annulled the decision on the ground, *inter alia*, that VAR had not, either when it submitted its tender or during the procurement procedure, provided proof that the products which it offered were equivalent to the original spare parts. VAR, supported by ATM, appealed against that judgment to the Consiglio di Stato (Council of State, Italy). ATM, supported by VAR, also appealed against the judgment to that court, which proceeded to join the cases.
- 17 The Consiglio di Stato (Council of State) points out that neither the wording of the specific rules governing the procurement procedure nor that of Article 68(13) of Legislative Decree No 163/2006 provides that the proof that the product is equivalent to the original must be provided by the tenderer at the time of the call for tenders. In that regard, Article 68(13) of Legislative Decree No 163/2006, which transposes Article 34(8) of Directive 2004/17 into national law, is to be distinguished from the case in which the contracting authority defines the products which are the subject matter of the tender in accordance with Article 68(3) of that legislative decree, namely, where the tenderer is required to prove at the tendering stage that the solutions which it proposes satisfy in an equivalent manner the requirements defined by the technical specifications. In addition, that court points out that account should also be taken of the technical specifications in the contract documentation, which provide that, in the case of equivalent products, equivalence must be attested by an appropriate certificate from the manufacturer, to be presented to the contracting authority at ‘the time of the first delivery of an equivalent spare part’. However, a systematic interpretation of Article 34(8) of Directive 2004/17 could require proof of equivalence to be furnished at the time when a tender is submitted.
- 18 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Must Article 34(8) of Directive 2004/17 be interpreted as meaning that it requires that proof that the products to be supplied are equivalent to the original products be presented at the stage of submission of the tender?
- (2) In the alternative, if the answer to the first question is in the negative, which steps are required to ensure that there is respect for the principles of equal treatment and impartiality, of open competition and sound administration, and for other tenderers’ rights of defence and right to be heard?’

Consideration of the questions referred

The first question

- 19 By its first question, the referring court asks whether Article 34(8) of Directive 2004/17 must be interpreted as meaning that, when the technical specifications in the contract documentation refer to a specific mark, origin or production, the contracting authority must require the tenderer to submit, as part of its tender, proof that the products which it proposes are equivalent to those defined in the technical specifications.

- 20 According to Article 34(2) of Directive 2004/17, technical specifications must afford equal access for tenderers and must not have the effect of creating unjustified obstacles to the opening-up of public procurement to competition.
- 21 It is in the light of that objective that Article 34(8) of Directive 2004/17 provides that technical specifications may not refer to a specific make or source, or to a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products, unless they are justified by the subject matter of the contract. Such a reference is to be permitted on an exceptional basis only, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to Article 34(3) and (4) is not possible, and it must be accompanied by the words ‘or equivalent’.
- 22 That provision does not state at what point in time or by what means the ‘equivalent’ nature of a product offered by a tenderer must be proved.
- 23 In that regard, Article 34(3) to (5) of Directive 2004/17 expressly states that, where the technical specifications are determined by reference to certain standards or in terms of performance or functional requirements, or to a combination of those standards or requirements, the tenderer must prove in its tender that it satisfies the requirements in the contract documentation. It also follows from that article that proof can be provided by ‘any appropriate means’ and that, in that regard, ‘an appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body’.
- 24 It thus follows from paragraphs 3 to 5 of Article 34 of Directive 2004/17 that those paragraphs define general rules concerning the formulation of the technical specifications, the means by which the tenderer can prove that its tender satisfies the requirements in those specifications and the stage at which that proof must be provided.
- 25 In relation to those general rules, Article 34(8) lays down specific rules governing the conditions under which a particular way of defining the content of the technical specifications, inter alia the reference to a specific make or source, or to a particular process, or to trade marks, patents, types or a specific origin or production, is permitted.
- 26 The exception which it establishes, which, by its very nature, must be interpreted narrowly, does not cover the point in time at which the tenderer must prove that its tender satisfies the requirements in the technical specifications or the means of proof available to it. Those criteria therefore remain subject to the general rules set out in Article 34(3) to (5) of Directive 2004/17.
- 27 It follows that, when the contracting authority makes use of the option available to it under the second sentence of Article 34(8) of that directive, it must require the tenderer which wishes to avail itself of the possibility of tendering products equivalent to those defined by reference to a specific mark, origin or production to provide, at the time of submission of its tender, proof of the equivalence of the products concerned.
- 28 That interpretation is supported by several provisions of Directive 2004/17 and by the principles governing that directive.
- 29 First of all, the principle of equal treatment and the duty of transparency enshrined in Article 10 of that directive require, 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, and constitute the basis of the EU rules on procedures for the award of public contracts (judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 37).

- 30 If a tenderer, in a procedure in respect of which the technical specifications have been defined in accordance with the specific method on an exceptional basis provided for in Article 34(8) of Directive 2004/17, were permitted to prove the equivalence of its products after it had submitted its tender, the tenders submitted by all of the tenderers would not be subject to the same conditions at the time when they are assessed.
- 31 Article 51(3) of Directive 2004/17 provides that contracting entities must verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders. Likewise, it is apparent from the second indent of Article 49(2) and from recital 42 of that directive that contracting entities should be able to provide a reason for any decision that equivalence does not exist.
- 32 Such verification and the possible adoption of a decision that equivalence does not exist can, however, take place only after the tenders have been opened, when they are assessed by the contracting entity, which means that that entity must have evidence that enables it to assess whether and to what extent the tenders submitted satisfy the requirements in the technical specifications, as otherwise it will run the risk that the principle of equal treatment may be infringed and that the tendering procedure may be vitiated by an irregularity.
- 33 With regard to the means by which tenderers can prove the equivalence of the solutions which they propose, the provisions of Article 34(4) and (5) of Directive 2004/17 are also applicable in procedures where the specific method of formulating the technical specifications, provided for in Article 34(8), has been adopted, which means that the use of any appropriate means is permitted.
- 34 As a result, although the contracting entity cannot permit tenderers to prove the equivalence of the solutions which they propose after they have submitted their tenders, that entity has a discretion in determining the means that may be used by tenderers to prove such equivalence in their tenders. That discretion must, however, be exercised in such a way that the means of proof allowed by the contracting entity actually enable that entity to carry out a meaningful assessment of the tenders submitted to it and do not go beyond what is necessary in order to do so, by preventing those means of proof from creating unjustified obstacles to the opening-up of public procurement to competition, in breach of Article 34(2) of Directive 2004/17.
- 35 In the light of the foregoing, the answer to the first question is that Article 34(8) of Directive 2004/17 must be interpreted as meaning that, when the technical specifications in the contract documentation refer to a specific mark, origin or production, the contracting authority must require the tenderer to submit, already in its tender, proof that the products which it proposes are equivalent to those defined in the technical specifications.

The second question

- 36 In the light of the answer to the first question, there is no need to answer the second question.

Costs

- 37 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 34(8) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors must be interpreted as meaning that, when the technical specifications in the contract documentation refer to a specific mark, origin or production, the contracting authority must require the tenderer to submit, already in its tender, proof that the products which it proposes are equivalent to those defined in the technical specifications.

[Signatures]