Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

2 May 2019*

(Reference for a preliminary ruling — Public procurement — Directive 2014/24/EU — Labour costs — Automatic exclusion of tenderer where those costs were not listed separately in the tender — Principle of proportionality)

In Case C-309/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decision of 20 March 2018, received at the Court on 7 May 2018, in the proceedings

Lavorgna Srl

v

Comune di Montelanico,

Comune di Supino,

Comune di Sgurgola,

Comune di Trivigliano,

intervener:

Gea Srl,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Chamber, S. Rodin (Rapporteur) and N. Piçarra, 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:

– Gea Srl, by E. Potena, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by M. Santoro, avvocato dello Stato,

* Language of the case: Italian.

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by G. Gattinara, 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 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), and the principles of EU law on public procurement.

2 The request has been made in proceedings between, of the one part, Lavorgna Srl and, of the other, the Comune di Montelanico (municipality of Montelanico, Italy), the Comune di Supino (municipality of Supino, Italy), the Comune di Sgurgola (municipality of Sgurgola, Italy) and the Comune di Trivigliano (municipality of Trivigliano, Italy), concerning the award of a public contract to a company that failed to list its labour costs separately in its financial tender.

Legal context

EU law

3 Recitals 40 and 98 of Directive 2014/24 are worded as follows:

'(40) Control of the observance of the … labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders. …

…

(98) [The] requirements concerning the basic working conditions regulated in Directive 96/71/EC [of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive.'

4 Article 18 of Directive 2014/24 provides:

'1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.'

5 According to Article 56(3) of that directive:

'Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.'

Italian law

6 Article 83(9) of decreto legislativo no. 50 — Codice dei contratti pubblici (Legislative Decree No 50 establishing the public procurement code) of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016), as amended by decreto legislativo no. 56 (Legislative Decree No 56) of 19 April 2017 (ordinary supplement to GURI No 103 of 5 May 2017), ('the Code of Public Contracts') is worded as follows:

'Shortcomings in any formal element of the application may be regularised using the *soccorso istruttorio* procedure [a procedure whereby a tenderer is permitted to rectify shortcomings in its tendering documentation] referred to in this paragraph. In particular, if the information and the European Single Procurement Document referred to in Article 85 are absent or incomplete, or where there is any other material irregularity affecting that information or those declarations, with the exception of defects relating to the technical and financial tender, the contracting authority shall give the tenderer a period, not exceeding 10 days, in which to submit, supplement or regularise the required declarations, and will indicate what they should contain and who is required to produce them …'

7 According to Article 95(10) of the Code of Public Contracts:

'In their financial tender operators must list their labour costs and the amount of business charges allocated to complying with their health and safety at work obligations, excluding supplies not requiring siting operations, intellectual services and the contracts referred to in Article 36(2)(a). In relation to labour costs, contracting authorities shall, before awarding the contract, verify that Article 97(5)(d) has been complied with.'

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

8 By a notice of 29 September 2017, the municipality of Montelanico published an open tender procedure with a contract value exceeding the threshold in Article 4 of Directive 2014/24. That notice did not expressly refer to the obligation on operators, under Article 95(10) of the Code of Public Contracts, to list labour costs in their financial tenders.

9 Six tenderers, which included Gea Srl and Lavorgna, submitted tenders.

10 After expiry of the deadline for submitting tenders, the awards committee, using the *soccorso istruttorio* procedure under Article 83(9) of the Code of Public Contracts, invited a number of the tenderers, including Gea, to state their labour costs.

11 By a decision of 22 December 2017, the municipality of Montelanico awarded the public contract to Gea.

12 Lavorgna, which was ranked second on conclusion of the selection procedure, brought proceedings before the referring court seeking, in particular, annulment of that decision, arguing that Gea ought to have been excluded from the tendering procedure because it had failed to list the labour costs in its tender, and ought not to have been given the opportunity to avail itself of the *soccorso istruttorio* procedure.

13 The Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) observes that, in its judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404), and its order of 10 November 2016, *Edra Costruzioni and Edilfac* (C-140/16, not published, EU:C:2016:868), the Court of Justice ruled on whether participants may be excluded from a public procurement procedure for failing to specify the costs relating to safety and security at work and whether such an omission can be regularised subsequently. On that occasion, the Court stated that, in a situation where a condition for participating in a procurement procedure, on pain of the tenderer being excluded, 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 in order to regularise its situation.

14 The referring court states that when the national legislature adopted the Code of Public Contracts in order to transpose Directive 2014/24 into the Italian legal system, that legislature expressly imposed an obligation on tenderers to list their labour costs in the financial tender, and at the same time ruled out the possibility that the contracting authority could use the *soccorso istruttorio* procedure to invite tenderers who have not satisfied that obligation to regularise their situation.

15 The Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) entertains doubts as to whether the national legislation at issue in the main proceedings is compatible with the general principles of protection of legitimate expectations, legal certainty and proportionality, in particular where, as in the case before it, the financial tender, which does not contain a statement of labour costs, was drawn up by the undertaking participating in the tender procedure in conformity with the documentation devised for that purpose by the contracting authority, and where the substantive compliance with the rules on labour costs is not in doubt.

16 The referring court notes that applying that national legislation could prove to be discriminatory against undertakings established in other Member States wishing to participate in a tendering procedure published by an Italian authority, because those undertakings could not rely on the accuracy of the tender application form provided by the contracting authority.

17 In those circumstances the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

‘Do the [EU] principles of the protection of legitimate expectations and legal certainty, together with the principles of the free movement of goods, the freedom of establishment and the freedom to provide services, laid down in the [FEU Treaty], as well as the principles deriving therefrom, such as equality of treatment, non-discrimination, mutual recognition, proportionality and transparency, referred to in Directive [2014/24], preclude the application of national legislation, such as the Italian legislation founded on the combined provisions of [Article 95(10) and Article 83(9) of the Code of Public Contracts], according to which the failure to list the labour costs separately in the financial tender in a procedure for the award of public services inevitably results in the exclusion of the tendering undertaking concerned without the possibility of supplementing or amending its tendering documentation [‘*soccorso istruttorio*’], even where the obligation to list those costs separately was not

set out in the tender documents, and even though, in substantive terms, the tender in question actually took into account the minimum labour costs, in accordance, moreover, with a declaration for that purpose made by the tenderer?'

Consideration of the question referred

18 By its question, the referring court asks, in essence, whether the principles of legal certainty, equal treatment and transparency, to which Directive 2014/24 refers, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, according to which failure to list the labour costs separately, in a financial tender submitted in a procedure for the award of public services, results in that tender being excluded without the possibility of supplementing or amending the tendering documentation, even where the obligation to list those costs separately was not set out in the tender documents.

19 In that regard, it is settled case-law of the Court that, first, 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. Secondly, 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, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 36 and the case-law cited).

20 In the light of those considerations, the Court has held 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 (judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 51; see, to that effect, order of 10 November 2016, *Spinosa Costruzioni Generali and Melfi*, C-162/16, not published, EU:C:2016:870, paragraph 32).

21 By contrast, those same principles do not, as a rule, preclude an economic operator from being excluded from a procedure for the award of a public contract because it has failed to comply with an obligation that is expressly imposed — on pain of the operator's being excluded — by the documents relating to that procedure or provisions of national law in force.

22 The foregoing applies all the more since, according to the settled case-law of the Court, where obligations were clearly imposed in the documents relating to the public procurement procedure — on pain of the operator's being excluded — the contracting authority cannot accept any rectification whatsoever of failures to comply with those obligations (see, by analogy, judgments of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraphs 46 and 48; of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 49; and of 10 November 2016, *Ciclat*, C-199/15, EU:C:2016:853, paragraph 30).

23 It should be added in that respect that under Article 56(3) of Directive 2014/24 Member States may restrict the situations in which the contracting authorities can request the economic operators concerned to submit, supplement, clarify or complete the supposedly incomplete, incorrect or missing information or documentation within an appropriate time limit.

24 Lastly, in accordance with the principle of proportionality, which is a general principle of EU law, since the purpose of national legislation relating to public procurement procedures is to safeguard the equal treatment of tenderers, such legislation must not go beyond what is necessary to achieve the intended objective (see, to that effect, judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 32 and the case-law cited).

25 In the present case, it is apparent from the information provided by the referring court that the obligation, on pain of an operator's being excluded, to list labour costs separately, is clearly apparent from reading Article 95(10) of the Code of Public Contracts in conjunction with Article 83(9) of that code, in force when the contract notice at issue in the main proceedings was published. On the basis of Article 56(3) of Directive 2014/24, the Italian legislature decided to exclude, in Article 83(9) of that code, use of the *soccorso istruttorio* procedure where, in particular, the missing information relates to labour costs.

26 Furthermore, although the referring court states that the contract notice at issue in the main proceedings did not expressly refer to the obligation on potential tenderers, under Article 95(10) of the Code of Public Contracts, to list their labour costs in the financial tender, it is nonetheless apparent from the information in the file available to the Court that the contract notice stated that 'the rules of the [Code of Public Contracts shall apply] to matters not expressly provided for in this notice and the tender documents and specifications'.

27 It follows that any reasonably informed tenderer exercising ordinary care was, as a rule, in a position to be aware of the relevant rules applicable to the tender procedure at issue in the main proceedings, including the obligation to list labour costs in the financial tender.

28 In those circumstances, the principles of equal treatment and transparency do not preclude national legislation, such as that at issue in the main proceedings, according to which the absence of a statement of labour costs causes the tenderer concerned to be excluded with no opportunity to use the *soccorso istruttorio* procedure, even where the contract notice did not expressly refer to the statutory obligation to provide that statement.

29 Nevertheless, it is apparent from Gea's written observations to the Court that it was not physically possible for the tenderers in the tender at issue in the main proceedings to list their labour costs separately on the tender application form that they were obliged to use. Moreover, the specifications for that tender procedure stated that tenderers could not submit any document that had not been specifically requested by the contracting authority.

30 It is for the referring court, which alone has jurisdiction to rule on the facts of the main proceedings and the documents relating to the contract notice at issue, to verify whether it was in fact physically impossible for the tenderers to list the labour costs in accordance with Article 95(10) of the Code of Public Contracts, and to assess whether, as a result, those documents gave rise to confusion in the minds of tenderers, even though they expressly referred to the clear provisions of that code.

31 Should the referring court conclude that this was in fact the case, it would then be necessary to add that, in such a situation, having regard to the principles of legal certainty, transparency and proportionality, the contracting authority may give such a tenderer the opportunity to regularise its position and comply with the obligations under the relevant national legislation within a period set by the contracting authority (see, to that effect, judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 51, and order of 10 November 2016, *Spinosa Costruzioni Generali and Melfi*, C-162/16, not published, EU:C:2016:870, paragraph 32).

32 In the light of all the foregoing, the answer to the question referred for a preliminary ruling is that the principles of legal certainty, equal treatment and transparency, as referred to in Directive 2014/24, must be interpreted as meaning that they do not preclude national legislation, such as that at issue in

the main proceedings, according to which failure to list the labour costs separately, in a financial tender submitted in a procedure for the award of public services, results in that tender being excluded without the possibility of supplementing or amending the tendering documentation, even where the obligation to list those costs separately was not set out in the tender documents, in so far as that requirement and that possibility of exclusion are clearly provided for by the national legislation on public procurement expressly referred to in those tender documents. However, if the provisions of the tender procedure do not enable the tenderers to list those costs in their financial tenders, the principles of transparency and proportionality must be interpreted as not precluding tenderers from being allowed to regularise their position and to comply with the obligations under the relevant national legislation within a period set by the contracting authority.

Costs

33 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 (Ninth Chamber) hereby rules that:

The principles of legal certainty, equal treatment and transparency, as referred to in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, according to which failure to list the labour costs separately, in a financial tender submitted in a procedure for the award of public services, results in that tender being excluded without the possibility of supplementing or amending the tendering documentation, even where the obligation to list those costs separately was not set out in the tender documents, in so far as that requirement and that possibility of exclusion are clearly provided for by the national legislation on public procurement expressly referred to in those tender documents. However, if the provisions of the tender procedure do not enable the tenderers to list those costs in their financial tenders, the principles of transparency and proportionality must be interpreted as not precluding tenderers from being allowed to regularise their position and to comply with the obligations under the relevant national legislation within a period set by the contracting authority.

[Signatures]