



Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

4 July 2013*

(Public procurement — Directive 89/665/EEC — Public procurement review — Action brought by an unsuccessful tenderer for review of a decision awarding a contract — Action for review based on the ground that the bid selected did not meet the technical specifications for the contract —

Counterclaim made by the successful tenderer alleging that certain technical specifications for the contract were not respected in the bid submitted by the tenderer seeking review — Neither of those bids in compliance with the technical specifications for the contract — National case-law requiring that the counterclaim be examined first and, where such a counterclaim proves well founded, that the main action be declared inadmissible without any consideration of its merits — Whether compatible with European Union law)

In Case C-100/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Piemonte (Italy), made by decision of 25 January 2012, received at the Court on 24 February 2012, in the proceedings

Fastweb SpA

v

Azienda Sanitaria Locale di Alessandria,

intervening parties:

Telecom Italia SpA,

Path-Net SpA,

THE COURT (Tenth Chamber),

composed of A. Rosas, President of the Chamber, E. Juhász and D. Šváby (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 6 December 2012,

after considering the observations submitted on behalf of:

— Telecom Italia SpA and Path-Net SpA, by A. Lirosi, M. Martinelli and L. Mastromatteo, avvocati,

* Language of the case: Italian.

— the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, *Avvocato dello Stato*,

— the European Commission, by A. Tokár and D. Recchia, 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 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), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665').
- 2 The request has been made in proceedings between, on the one hand, Fastweb SpA ('Fastweb') and, on the other, Azienda Sanitaria Locale di Alessandria (ASL) (Alessandria Local Health Authority; 'the ASL Alessandria'), Telecom Italia SpA ('Telecom Italia') and one of its subsidiaries, Path-Net SpA ('Path-Net'), concerning the award of a public procurement contract to Path-Net.

Legal context

- 3 The second and third recitals in the preamble to Directive 89/665 state:

'... the existing arrangements at both national and Community levels for ensuring the [effective application of directives on public procurement] are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected;

... the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; ..., for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law'.

- 4 Recital 3 to Directive 2007/66 states:

'... The guarantees of transparency and non-discrimination sought by [a number of directives, including Directive 89/665] should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by [a number of directives, including 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)]. ...'

- 5 Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides:

'1. This Directive applies to contracts referred to in Directive [2004/18], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2004/18], decisions taken by the contracting authorities 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 Community law in the field of public procurement or national rules transposing that law.

...

3. Member States shall ensure that review procedures are available, under detailed rules which Member States 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.

...'

6 Article 2(1) of Directive 89/665 provides:

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

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully ...

...'

7 Recital 2 to Directive 2004/18 states:

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty [on the Functioning of the European Union] and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the abovementioned rules and principles and with other rules of the Treaty.'

8 Under Article 2 of Directive 2004/18:

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

9 Article 32 of Directive 2004/18 provides:

'...

2. For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. ...

Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. ...

...

4. ...

Contracts based on framework agreements concluded with several economic operators may be awarded either:

...

— where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

(a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;

...

(d) contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.'

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

- 10 Under Legislative Decree No 82/2005 of 7 March 2005 establishing the Digital Administration Code (Decreto legislativo 7 marzo 2005, n. 82: Codice dell'amministrazione digitale; Ordinary Supplement to GURI No 112 of 16 May 2005), the Centro Nazionale per l'Informatica nella Pubblica Amministrazione (CNIPA) (National Centre for Public Administration Informatics) is empowered to conclude framework agreements with economic operators of its choosing. Non-State-owned authorities may award contracts which are based on those framework agreements but which take into account the authorities' own requirements.
- 11 The CNIPA concluded such a framework agreement, inter alia, with Fastweb and Telecom Italia. On 18 June 2010, the ASL Alessandria invited those companies to submit a tender relating to voice and data telephony on the basis of tender specifications. By decision of 15 September 2010, it selected the bid submitted by Telecom Italia and concluded a contract on 27 September 2010 with Path-Net, that company's subsidiary.
- 12 Fastweb brought an action for review of the decision awarding that contract before the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court, Piedmont; 'the TAR Piemonte'); Telecom Italia and Path-Net intervened in those proceedings and filed a counterclaim. Each of those operators challenged the validity of the bid submitted by its sole competitor on grounds of failing to comply with certain technical requirements under the tender specifications.
- 13 Following a check, ordered by the TAR Piemonte, as to whether the bids submitted by the two companies met the tender specifications, it was found that neither of the bids complied with all the technical requirements under the tender specifications. Logically, according to the TAR Piemonte, that finding should mean that both actions for review should succeed, causing the public procurement

procedure at issue before that court to be annulled, as no tenderer would have submitted a bid capable of winning the contract. That result would be in Fastweb's interests, since the recommencement of the award procedure would provide it with another chance to win the contract.

- 14 However, the TAR Piemonte pointed out that, by Decision No 4 of 7 April 2011 made in Plenary Assembly, the Consiglio di Stato (Italian Council of State) had held – stating a key principle of law as regards actions for the review of public procurement procedures – that a counterclaim, challenging the *locus standi* of a party who has brought an action for review on the grounds that that party had been unlawfully admitted to the award procedure, must be examined before the main action is considered, even in cases where the applicant in the main action has a material interest in the recommencement of the award procedure in its entirety and irrespective of the number of participants competing in that procedure or the forms of order sought in the counterclaim or the needs of the authority concerned.
- 15 The Consiglio di Stato considers that only a party which has taken part lawfully in the award procedure has legal standing to challenge the decision awarding the public contract concerned. According to that court, a finding that the party seeking review of that decision had been unlawfully admitted to the procedure has full retroactive effect and the definitive exclusion of that party from the public procurement procedure would bar that party from challenging the outcome of the procedure.
- 16 In accordance with the case-law of the Consiglio di Stato, a practical interest in recommencement of the tendering procedure, as relied upon by the party which has brought an action challenging the decision awarding a public contract, does not confer on that party legal standing to do so. Such an interest is in no way different from the interest of any other economic operator in the sector which wishes to take part in a new award procedure. Consequently, the counterclaim contesting the *locus standi* of the party which has brought that action must always be examined first, even in cases where there were only two tenderers, namely the unsuccessful tenderer (the applicant in the main action) and the successful tenderer (the counterclaimant).
- 17 The TAR Piemonte is uncertain whether that case-law – specifically in so far as it provides that the counterclaim is unconditionally to be given priority over the main action – is consistent with the principles of equality, non-discrimination, free competition and effective judicial protection, as reflected in Articles 1(1) and 2(1)(b) of Directive 89/665. According to that court, the fact that the counterclaim is to be the first claim examined – and, possibly, the only claim examined – confers on the successful tenderer an unjustified advantage over the other economic operators who participated in the award procedure where it is found that the contract has been unlawfully awarded.
- 18 In those circumstances, the TAR Piemonte decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Do the principles of equality of the parties, of non-discrimination and of protection of competition in public tendering procedures, referred to in Directive [89/665] preclude the most recent case-law as laid down in Decision No 4 of 2011 of the Plenary Assembly of the Consiglio di Stato, according to which the counterclaim, by which it is sought to challenge the *locus standi* of the applicant in the main action by contesting its admission to the tendering procedure, must of necessity be heard before the main action and carry compelling implications for examination of the main action, even in cases where the applicant in the main action has an interest in the recommencement of the entire selection procedure (*interesse strumentale*) and irrespective of the number of competitors which took part in the procedure, with specific reference to cases where only two participants remained in play in that procedure (namely, the applicant in the main action and the counterclaimant, the latter being also the successful tenderer), each seeking to have the other excluded on the grounds that its bid failed to meet the minimum requirements for the bid to be considered suitable?’

Admissibility of the request for a preliminary ruling

- 19 Telecom Italia, Path-Net and the Italian Government challenge the admissibility of this request for a preliminary ruling on a number of grounds. The four preliminary pleas of inadmissibility thus raised cannot, however, be upheld.
- 20 First of all, this request for a preliminary ruling concerns a situation which falls squarely within the purview of Article 267 TFEU. In accordance with the first and second paragraphs of Article 267 TFEU, a court or tribunal of a Member State may request the Court to give a ruling on any question relating to the interpretation of the Treaties or of various instruments of secondary legislation where that court or tribunal considers that a decision on that question is necessary to enable it to give judgment in the case before it. In the present case, it is clear from the order for reference that the TAR Piemonte is uncertain as to the implications of Directive 89/665 in the procedural and factual context of the dispute before it, envisaging two possible responses which would entail two different outcomes.
- 21 Secondly, the order for reference adequately sets out the national legal context, since it describes and explains the case-law of the Consiglio di Stato, which is shaped by the way in which the Consiglio di Stato construes all the relevant rules and procedural principles of national law applicable to circumstances such as those under consideration in the main proceedings, and the inferences which can be drawn from the *dicta* of that court as regards the admissibility of the main action, brought by the unsuccessful tenderer.
- 22 Thirdly, even though the TAR Piemonte does not indicate which specific provision of European Union law it wishes to have interpreted, it refers explicitly, in the question itself, to Directive 89/665, and the order for reference gives sufficient information to enable the Court to establish the elements of European Union law that require interpretation, account being taken of the matters to which the dispute before the referring court relates (see, by analogy, Case C-346/05 *Chateignier* [2006] ECR I-10951, paragraph 19 and the case-law cited).
- 23 Fourthly and lastly, it does not appear that that dispute concerns a public procurement contract covered by one of the exemptions referred to in Article 1(1) of Directive 89/665. Accordingly, provided that the value of that contract reaches the threshold at which Directive 2004/18 becomes applicable, as provided for in Article 7 of that directive - a matter for the referring court to verify, although there is nothing to cast any doubt in that regard at this stage - Directives 89/665 and 2004/18 are applicable to a public contract such as the contract at issue in the main proceedings. In that regard, it should be borne in mind that the application of Directive 2004/18 is unaffected by the fact that a particular procedure for the award of a public procurement contract involves only national undertakings (see, to that effect, Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraph 29 and the case-law cited).

Consideration of the question referred

- 24 By its question, the TAR Piemonte asks, in essence, whether the provisions of Directive 89/665 – and, in particular, Articles 1 and 2 thereof – must be interpreted to the effect that, if, in review proceedings, the successful tenderer raises a preliminary plea of inadmissibility on the grounds that the tenderer seeking review lacks standing to challenge the award because its bid should have been rejected by the contracting authority as not being in conformity with the technical requirements under the tender specifications, Article 1(3) of that directive precludes that action for review from being declared inadmissible as a consequence of the examination of that preliminary plea, where the applicant for review is itself contesting, on identical grounds, the validity of the bid submitted by the successful tenderer and where only those two economic operators submitted a bid.

- 25 It should be noted that, as is clear from Article 1 of Directive 89/665, the aim of that directive is to ensure that decisions made by contracting authorities in breach of European Union law can be effectively reviewed. Under Article 1(3) of the directive, Member States must ensure that review procedures are available, under 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.
- 26 In that regard, a decision by which the contracting authority rejects a bid even before the stage at which the winning bid is selected is a decision in respect of which it must be possible to seek review under Article 1(1) of Directive 89/665, since that provision applies to all decisions taken by contracting authorities which are subject to the rules of European Union law on public procurement and makes no provision for any limitation as regards the nature and content of those decisions (see, inter alia, Case C-249/01 *Hackermüller* [2003] ECR I-6319, paragraph 24 and the case-law cited).
- 27 Accordingly, in paragraph 26 of *Hackermüller*, the Court held that, if a review body were to refuse access to those procedures, on grounds of lack of *locus standi*, to a tenderer whose bid had been rejected even before the stage at which the winning bid is selected, the effect would be to deny that tenderer not only its right to seek review of the decision which it alleges to be unlawful, but also the right to challenge the validity of the ground for exclusion raised by that body to deny him the status of a person who has been or risks being harmed by the alleged unlawfulness.
- 28 Admittedly, if, in order to mitigate that situation, it is recognised that the tenderer has the right to challenge the validity of that ground of exclusion by means of an action for review which it brings in order to contest the lawfulness of the decision by which the contracting authority did not consider its bid as the best, it is conceivable that, at the end of that procedure, the review body may conclude that the bid actually should have been rejected at the outset and that the tenderer's action for review falls to be dismissed on the ground that, given that fact, it neither has been nor risks being harmed by the infringement alleged (see *Hackermüller*, paragraph 27).
- 29 In such a situation, the tenderer which has brought an action for review of the decision awarding a public contract must have the right to challenge before the review body, and in accordance with the review procedure, the validity of the grounds on which its bid was rejected (see, to that effect, *Hackermüller*, paragraphs 28 and 29).
- 30 That approach is also called for, as a rule, where the preliminary plea of inadmissibility is raised, not by the review body of its own motion, but in the context of a counterclaim brought by a party to the review procedure, such as the successful tenderer which has intervened lawfully in that procedure.
- 31 In the case before it, the TAR Piemonte, after checking whether the bids made by the two companies concerned were satisfactory, found that the bid submitted by Fastweb did not comply with all the technical rules under the tender specifications. It reached the same conclusion, however, with regard to the bid submitted by the other tenderer, Telecom Italia.
- 32 This situation can be distinguished from the facts in *Hackermüller*, inter alia because it has been found that the selected bid was, wrongly, not excluded at the stage of verification of the tenders, even though it did not comply with the technical requirements under the tender specifications.
- 33 In the presence of such a finding, a counterclaim filed by the successful tenderer cannot bring about the dismissal of an action for review brought by a tenderer where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings and on identical grounds. In such a situation, each competitor can claim a legitimate interest in the exclusion of the bid submitted by the other, which may lead to a finding that the contracting authority is unable to select a lawful bid.

- 34 In the light of the foregoing, the answer to the question is that Article 1(3) of Directive 89/665 must be interpreted to the effect that, if, in review proceedings, the successful tenderer – having won the contract and filed a counterclaim – raises a preliminary plea of inadmissibility on the grounds that the tenderer seeking review lacks standing to challenge the award because its bid should have been rejected by the contracting authority by reason of its non-conformity with the technical requirements under the tender specifications, that provision precludes that action for review from being declared inadmissible as a consequence of the examination of that preliminary plea in the absence of a finding as to whether those technical requirements are met both by the bid submitted by the successful tenderer, which won the contract, and by the bid submitted by the tenderer which brought the main action for review.

Costs

- 35 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(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, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, must be interpreted to the effect that, if, in review proceedings, the successful tenderer – having won the contract and filed a counterclaim – raises a preliminary plea of inadmissibility on the grounds that the tenderer seeking review lacks standing to challenge the award because its bid should have been rejected by the contracting authority by reason of its non-conformity with the technical requirements under the tender specifications, that provision precludes that action for review from being declared inadmissible as a consequence of the examination of that preliminary plea in the absence of a finding as to whether those technical requirements are met both by the bid submitted by the successful tenderer, which won the contract, and by the bid submitted by the tenderer which brought the main action for review.

[Signatures]