



Reports of Cases

ARCHUS AND GAMA JUDGMENT OF THE COURT (Eighth Chamber)

11 May 2017*

(Reference for a preliminary ruling — Public procurement — Directive 2004/17/EC — Principles of awarding contracts — Article 10 — Principle of equal treatment of tenderers — Requirement for contracting authorities to request tenderers to amend or supplement their tender — Right of the contracting authority to retain the bank guarantee in the event of refusal — Directive 92/13/EEC — Article 1(3) — Review procedures — Decision to award a public contract — Exclusion of a tenderer — Actions for annulment — Interest in bringing proceedings)

In Case C-131/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland), made by decision of 19 February 2016, received at the Court on 1 March 2016, in the proceedings

Archus sp. z o.o.,

Gama Jacek Lipik

v

Polskie Górnictwo Naftowe i Gazownictwo S.A.,

intervener:

Digital-Center sp. z o.o.,

THE COURT (Eighth Chamber),

composed of M. Vilaras, President of the Chamber (Rapporteur), M. Safjan and D. Šváby, 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:

— Polskie Górnictwo Naftowe i Gazownictwo S.A., by A. Olszewska,

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

* Language of the case: Polish.

— the Italian Government, by G. Palmieri, acting as Agent, and by F. Di Matteo, avvocato dello Stato,

— the European Commission, by K. Herrmann and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 10 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) and Article 1(3) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 92/13').
- 2 The request has been made in proceedings between Archus sp. z o.o. and Gama Jacek Lipik (together, 'Archus and Gama') and Polskie Górnictwo Naftowe i Gazownictwo S.A. (Polish oil extraction and gas industry company) concerning that company's decisions rejecting their tender in the procedure for the award of a public service contract and accepting the tender submitted by Digital-Center sp. z o.o.

Legal context

European Union law

- 3 Article 10 of Directive 2004/17 provides:

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

- 4 Article 1(3) of Directive 92/13 provides:

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

- 5 The third paragraph of Article 2a(2) of Directive 92/13 provides as follows:

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

Polish law

- 6 Article 25 of the Ustawa z dnia 29 stycznia 2004 r. — Prawo zamówień publicznych (Dz. U. 2015, position 2164) (law of 29 January on public procurement) ('the Pzp') provides:

'1. In the procedure for the award of a contract the contracting authority may request from economic operators only declarations and documents necessary to conduct the procedure. The declarations and documents proving that:

- (1) the conditions for participation in the procedure have been fulfilled, and
- (2) the tendered supplies, services or works satisfy the requirements laid down by the contracting authority,

shall be indicated by the contracting authority in the contract notice, the tender specifications or the invitation to tender.

2. The President of the Council of Ministers shall determine, by order, the kinds of documents which a contracting authority can request from an economic operator and the forms in which those documents may be submitted ...'

- 7 Article 26(3) of the Pzp states:

'The contracting authority shall request economic operators which within the period laid down did not submit the declarations or documents referred to in Article 25(1) required by the contracting authority, or which did not submit authorisations, which submitted declarations or documents referred to in Article 25(1) required by the contracting authority that contain errors, or which submitted incorrect authorisations, to submit them within a specified period unless, notwithstanding the submission thereof, the economic operator's tender is to be rejected or it would be necessary to annul the procedure. The declarations and documents submitted at the request of the contracting authority must prove that the economic operator fulfils the conditions for participation in the procedure and that the tendered supplies, services or works fulfil the requirements laid down by the contracting authority, no later than on the date on which the period for submitting applications to participate in the procedure or the period for submitting tenders expires.'

- 8 Article 46(4)(a) of the Pzp is worded as follows:

'The contracting authority shall retain the guarantee and interest if the economic operator, in reply to the invitation referred to in Article 26(3), has not provided, for reasons for which it is responsible, the documents or declarations referred to in Article 25(1), the authorisations, the list of entities belonging to the same group referred to in Article 24(2)(5), or the information that they do not belong to a group, or if they have not consented to the correction of an error referred to in Article 87(2)(3), which has made it impossible to select its tender as being the most advantageous.'

- 9 Article 87 of the Pzp provides:

'1. During the examination and assessment of tenders the contracting authority may request an economic operator to clarify the content of submitted tenders. Negotiations between the contracting authority and an economic operator concerning the submitted tender and, subject to paragraphs 1a and 2, any changes to the content thereof shall not be permitted.

1a. During the examination and assessment of tenders in a competitive dialogue procedure the contracting authority may request economic operators to clarify and improve the content of tenders and to provide additional information; however, fundamental changes to the content of tenders or changes to the requirements contained in the tendering specifications shall not be permitted.

2. The contracting authority shall correct in the tender:

- (1) obvious drafting errors,
- (2) obvious calculation errors, having regard to the calculation consequences of the corrections made,
- (3) any other errors consisting of inconsistency of the tender with the tendering specifications not giving rise to fundamental changes to the content of the tender — informing the economic operator whose tender has been corrected thereof without delay.'

10 Article 179(1) of the Pzp provides:

'The legal protection measures laid down in this section shall be available to an economic operator, competition participant or other person where it has, or has had, an interest in obtaining a particular contract or sustained, or may sustain, damage as a result of the breach of the provisions of this Law by the contracting authority.'

11 Article 180(1) of the Pzp states:

'An appeal shall be available only against action taken by the contracting authority in the procedure for the award of a contract which is inconsistent with this Law or failure to take the action which the contracting authority is required to take under this Law.'

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

12 On 3 June 2015 Polskie Górnictwo Naftowe i Gazownictwo published in the *Official Journal of the European Union*, under number 2015/S 105-191838, a notice of a restricted invitation to tender for the award of a public service contract for the digitalisation of documents in its central geological archives and the preparation of an electronic version of the documents available on its internal network. The subject matter of the contract consisted of scanning the paper documents in those archives, digitally processing the scanned documents and recording them on durable data carriers in common use in given digital formats and in the form of microfilms.

13 Paragraph 4.1 of the tender specification stated that tenderers had to attach two documents to their tender. One was to be a scanned copy of a document prepared by the contracting authority, recorded on a durable medium and edited in accordance with a detailed description in paragraph 4.1(a) of the specification. The other was to be a sample of 35mm microfilm containing the exposed result of the work submitted for quality assessment in A4 format and an enlargement thereof (16 times) to A O format, together with a description of the microfilming method and the technical parameters specified in paragraph 4.1(b) of the specification ('the microfilm sample').

14 The quality of the first document was to be assessed under the tender evaluation criteria, while the quality of the microfilm sample was to be assessed according to the 'satisfies/does not satisfy' rule, it being stipulated that if the sample was not satisfactory the offer was to be rejected pursuant to Article 89(1)(2) of the Pzp.

15 Tenders were also required to secure their tender by means of a deposit in the amount of PLN 20 000.

- 16 Two tenders were submitted in that procedure, one jointly by Archus and Gama, the other by Digital-Center.
- 17 On 15 October 2015 Archus and Gama, stating that there had been an inadvertent mistake, sent the contracting authority a request for correction of their tender, pursuant to Article 87(2)(3) of the Pzp, seeking to substitute a new microfilm sample for that annexed to their tender, which did not conform to the tender specifications.
- 18 On 17 November 2015 the contracting authority replied to that request, stating that it considered that the new microfilm sample supplemented the documents sent, pursuant to Article 26(3) of the Pzp. However, it also informed them that they had not provided information on the method for microfilming the sample and the technical parameters required in accordance with paragraph 4(1)(b) of the tender specification and, therefore, invited them to supplement that information.
- 19 After examination of the two microfilm samples provided by Archus and Gama, the contracting authority finally rejected their tender as not being in accordance with paragraph 4(1)(b) of the tender specification. It took the view that the samples of microfilm submitted by those companies were not readable at a minimum resolution of 200 dots per inch (dpi) from a microfilmed copy of an A 0 sheet. In addition, it considered that the tender submitted by Digital-Center was the most favourable.
- 20 Archus and Gama then brought an action before the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland) against the decisions of the contracting authority rejecting their tender and accepting Digital-Center's tender.
- 21 The referring court argues, in essence, that under the national legislation on public procurement the contracting authority may require tenderers to present 'documents and declarations' and samples of the products which are to be supplied in connection with the call for tenders. It is also required to ask them to supplement, where appropriate, documents which are missing or which contain errors so that they comply with the requirements of the tender specification, except where the bid ought to be rejected for other reasons or where it is necessary to cancel the procedure.
- 22 The referring court expresses uncertainty, first, on the lawfulness of the requirement imposed on the contracting authority to invite a tenderer to supplement a document required by the tender specification or to submit a new sample in accordance with that specification, as in the case in the main proceedings, in so far as that may lead that tenderer to alter the content of his tender, which would be detrimental to the transparency of the procurement procedure. It is also uncertain as to the lawfulness of the retention of the guarantee paid by the tenderer where the tenderer does not take up the contracting authority's invitation to supplement such a document. Lastly, it questions the legal interest of Archus and Gama in the cancellation of Digital-Center's tender.
- 23 In those circumstances, the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Can Article 10 of [Directive 2004/17] be interpreted as meaning that the contracting authority can be required to invite economic operators which have not submitted within the prescribed period (that is to say, the period specified for submitting tenders) "declarations or documents" requested by the contracting authority proving that the tendered supplies, services or works satisfy the requirements laid down by the contracting authority (that term also covering samples of the subject matter of the contract), or which submitted "declarations or documents" requested by the contracting authority containing errors, to submit "declarations or documents" (samples) which are missing or which correct errors within a specified additional period, without laying down a prohibition under which supplemented "declarations or documents" (samples) cannot alter the content of the tender?

- (2) Can Article 10 of [Directive 2004/17] EC be interpreted as meaning that the contracting authority can retain the deposit lodged by the economic operator if that operator, in response to the contracting authority's invitation to supplement the tender, did not submit "documents or declarations" (samples) proving that the tendered supplies, services or works satisfy the requirements laid down by the contracting authority, where that supplementation would result in a change to the content of the tender, or did not consent to the contracting authority's correction of the tender, which made it impossible to select the tender submitted by the economic operator as being the most advantageous?
- (3) Must Article 1(3) of [Directive 92/13] be interpreted as meaning that "a particular contract", as referred to in that provision in the phrase "interest in obtaining a particular contract", means "a particular procedure carried out for the award of a public contract" (in this case: that published in the notice of 3 June 2015), or "the particular subject matter of the contract" (in this case: the service of digitising the contracting authority's archive documents), irrespective of whether, as a consequence of an appeal being allowed, the contracting authority will be required to annul the procedure for the award of a public contract and possibly to initiate a subsequent procedure for the award of a public contract?

The first question

- 24 By its first question, the referring court asks, in essence, whether the principle of equal treatment of economic operators laid down in Article 10 of Directive 2004/17 must be interpreted as precluding, in the context of a call for tenders, a contracting authority from inviting tenderers to provide the required declarations or documents which were not supplied by them within the prescribed period for the submission of tenders or to correct those declarations or documents in case of errors, without that contracting authority also being required to point out to those tenderers that they are prohibited from altering the content of the tenders submitted.
- 25 In that regard, it must be recalled, first of all, that the requirement for the contracting authority to observe the principle of equal treatment of tenderers which has the aim of promoting the development of healthy and effective competition between undertakings taking part in a public procurement procedure (see, *inter alia*, judgments of 29 April 2004, *Commission v CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 110, and of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 33) and which lies at the very heart of the EU rules on public procurement procedures (see, *inter alia*, judgments of 22 June 1993, *Commission v Denmark*, C-243/89, EU:C:1993:257, paragraph 33; of 25 April 1996, *Commission v Belgium*, C-87/94, EU:C:1996:161, paragraph 51; and of 18 October 2001, *SIAC Construction*, C-19/00, EU:C:2001:553, paragraph 33) means, *inter alia*, 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 (see judgments of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 45, and of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 37).
- 26 That principle requires, in particular, that all tenderers are afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions (judgments of 25 April 1996, *Commission v Belgium*, C-87/94, EU:C:1996:161, paragraph 54; of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 93, and of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 33).
- 27 The principle of equal treatment and the obligation of transparency also preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the

request of the contracting authority or at the request of the tenderer (see, to that effect, judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 36, and of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 31).

- 28 To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful, to the detriment of the other tenderers and in breach of the principle of equal treatment (judgment of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 37).
- 29 However, the Court has also previously held that the principle of equal treatment does not preclude the correction or amplification of details of a tender, where it is clear that they require clarification or where it is a question of the correction of obvious clerical errors, subject, however, to the fulfilment of certain requirements (see, to that effect, in the context of tendering procedures under 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), judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraphs 35 to 45, concerning the evaluation of offers stage, and of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraphs 30 to 39, concerning the stage of pre-selection of tenderers).
- 30 First of all, a request for clarification of a tender, which may not be made until after the contracting authority has looked at all the tenders, must, as a general rule, be sent in an equivalent manner to all undertakings which are in the same situation and must relate to all sections of the tender which require clarification (see judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraphs 42 to 44, and of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraphs 34 and 35).
- 31 In addition, that request may not lead to the submission by a tenderer of what would appear in reality to be a new tender (see judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 40, and of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 36).
- 32 Lastly, as a general rule, when exercising its discretion as regards the right to ask a tenderer to clarify its tender, the contracting authority must treat tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome (see judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 41, and of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 37).
- 33 A request for clarification cannot, however, make up for the lack of a document or information whose production was required by the contract documents, the contracting authority being required to comply strictly with the criteria which it has itself laid down (see, to that effect, judgment of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 40).
- 34 In the present case, the referring court stated, in its request for a preliminary ruling, that the tenderers had to include, as an annex to their bid, samples of digitised archive documents, which had to be prepared following the instructions set out at paragraph 4.1 of the tender specification, and had to indicate the process for the digitisation and its quality.

- 35 In the circumstances of the main proceedings, it was Archus and Gama as tenderers who sent the contracting authority a request for their tender to be corrected, based on Article 87(2)(3) of the Pzp, in order to replace the sample which they had annexed to their bid, which did not comply with the specifications in the tender specification, with a new microfilm sample.
- 36 In accordance with the case-law referred to in paragraph 29 above, a request sent by the contracting authority to a tenderer to supply the declarations and documents required cannot, in principle, have any other aim than the clarification of the tender or the correction of an obvious error vitiating the tender. It cannot, therefore, permit a tenderer generally to supply declarations and documents which were required to be sent in accordance with the tender specification and which were not sent within the time limit for tenders to be submitted. Nor can it, in accordance with the case-law referred to in paragraph 31 above, result in the presentation by a tenderer of documents containing corrections where in reality they constitute a new tender.
- 37 In any event, the obligation which a contracting authority may have under national law, to invite tenderers to submit the declarations and documents required which they have not sent within the time limit given for the submission of offers, or to correct those declarations and documents in the event of errors, cannot be permitted except in so far as the additions or corrections made to the initial tender do not result in a substantial amendment of that tender. It is apparent from paragraph 40 of the judgment of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191) that the initial tender cannot be amended to correct obvious clerical errors other than exceptionally and where that amendment does not result, in reality, in the proposal of a new tender.
- 38 It is for the referring court to determine whether, in the circumstances of the main proceedings, the substitution made by Archus and Gama remained within the limits of the correction of an obvious error vitiating its tender.
- 39 Consequently, the answer to the first question referred is that the principle of equal treatment of economic operators set out in Article 10 of Directive 2004/17 must be interpreted as precluding, in a public procurement procedure, the contracting authority from inviting a tenderer to submit declarations or documents whose communication was required by the tender specification and which have not been submitted within the time limit given for the submission of tenders. On the other hand, that article does not preclude the contracting authority from inviting a tenderer to clarify a tender or to correct an obvious clerical error in that tender, on condition, however, that such an invitation is sent to all tenderers in the same situation, that all tenderers are treated equally and fairly and that that clarification or correction may not be equated with the submission of a new tender, which is for the referring court to determine.

The second question

- 40 By its second question, the referring court asks, in essence, whether Article 10 of Directive 2004/17 must be interpreted as not precluding, in circumstances such as those of the main proceedings, the contracting authority from retaining the guarantee lodged by a tenderer in a public procurement procedure, where the tenderer either did not submit the documents showing that its tender satisfied the requirements set in the tender specification by the contracting authority, because that would change the content of its offer, or did not consent to the contracting authority correcting its tender, with the consequence that its tender could not be selected.
- 41 According to settled case-law, the procedure laid down in Article 267 TFEU is an instrument of cooperation between the Court and the national courts, by means of which the former provides the latter with the points of interpretation of European Union law which they need in order to decide the disputes before them (see, *inter alia*, judgments of 12 June 2003, *Schmidberger*, C-112/00,

EU:C:2003:333, point 30; of 15 September 2011, *Unió de Pagesos de Catalunya*, C-197/10, EU:C:2011:590, paragraph 16; and of 19 June 2012, *Chartered Institute of Patent Attorneys*, C-307/10, EU:C:2012:361, paragraph 31).

- 42 In the context of that cooperation, questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, judgments of 21 January 2003, *Bacardi-Martini and Cellier des Dauphins*, C-318/00, EU:C:2003:41, paragraph 43; of 15 September 2011, *Unió de Pagesos de Catalunya*, C-197/10, EU:C:2011:590, paragraph 17, and of 19 June 2012, *Chartered Institute of Patent Attorneys*, C-307/10, EU:C:2012:361, paragraph 32).
- 43 The Court's function in preliminary rulings is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see, *inter alia*, judgments of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 32, and of 15 September 2011, *Unió de Pagesos de Catalunya*, C-197/10, EU:C:2011:590, paragraph 18).
- 44 It must be noted that, as is apparent from the order for reference, the circumstances of the main proceedings clearly do not correspond to either of the two scenarios envisaged by the referring court in its second question.
- 45 The dispute in the main proceedings essentially relates, as is clear from the consideration of the first question, to whether the contracting authority may, without disregarding the principle of equal treatment set out in Article 10 of Directive 2004/17, allow a tenderer, after his tender has been lodged, to replace a document which was required to be produced by the tender specification, in the present case a microfilm sample, where the sample sent had allegedly been sent in error. It is in no way apparent from the order for reference that Archus and Gama failed to provide the documents required by the specification or refused to consent to the contracting authority correcting their tender. It must therefore be held that the issue raised by the referring court in its second question is hypothetical.
- 46 The second question of the referring court must, in those circumstances, be declared to be manifestly inadmissible.

The third question

- 47 By its third question, the referring court asks, in essence, whether Article 1(3) of Directive 92/13 must be interpreted as meaning that the concept of 'a particular contract' within the meaning of that provision refers to a specific public procurement procedure or the actual subject matter of the contract which is to be awarded following a public procurement procedure, in a situation where only two tenders have been submitted and where the tenderer whose tender has been rejected may be regarded as having an interest in seeking the rejection of the tender of the other tenderer and, as a result, the initiation of a new public procurement procedure.
- 48 The referring court pointed out in that regard that an economic operator who has submitted a tender in a public procurement procedure does not, where his tender is rejected, have an interest in bringing proceedings against the decision awarding the public contract. Consequently, whilst a tenderer like Archus and Gama clearly has an interest in challenging a decision rejecting his tender, in so far as in such a case he retains the opportunity to be awarded the contract, on the other hand he no longer has any interest in the result of the public procurement procedure, since his tender was definitively rejected, at least where several tenders were submitted and selected.

- 49 It is in that context that the referring court asks whether the concept of ‘a particular contract’ within the meaning of Article 1(3) of Directive 92/13 relates to the possible initiation of a new public procurement procedure.
- 50 It should be recalled, in that connection, that Article 1(3) of Directive 92/13 provides that 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.
- 51 When called upon to interpret the equivalent provisions of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), the Court has previously held that, in a public procurement procedure, tenderers have a legitimate interest in the exclusion of the bids submitted by the other tenderers with a view to obtaining the contract (see, to that effect, judgments of 4 July 2013, *Fastweb*, C-100/12, EU:C:2013:448, paragraph 33; of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 27; and of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich*, C-355/15, EU:C:2016:988, paragraph 29), whatever the number of participants in the procedure and the number of participants who have instigated review procedures (see, to that effect, judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 29).
- 52 On the one hand, the exclusion of one tenderer may lead to the other being awarded the contract directly in the same procedure. On the other, if all tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly (see judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 27).
- 53 The principle of case-law established by the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448) and 5 April 2016, *PFE* (C-689/13, EU:C:2016:199) applies to the situation at issue in the main proceedings.
- 54 In connection with a public procurement procedure in which two tenders have been submitted and the contracting authority has adopted two simultaneous decisions rejecting the tender of one of the tenderers and awarding the contract to the other, an action has been brought before the referring court by the unsuccessful tenderer concerning those two decisions. In that action, the unsuccessful tenderer seeks the exclusion of the tender of the successful tenderer on the ground that it does not comply with the tender specifications.
- 55 In such a situation, the tenderer who has brought the action must be regarded as having a legitimate interest in the exclusion of the bid submitted by the successful tenderer, which may lead, where appropriate, to a finding that the contracting authority is unable to select a lawful bid (see, to that effect, judgments of 4 July 2013, *Fastweb*, C-100/12, EU:C:2013:448, paragraph 33, and of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 24).
- 56 That interpretation is confirmed by the provisions of Article 2a(1) and (2) of Directive 92/13, which expressly provide a right of review for tenderers who are not definitively excluded against, inter alia, award decisions taken by contracting authorities.
- 57 Admittedly, the Court ruled in its judgment of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich* (C-355/15, EU:C:2016:988, paragraphs 13 to 16, 31 and 36), that a tenderer whose offer had been excluded by the contracting authority from a public procurement procedure could be refused access to a review of the decision awarding the public contract. However, the decision to exclude that tenderer had, in that case, been confirmed by a

decision that had the force of *res judicata* before the court hearing the review of the contract award decision gave its decision, so that that tenderer had to be regarded as definitively excluded from the public procurement procedure at issue.

- 58 In the main proceedings, on the other hand, Archus and Gama brought an action against the decision excluding their tender and against the decision awarding the contract, which were adopted simultaneously, and cannot therefore be considered to be definitively excluded from the public procurement procedure. In such a situation, the concept of ‘a particular contract’ within the meaning of Article 1(3) of Directive 93/13 may, where appropriate, apply to the possible initiation of a new public procurement procedure.
- 59 It follows from the foregoing considerations that Directive 92/13 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings in which in a public procurement procedure two tenders have been submitted and the contracting authority has adopted two simultaneous decisions rejecting the offer of one tenderer and awarding the contract to the other, the unsuccessful tenderer who brings an action against those two decisions must be able to request the exclusion of the tender of the successful tenderer, so that the concept of ‘a particular contract’ within the meaning of Article 1(3) of Directive 92/13 may, where appropriate, apply to the possible initiation of a new public procurement procedure.

Costs

- 60 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 (Eighth Chamber) hereby rules:

1. **The principle of equal treatment of economic operators set out in Article 10 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 precluding, in a public procurement procedure, the contracting authority from inviting a tenderer to submit declarations or documents whose communication was required by the tender specification and which have not been submitted within the time limit given for the submission of tenders. On the other hand, that article does not preclude the contracting authority from inviting a tenderer to clarify a tender or to correct an obvious clerical error in that tender, on condition, however, that such an invitation is sent to all tenderers in the same situation, that all tenderers are treated equally and fairly, and that that clarification or correction may not be equated with the submission of a new tender, which is for the referring court to determine.**
2. Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, must be interpreted as meaning that, in a situation such as that at issue in the main proceedings in which, in a public procurement procedure two tenders have been submitted and the contracting authority has adopted two simultaneous decisions rejecting the offer of one tenderer and awarding the contract to the other, the unsuccessful tenderer who brings an action against those two decisions must be able to request the exclusion of the tender of the successful tenderer, so that the concept of ‘a particular contract’ within the meaning of Article 1(3) of Directive 92/13, as amended by Directive 2007/66, may, where appropriate, apply to the possible initiation of a new public procurement procedure.

[Signatures]