Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

12 March 2015*

(Reference for a preliminary ruling — Public procurement — Directives 89/665/EEC and 2004/18/EC — Principles of equal treatment and transparency — Connection between the successful tenderer and the contracting authority's experts — Obligation to take that connection into account — Burden of proving bias on the part of an expert — Such bias having no effect on the final result of the evaluation — Time-limit for instituting proceedings — Challenging the abstract award criteria — Those criteria clarified after the exhaustive reasons for the award of the contract had been communicated — Degree of the tenders' conformity with the technical specifications as an evaluation criterion)

In Case C-538/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Lithuania), made by decision of 9 October 2013, received at the Court on 14 October 2013, in the proceedings

eVigilo Ltd

v

Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos,

supported by:

'NT Service' UAB,

'HNIT-Baltic' UAB,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas, E. Juhász (Rapporteur) and D. Šváby, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— eVigilo Ltd, by J. Puškorienė, advokatė,

* Language of the case: Lithuanian.

— Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos, by R. Baniulis, acting as Agent,

— 'NT Service' UAB and 'HNIT-Baltic' UAB, by D. Soloveičikas, advokatas,

— the Lithuanian Government, by D. Kriaučiūnas and K. Dieninis and by V. Kazlauskaitė-Švenčionienė, acting as Agents,

— the Greek Government, by K. Paraskevopoulou and V. Stroumpouli, acting as Agents,

— the European Commission, by A. Steiblytė 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 the third subparagraph of Article 1(1) 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') and by Article 2, Article 44(1) and Article 53(1)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between eVigilo Ltd ('eVigilo') and the Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos (General Department of Fire and Rescue at the Ministry of the Interior) ('the contracting authority') concerning the evaluation of tenders in a public procurement procedure.

Legal context

EU law

3 The third subparagraph of Article 1(1) of Directive 89/665 provides:

'Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, 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.'

4 Recitals 2 and 46 in the preamble to Directive 2004/18 state as follows:

'(2) 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 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 aforementioned rules and principles and other rules of the Treaty.

…

(46) Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: "the lowest price" and "the most economically advantageous tender".

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. …

Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.

…'

5 Under Article 2 of Decision 2004/18:

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

6 Article 44(1) of that directive provides:

'Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.'

7 Article 53(1)(a) of that directive provides:

‘(1) Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.’

Lithuanian law

8 Article 2(17) of Law No VIII-1210, of 13 August 1996, on public contracts (Žin., 1996, No 84-2000)(‘the law on public contracts’), provides:

‘“Declaration of impartiality”: a written declaration from a member of the Public Procurement Commission or an expert, showing that they are impartial vis-à-vis tenderers.’

9 Article 16(5) of that Law provides:

‘No member of the Public Procurement Commission and no expert may participate in the work of that Commission until he has signed a declaration of impartiality and a commitment to respect confidentiality.’

10 Article 3 of that law, entitled ‘Fundamental principles relating to the award of contracts and compliance therewith’, provides in paragraph 1 thereof:

‘(1) The contracting authority shall ensure that, during procedures relating to procurement and the award of contracts, the principles of equality of arms, non-discrimination, proportionality and transparency are observed.’

11 Article 90 of that Law provides:

‘On the basis of the results of the evaluation of the tenders carried out in accordance with the procedure referred to in Article 39(7) of the present law, the supplies, services or work shall be purchased from the tenderer who submitted the most economically advantageous tender or offered the lowest price. During procedures for awarding supply, service or works contracts, the tenders submitted may be evaluated on the basis of the criterion relating to the most economically advantageous tender or the lowest price, or on the basis of criteria relating to the purpose of the contract which are established in the procurement documents of the contracting authority and which may not restrict the access of tenderers to the contract either unlawfully or on the basis of bias or grant privileged access to certain tenderers, thereby infringing the conditions set out in Article 3(1) of the present law.’

12 Article 39(7) of the law on public contracts, in its version which was in force between 1 September 2009 and 2 March 2010, provides:

‘In order to take a decision relating to a successful tender, the contracting authority must:

(1) in accordance with the procedure and with the evaluation criteria established in the procurement documents, evaluate without delay the tenders submitted by the tenderers and establish a preliminary classification thereof (except where a single tenderer is requested to submit a tender, or where a single tenderer submits a tender). The preliminary classification of tenders shall be established in descending order of their economic advantage or in ascending order of their price. If the criterion for evaluating the most economically advantageous tender applies and the tenders submitted by several tenderers present an identical economic advantage, during the preliminary classification of the tenders priority shall be granted to the tenderer whose envelope containing the tenders was registered first or whose tender, made electronically, was submitted the earliest. In the event that the criterion for evaluating the tenders is the lowest price submitted and several tenders contain identical prices, during the preliminary classification, priority shall be granted to the tenderer whose envelope containing the tenders was registered first or whose tender, made electronically, was submitted earliest;

(2) notify without delay all the tenderers who submitted tenders of the preliminary classification of the tenders and all the tenderers whose tenders were not included in that classification, of the grounds for the rejection of their tenders, including the rejection of tenders on the ground of non-equivalence or failure to comply with the functional requirements and the requirements relating to the description of the planned performances, established by the contracting authority in accordance with Article 25 of the present law;

(3) not confirm the classification of the tenders or take a decision relating to the successful tender until it has examined, in accordance with the procedure referred to in the present law, the applications and the actions of the tenderers who submitted tenders (where such actions and applications have been made), and at least 10 days after sending the notification of the preliminary classification of the tenders to the tenderers.’

13 Article 39(7) of the law on public contracts, in the version in force since 2 March 2010, is worded as follows:

‘In order to take a decision on the award of a contract, the contracting authority must, in accordance with the procedure and with the evaluation criteria established in the procurement documents, evaluate without delay the tenders made by the tenderers, in the situation referred to in Article 32(8) of the present law, the conformity of the tenderer, whose tender may be successful on the basis of the results of the evaluation, with the minimum requirements relating to qualification, establish the classification of the tenders (except where a single tenderer is requested to submit a tender, or where a single tenderer submits a tender) and accept a tender. The preliminary classification of tenders shall be established in descending order of their economic advantage or in ascending order of their price. In the event that the criterion for evaluating the most economically advantageous tender applies and the tenders submitted by several tenderers present an identical economic advantage, during the classification of the tenders priority shall be granted to the tenderer whose envelope containing the tenders was registered first or whose tender, made electronically, was submitted earliest.’

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

14 On 22 January 2010, the contracting authority published an open invitation to tender entitled 'for the purchase of a system for warning and informing the public, using the infrastructure of the networks of providers of services relating to public mobile telephone connections', in the context of which eVigilo, together with 'ERP' UAB and 'Inta' UAB, and another consortium composed of 'NT Service' UAB and 'HNIT-Baltic' UAB, submitted their tenders.

15 According to the referring court, the value of the contract in the dispute pending before it being 14 998 972,45 Lithuanian litas (LLT) (approximately EUR 4 344 002), the invitation to tender at issue concerns a purchase coming within the ambit of Directives 2004/18 and 89/665.

16 It is apparent from the case-file submitted to the Court that, in paragraph 67 of the conditions of the invitation to tender there appear, as evaluation criteria, the overall price of that warning system, the number of operators taking part in the project with the tenderer and the general and functional requirements. The latter include the justification for the technical and architectural solution and the particulars of the functional elements and their conformity with the technical specifications and the requirements of the contracting authority; the integrity and compatibility of the system proposed with the technical and information-technology infrastructure used by the contracting authority; the extension of the functional scope of the system and the justification thereof; and the strategy for implementing the project, the effectiveness of the management plan, the description of quality control measures and of the project team.

17 The contracting authority's Public Procurement Commission, having examined the evaluation of the technical tenders carried out by six experts, upheld the results of that evaluation. On 4 November 2010, the contracting authority informed the tenderers of the results of that evaluation.

18 On 2 November 2010, eVigilo brought a first action relating to the lawfulness of the procurement procedures, arguing in particular that the conditions of the call for tenders lacked clarity.

19 Further details were added to the application on 20 December 2010, alleging failings in the experts' evaluation and that the results of that evaluation were groundless.

20 On 31 January 2011, by a second application, eVigilo contested the lawfulness of the actions of the contracting authority, claiming that the third parties' tender should be rejected, because its price exceeded the level of financing allocated to the project at issue.

21 On 8 March 2011, the contracting party and 'NT Service' UAB and 'HNIT-Baltic' UAB concluded the contract, even though the proceedings between eVigilo and the contracting authority were still pending.

22 On 19 March 2012, eVigilo added to its first application relating to the lawfulness of the evaluation of tenders, explaining its arguments concerning the erroneous definition of the criteria in the invitation to tender for evaluating an economic advantage.

23 On 10 April 2012, eVigilo again added to its first application and invoked new facts connected with the bias of the experts who evaluated the tenders, liable to show the existence of professional relations between the latter and the specialists referred to in the third parties' tender.

24 It claimed that the specialists referred to in the tender submitted by the successful tenderers were, at the Technical University of Kaunas (Kauno technologijos universitetas), colleagues of three of the six experts of the contracting authority who drew up the tender documents and evaluated the tenders.

25 eVigilo's applications were rejected by the courts of first instance and of appeal.

26 By its appeal on a point of law before the Lietuvos Aukščiausiasis Teismas, eVigilo states that those courts incorrectly assessed the connections between the specialists referred to by the successful tenderers and the experts appointed by the contracting authority. It claims also that those courts thereby failed to take account of the experts' bias.

27 Furthermore, eVigilo claims that the contracting authority laid down very abstract criteria for the evaluation of the most economically advantageous tender, in particular the criterion of 'compatibility with the needs of the contracting authority', which had an effect on the tenders made by the tenderers, and on the evaluation of those tenders by the contracting authority. It claims that it was able to understand the award criteria of the most economically advantageous tender only after the contracting authority sent it exhaustive reasons for the refusal to award the contract. It was, therefore, only after that communication had been made that the period for bringing an action ought to have started to run.

28 According to the contracting authority and the successful tenderers, the courts of first instance and of appeal were correct in holding that eVigilo was required not only to show objective connections existing between the successful tenderers' specialists and the experts who evaluated the tenders, but also to prove the subjective fact that the experts were biased. They maintain too that eVigilo challenged out of time the lawfulness of the criteria for the evaluation of the most economically advantageous tender.

29 In addition, the contracting authority and the successful tenderers contest the claim that those criteria for the award of the public contract were inappropriately defined, given that, until the closing date for the submission of tenders, eVigilo had not contested them and had not requested that they be explained.

30 In those circumstances, the Lietuvos Aukščiausiasis Teismas decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Are the public procurement rules of EU law — the third subparagraph of Article 1(1) of [Directive 89/665, as amended by] Directive 2007/66, in which are laid down the principles of effectiveness and expeditiousness with regard to the defence of rights of tenderers which have been infringed, Article 2 of Directive [2004/18], which lays down the principles of equal treatment of tenderers and of transparency, and Articles 44(1) and 53(1)(a) of Directive 2004/18, in which is set out the procedure governing the conclusion of a contract with the tenderer which has submitted the most economically advantageous tender — to be understood and interpreted together or separately (but without a limitation to the aforementioned provisions) as meaning that:

(a) in the case where a tenderer has become aware of a possible significant connection (link) which another tenderer has with the contracting authority's experts who evaluated the tenders, and (or) has become aware of the potentially exceptional position of that tenderer by reason of preparatory work previously performed in connection with the procurement procedure in dispute, and where, in regard to those circumstances, the contracting authority has not undertaken any actions, that information alone is sufficient to establish a claim that the review body should recognise as unlawful the actions of the contracting authority which failed to ensure transparency and objectivity in the procedures, the applicant, moreover, not being required to prove in concrete terms that the experts acted in a biased manner;

(b) the review body, having established that the grounds for the applicant's abovementioned claim are well founded, is not obliged, when ruling on the consequences which those grounds may have for the results of the tendering procedure, to have regard for the fact that

the results of the evaluation of the tenders submitted by tenderers would essentially have been the same if there had not been any biased assessors among the experts who evaluated the tenders;

(c) the tenderer becomes (finally) aware of the content of the criteria relating to the most economically advantageous tender, which were formulated in accordance with the qualitative parameters and set out in abstract terms in the tendering conditions (criteria such as completeness and compatibility with the needs of the contracting authority), in respect of which the tenderer was essentially able to submit a tender, only at the time when, in accordance with those criteria, the contracting authority evaluated the tenders submitted by tenderers and provided interested parties with comprehensive information concerning the grounds for the decisions taken, and only from that moment could the limitation period governing the review procedure laid down in national law be applied to that tenderer?

(2) Must Article 53(1)(a) of Directive [2004/18], applied in conjunction with the principles governing the award of a contract set out in [Article] 2 of that directive, be understood and interpreted as meaning that contracting authorities are prohibited from establishing (and applying) a procedure for the evaluation of tenders submitted by tenderers under which the results of the evaluation of tenders depend on how comprehensively tenderers have demonstrated that their tenders satisfy the requirements of the tendering documents, that is to say, the more comprehensively (more extensively) the tenderer has described the conformity of its tender with the tendering conditions, the greater will be the number of marks awarded to its tender?'

Consideration of the questions referred for a preliminary ruling

Question 1(a) and (b)

31 By question 1(a) and (b), the referring court asks, in essence, whether the third subparagraph of Article 1(1) of Directive 89/665 and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18 must be interpreted as precluding a finding that the evaluation of the tenders is unlawful solely because the tenderer has had significant connections with experts appointed by the contracting authority who evaluated the tenders, without other evidence in the proceedings being examined, including the fact that those experts may have been biased had no effect on the decision to award the contract and without the unsuccessful tenderer being required to provide tangible proof that those experts were biased.

32 According to Article 2 of Directive 2004/18, entitled 'Principles of awarding contracts', '[c]ontracting authorities [are to] treat economic operators equally and non-discriminatorily and shall act in a transparent way'.

33 Under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions (see, to that effect, judgments in *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 110, and *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44).

34 The obligation of transparency, which is its corollary, is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority with respect to certain tenderers or certain tenders (see, to that effect, judgments in *Commission* v *CAS Succhi di Frutta*, EU:C:2004:236, paragraph 111, and *Cartiera dell'Adda*, EU:C:2014:2345, paragraph 44).

35 A conflict of interests entails the risk that the contracting authority may choose to be guided by considerations unrelated to the contract in question and that on account of that fact alone preference may be given to a tenderer. Such a conflict of interests is thus liable to constitute an infringement of Article 2 of Directive 2004/18.

36 In that regard, the fact that the contracting authority appointed experts acting on its mandate in order to evaluate the tenders submitted does not relieve that authority of its responsibility to comply with the requirements of EU law (see, to that effect, judgment in *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 23).

37 The finding of bias on the part of an expert requires in particular the assessment of facts and evidence that comes within the competence of the contracting authorities and the administrative or judicial control authorities.

38 It should be pointed out that neither Directive 89/665 nor Directive 2004/18 contains specific provisions in that regard.

39 The Court has consistently held that, in the absence of EU rules governing the matter, it is for every Member State to lay down the detailed rules of administrative and judicial procedures for safeguarding rights which individuals derive from EU law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (see judgment in *Club Hotel Loutraki and Others*, C-145/08 et C-149/08, EU:C:2010:247, paragraph 74 and the case-law cited).

40 In particular, the detailed procedural rules governing the remedies intended to protect rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities must not compromise the effectiveness of Directive 89/665 (see judgment in *Uniplex (UK)*, C-406/08, EU:C:2010:45, paragraph 27 and the case-law cited).

41 It is not, as a general rule, contrary to those principles for an expert's bias to be established in a Member State solely on the basis of an objective situation in order to prevent any risk that the public contracting authority could be guided by considerations unrelated to the contract in question and liable, by virtue of that fact alone, to give preference to one tenderer.

42 Concerning the rules on evidence in that regard, it should be pointed out that, in accordance with Article 2 of Directive 2004/18, the contracting authorities are to treat economic operators equally and non-discriminatorily and to act in a transparent way. It follows that they are assigned an active role in the application of those principles of public procurement.

43 Since that duty relates to the very essence of the public procurement directives (see judgment in *Michaniki*, C-213/07, EU:C:2008:731, paragraph 45), it follows that the contracting authority is, at all events, required to determine whether any conflicts of interests exist and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them. It would be incompatible with that active role for the applicant to bear the burden of proving, in the context of the appeal proceedings, that the experts appointed by the contracting authority were in fact biased. Such an outcome would also be contrary to the principle of effectiveness and the requirement of an effective remedy laid down in the third subparagraph of Article 1(1) of Directive 89/665, in light, in particular, of the fact that a tenderer is not, in general, in a position to have access to information and evidence allowing him to prove such bias.

44 Thus, if the unsuccessful tenderer presents objective evidence calling into question the impartiality of one of the contracting authority's experts, it is for that contracting authority to examine all the relevant circumstances having led to the adoption of the decision relating to the award of the contract in order to prevent and detect conflicts of interests and remedy them, including, where appropriate, requesting the parties to provide certain information and evidence.

45 Evidence such as the claims in the main proceedings relating to the connections between the experts appointed by the contracting authority and the specialists of the undertakings awarded the contract, in particular, the fact that those persons work together in the same university, belong to the same research group or have relationships of employer and employee within that university, if proved to be true, constitutes such objective evidence as must lead to a thorough examination by the contracting authority or, as the case may be, by the administrative or judicial control authorities.

46 Subject to compliance with the obligations under EU law, and specifically with those referred to in paragraph 43 above, the concept of 'bias' and the criteria for it are to be defined by national law. The same applies to the rules relating to the legal effects of possible bias. Thus, it is for national law to determine whether, and if so to what extent, the competent administrative and judicial authorities must take into account the fact that possible bias on the part of the experts had no effect on the decision to award the contract.

47 In the light of the foregoing considerations, the answer to question 1(a) and (b) is that the third subparagraph of Article 1(1) of Directive 89/665 and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18 must be interpreted as not precluding a finding that the evaluation of the tenders is unlawful on the sole ground that the tenderer has had significant connections with experts appointed by the contracting authority who evaluated the tenders. The contracting authority is, at all events, required to determine the existence of possible conflicts of interests and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them. In the context of the examination of an action for annulment of an award decision on the ground that the experts were biased, the unsuccessful tenderer may not be required to provide tangible proof of the experts' bias. It is, in principle, a matter of national law to determine whether, and if so to what extent, the competent administrative and judicial control authorities must take account of the fact that possible bias on the part of experts had an effect on the decision to award the contract.

Question 1(c)

48 By question 1(c), the referring court asks, in essence, whether the third subparagraph of Article 1(1) of Directive 89/665 and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18 must be interpreted as requiring a right to bring an action relating to the lawfulness of the tender procedure to be open, after the expiry of the period prescribed by national law, to a tenderer who could understand the tender conditions only when the contracting authority, after evaluating the tenders, provided exhaustive information relating to the reasons for its decision.

49 That question refers to the period prescribed for bringing an action relating to the lawfulness of a call for tenders provided for by national law. That question starts from the premiss that a legal remedy is available to the tenderers concerned, at the stage of the call for tenders, allowing the lawfulness of the latter to be contested. It relates to the question whether an interested tenderer is prevented by being out of time from bringing an action relating to the lawfulness of a call for tenders which it brought before being informed about the award of the contract at issue.

50 In that regard, it should be noted that the provisions of Directive 89/665, intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are designed to reinforce existing arrangements for ensuring the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified (judgment in *Fastweb*, C-19/13,

EU:C:2014:2194, paragraph 34 and the case-law cited). Article 1(1) and (3) of Directive 89/665 requires effective remedies to be available 'under detailed rules which the Member States may establish', and in particular, as rapidly as possible, in accordance with the conditions set out in Articles 2 to 2f of that directive.

51 In accordance with the Court's case-law, the setting of reasonable limitation periods for bringing proceedings must be regarded as satisfying, in principle, the requirement of effectiveness under Directive 89/665, since it is an application of the fundamental principle of legal certainty. The full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringements of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements (judgments in *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraphs 75 and 76 and the case-law cited; *Lämmerzahl*, C-241/06, EU:C:2007:597, paragraphs 50 and 51; and *Commission* v *Ireland*, C-456/08, EU:C:2010:46, paragraphs 51 and 52).

52 According to the Court's case-law, the objective laid down in Article 1(1) of Directive 89/665 of guaranteeing effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing proceedings start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions (see judgments in *Uniplex (UK)*, EU:C:2010:45, paragraph 32, and *Idrodinamica Spurgo Velox and Others*, C-161/13, EU:C:2014:307, paragraph 37).

53 It should be noted that the award criteria for contracts must be stated in the contract notice or in the tender specifications and the fact that they are incomprehensible or lack clarity may constitute an infringement of Directive 2004/18.

54 In paragraph 42 of its judgment in *SIAC Construction*, C-19/00, EU:C:2001:553, the Court held that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.

55 It follows that it is for the referring court to assess whether the tenderer concerned was in fact unable to understand the award criteria at issue or whether he should have understood them by applying the standard of a reasonably informed tenderer exercising ordinary care.

56 In the context of that assessment, it is necessary to take into account the fact that the tenderer concerned and the other tenderers were capable of submitting tenders and that the tenderer concerned, before submitting its tender, did not request clarification from the contracting authority.

57 Where it follows from that assessment that the tender conditions were in fact incomprehensible to the tenderer and that the latter was prevented from introducing an application within the period provided for by national law, that tenderer is entitled to bring an action until the period prescribed for bringing proceedings against the decision to award the contract has expired.

58 Consequently, the answer to question 1(c) is that the third subparagraph of Article 1(1) of Directive 89/665 and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18 must be interpreted as requiring a right to bring an action relating to the lawfulness of the tender procedure to be open, after the expiry of the period prescribed by national law, to reasonably well-informed and normally diligent tenderers who could understand the tender conditions only when the contracting authority, after evaluating the tenders, provided exhaustive information relating to the reasons for its decision. Such a right to bring an action may be exercised until the period prescribed for bringing proceedings against the decision to award the contract has expired.

Question 2

59 By question 2, the referring court asks, in essence, whether Articles 2 and 53(1)(a) of Directive 2004/18 must be interpreted as allowing a contracting authority to use, as an evaluation criterion for tenders submitted by the tenderers for a public procurement contract, the degree to which those tenders are consistent with the requirements included in the tender documentation.

60 According to Article 53(1)(a) of Directive 2004/18, the tender most economically advantageous from the point of view of the contracting authority is to be assessed according to various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.

61 According to the case-law, as follows from the use of the phrase 'for example', that list is non-exhaustive (see judgment in *Commission* v *Netherlands*, C-368/10, EU:C:2012:284, paragraph 84).

62 Thus, the contracting authority has the power to establish other award criteria, in so far as they are connected with the purpose of the contract and respect the principles set out in Article 2 of Directive 2004/18.

63 It is all the more important that the contracting authority must enjoy such freedom since the most economically advantageous tender is to be assessed 'from the point of view of the contracting authority'.

64 Subject to the checking by the referring court, it appears that, in the main proceedings, the degree of conformity of the tender with the requirements of the tender documentation is connected with the purpose of the contract and there is nothing to suggest that that award criterion fails to respect the principles set out in Article 2 of Directive 2004/18.

65 Consequently, the answer to question 2 is that Articles 2 and 53(1)(a) of Directive 2004/18 must be interpreted as allowing, in principle, a contracting authority to use, as an evaluation criterion for tenders submitted by the tenderers for a public procurement contract, the degree to which those tenders are consistent with the requirements included in the tender documentation.

Costs

66 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 (Fifth Chamber) hereby rules:

1. **The third subparagraph of Article 1(1) 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, and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, must be interpreted as not precluding a finding that the evaluation of the tenders is unlawful solely on the grounds that the tenderer has had significant connections with experts appointed by the contracting authority who evaluated the tenders. The**

contracting authority is, at all events, required to determine the existence of possible conflicts of interests and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them. In the context of the examination of an action for annulment of an award decision on the ground that the experts were biased, the unsuccessful tenderer may not be required to provide tangible proof of the experts' bias. It is, in principle, a matter of national law to determine whether, and if so to what extent, the competent administrative and judicial control authorities must take account of the fact that possible bias on the part of experts has had an effect on the decision to award the contract.

The third subparagraph of Article 1(1) of Directive 89/665, as amended by Directive 2007/66, and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18, must be interpreted as requiring a right to bring an action relating to the lawfulness of the tender procedure to be open, after the expiry of the period prescribed by national law, to reasonably well-informed and normally diligent tenderers who could understand the tender conditions only when the contracting authority, after evaluating the tenders, provided exhaustive information relating to the reasons for its decision. Such a right to bring an action may be exercised until the expiry of the period for bringing proceedings against the decision to award the contract.

2. **Articles 2 and 53(1)(a) of Directive 2004/18 must be interpreted as allowing, in principle, a contracting authority to use, as an evaluation criterion of tenders submitted by the tenderers for a public contract, the degree to which they are consistent with the requirements in the tender documentation.**

[Signatures]