Case C-387/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

17 May 2019

Referring court:

Raad van State (Belgium)

Date of the decision to refer:

7 May 2019

Applicants:

RTS infra BVBA

Aannemingsbedrijf Norré-Behaegel

Defendant:

Vlaams Gewest

Subject of the action in the main proceedings

Action for the annulment of the decision of 29 November 2016 of the afdeling Wegen en Verkeer Oost-Vlaanderen (Department of Roads and Traffic of East Flanders) of the agentschap Wegen en Verkeer (Agency for Roads and Traffic) of the Flemish Region by which a public contract for roadworks was awarded to a competitor of the applicants.

Subject and legal basis of the request for a preliminary ruling

Legal basis 267 TFEU

The reference for a preliminary ruling concerns the question whether a tenderer which has been excluded by the contracting authority on account of 'grave professional misconduct' should be expected, on its own initiative, to report possible grave professional misconduct and any self-cleaning measures it has taken in that regard, or whether the contracting authority should still make

provision for an adversarial procedure after it has established that, in its own opinion, there is grave misconduct that may result in exclusion and before being able to effectively make a decision with regard to exclusion.

Questions referred

1. Should the provisions of Article 57(4)(c) and (g), in conjunction with paragraphs 6 and 7 of that article, of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC be interpreted as precluding an application whereby the economic operator is required to provide evidence on its own initiative of the measures that the economic operator has taken to demonstrate its reliability?

2. If so, do the provisions of Article 57(4)(c) and (g), in conjunction with paragraphs 6 and 7 of that article, of [Directive 2014/24] therefore have direct effect?

Provisions of European Union law cited

– Article 57(4)(c) and (g), and paragraphs 6 and 7 of that article; Article 69(1); Article 90 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65)

– General legal principle of *audi et alteram partem*

– Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document (OJ 2016 L 3, p. 16)

Provisions of national law cited

– Articles 23 and 24 of the wet van 15 juni 2006 overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten (Law of 15 June 2006 on public procurement and certain contracts for works, supplies and services)

– Articles 2 and 3 of the wet van 29 juli 1991 betreffende de uitdrukkelijke motivering van de bestuurshandelingen (Law of 29 July 1991 on the formal notification of the reasons for administrative acts)

– Article 70 of the wet van 17 juni 2016 inzake overheidsopdrachten (Law of 17 June 2016 on public procurement)

– Article 61, § 1 and § 2, of the koninklijk besluit van 15 juli 2011 plaatsing overheidsopdrachten klassieke sectoren (Royal Decree of 15 July 2011 on public procurement in the classic sectors)

– Article 20 of the algemene aannemingsvoorwaarden voor de overheidsopdrachten voor aanneming van werken, leveringen en diensten en voor de concessies voor openbare werken (General contracting conditions for public contracts for works, supplies and services and for public works concessions), attached as an annex to the Koninklijk besluit van 26 september 1996 (Royal Decree of 26 September 1996)

– General principles of law relating to sound administration: the principles of equality, competition, due diligence, and transparency, and the principle of providing substantive reasons

Brief summary of the facts and the procedure in the main proceedings

1 The agentschap Wegen en Verkeer issued a public works contract notice for the award of roadworks. The contract is awarded by open tender. The notice expressly points out that the contracting authority may exclude a tenderer if it is guilty of grave professional misconduct.

2 The tender submitted by the applicants, who together form a temporary company, is excluded from the contract award decision due to grave professional misconduct. The statement of reasons in the contract award report, which is included in the contract award decision, explains the facts that are considered to constitute grave professional misconduct for each of the applicants. This relates, among other things, to breaches of health and safety regulations on site, inadequate road signs and (technical) shortcomings in the execution of earlier works.

3 In response to that contract award decision, the applicants have brought an action for annulment before the referring court.

4 The latter finds that the resolution of the dispute requires the interpretation of European Union law, in particular, Article 57 of Directive 2014/24.

Main submissions of the parties to the main proceedings

5 The applicants allege infringement of Articles 23 and 24 of the aforementioned wet van 15 juni 2006, of Article 57(4), (6) and (7) of Directive 2014/24, of the principle of *audi et alteram partem* contained in the Directive, of Articles 2 and 3 of the wet van 29 juli 1991 (‘formelemotiveringswet’) (‘Law on the formal provision of reasons’) and of several general principles of sound administration.

6 They consider that, before being excluded on grounds of alleged grave professional misconduct, they must be given the opportunity to put forward a defence in which they can show that they have remedied the problems. The aforementioned provisions of the Directive provide for an adversarial procedure by which the tenderer may provide evidence that past errors have been corrected or superseded and, moreover, provide that facts such as those at issue here may be used for a maximum of three years to exclude a tenderer, even if it does not show that it has solved the problems in the meantime.

7 The applicants rely on the direct effect of the aforementioned provisions of that Directive.

They may invoke that Directive, which was not transposed into the Belgian legal order in time, against the defendant as a regional administration, in view of the broad interpretation by the Court of Justice of the concept of 'State'.

They are of the view that those provisions are unconditional, clear and precise. The statement that a Member State 'shall put in place the necessary measures' and the mere mention in the preamble that the exact procedural and substantive conditions should be worked out by the Member State — conditions which, according to the applicants, relate only to the procedure — do not in themselves mean that the introduction of every economic operator's right to provide evidence of its self-clearance would be conditional.

The applicants refer, inter alia, to the structure of the Directive, which, in their view, should be read in the sense that every economic operator should have the possibility of showing that it has put measures in place if the contracting authority considers that its integrity has been rendered questionable by misconduct. After all, the tenderer can only know what the public authorities consider to be grave misconduct if this is communicated to it. Consequently, 'the ratio legis of the defended action ... [implies] that the person who is allowed to defend an action knows what he can defend'. It is therefore not the case that a candidate or tenderer should provide evidence 'on its own initiative' that it has taken corrective measures. According to the applicants, that obligation, which was imposed by a future law, is not applicable to the contract at issue here and, moreover, it is contrary to the essence and the purpose of Article 57 of the Directive, which, as in the case of abnormal prices, makes provision for an adversarial verification procedure.

In addition, the legal principle *audi et alteram partem*, which is explicitly included in the Directive, has also been infringed. Furthermore, the defendant has been careless and has acted contrary to the principle of transparency, the principle of fair competition and the principle of equality, since the applicants have been treated unequally in comparison with their 'European colleagues'.

8 The defendant disputes primarily that Article 57 of Directive 2014/24 has direct effect. It disputes the unconditional, clear and precise nature of Article 57(6) of

that Directive. At least as far as the corrective measures are concerned, the defendant maintains that that requirement has not been met, since Article 57(7) provides that '[b]y law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article'. In that context, it also refers to recital 102 of that Directive. The concise manner in which the Directive 'works out' the system of corrective measures also implies that Member States have a wide discretion in implementing the Directive in that regard. For example, the Directive does not specify when the candidate or tenderer must report that corrective measures were taken, or how this should be done. That the Member States themselves have wide powers to draw up a regime of corrective measures is also clear from the fact that the Directive leaves the Member States free to determine which body — the contracting authority or another body — is competent to evaluate the corrective measures. A further indication of this is the fact that the Belgian legislature added or clarified fundamental issues to what was still a piece of future legislation at the time the contract was awarded (Article 70 of the wet van 17 juni 2016, which transposes Article 57 of Directive 2014/24) with regard to the regime relating to corrective measures.

9 In the alternative, the defendant argues that the contested decision does not infringe the self-cleaning regime laid down by the Directive. Since the Directive only describes in very general terms how the system of corrective action is to be implemented, it is difficult for a contracting authority to determine, on the basis of Article 57(6), how it should apply self-cleaning. According to the defendant, it is therefore logical that, in such circumstances, a connection be sought to the wet van 17 juni 2016, which imposes the obligation to provide evidence on one's own initiative of the concrete measures taken, even if that law has not yet entered into force. According to the defendant, nothing prevented the applicants from reporting the corrective measures concerned when submitting their tender.

According to the defendant, such an interpretation of the system of corrective measures is not contrary to Article 57 of the Directive. After all, the tenderer is best placed to assess whether it is covered by one of the optional grounds for exclusion and should therefore take corrective measures. In the present case, the seriousness of the shortcomings evidenced in earlier works contracts was obvious, all the more since those contracts also originated from the defendant.

As regards the comparison with the adversarial verification procedure in the case of abnormal prices, the defendant replies that it appears from Article 57(6) itself and from its comparison with Article 69(1) of the Directive that there is a fundamental difference between those provisions.

It also refers to Implementing Regulation (EU) 2016/7, where the model form contained in the annex offers the possibility of indicating whether self-cleaning measures have been taken with regard to any optional grounds for exclusion, including grave professional misconduct which is at issue in the present case. It concludes from this that the European Commission is also of the view that it

follows from Directive 2014/24 that it is up to the candidate or tenderer to take the initiative and to bring any corrective measures to the attention of the contracting authority.

The defendant further disputes the contention that the self-cleaning procedure would differ depending on the applicable ground for exclusion. Since the Directive aims at a significant administrative simplification of the public procurement procedure, it cannot be construed as indicating that it was the intention of the European legislature to provide for different procedures in relation to self-cleaning.

In the further alternative, the defendant claims that the principles of sound administration have not been infringed. Finally, referring to the settled case-law of the Raad van State (Council of State) on the right to be heard, it states that a contracting authority wishing to make an exclusion decision is in principle not subject to the obligation to give effect to the right to be heard since it is not removing a previously granted advantage or imposing a penalty, but is simply not granting a requested benefit.

Brief summary of the reasons for the referral

10 First of all, the referring court finds that the contract notice was published on 11 and 13 May 2016, that is to say, after the deadline for transposition of the Directive, namely, 18 April 2016. From that date onwards, the standard form referred to in Implementing Regulation 2016/7 must also be used for the preparation of the European Single Procurement Document. Under 'Exclusion grounds' that form mentions the possibility of reporting whether the economic operator has taken self-cleaning measures and to describe these measures where appropriate.

Article 61, § 2, 4 °, of the koninklijk besluit van 2011, applicable to the main proceedings, on the basis of which the applicants were excluded, provided that the candidate or tenderer which is guilty of grave professional misconduct must be excluded from every stage of the contract award procedure.

The referring court then points out that the wet van 17 juni 2016 — which provides for a procedure whereby the candidate or tenderer which can be excluded on the grounds of serious shortcomings, may on its own initiative provide evidence that it has taken 'corrective measures' — had not yet entered into force on the date of the contested decision.

The referring court considers that, for the purpose of assessing the action for annulment, the question to be answered is whether or not Article 57(4)(c) and (g), in conjunction with paragraphs 6 and 7 of that article, of Directive 2014/24 precludes the interpretation that an economic operator which, as in the present case, according to the contracting authority is guilty of grave professional misconduct and did not, on its own initiative, report any corrective action, is to be

excluded without — expressly within the framework of an intended exclusion by the contracting authority — being given the opportunity to provide evidence of any measures taken to nevertheless prove its reliability, or being invited to do so in the notice or tender documents.

If the answer to the aforementioned question is that the Directive permits the interpretation concerned, the question of whether the relevant provisions of the Directive have direct effect should not be examined further.

However, the referring court finds no clear answer to that question in the wording of the provisions concerned or in the case-law of the Court of Justice.

In fact, previous case-law of the Court of Justice, in particular the judgment of 24 October 2018, C-124/17, *Vossloh Laeis GmbH* (paragraphs 20 to 23 and the operative part) concerning the self-cleaning regime, does not deal with the question at issue here, in particular, whether Article 57(6) of the Directive may be interpreted as meaning that an economic operator should adopt self-cleaning measures on its own initiative, or whether, before a decision can be taken to exclude it, it should be invited to do so.

The wording of the relevant provision of the Directive is not conclusive since it merely states that '[a]ny economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.' Recital 102 of the Directive also merely states in general terms that '[e]conomic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined.'

The standard form included in Implementing Regulation 2016/7 makes provision under 'Exclusion grounds' for the possibility of reporting whether the economic operator has taken self-cleaning measures and of describing those measures, if necessary.

However, the possible grounds for exclusion relate to various situations. In some cases it will be clearly foreseeable for the economic operator concerned whether or not an applicable ground for exclusion exists. In the case of other grounds for exclusion, it may be less obvious. There are mandatory and optional grounds for exclusion. To the extent that there may be 'grave professional misconduct', such as that at issue here, it is for the contracting authority, in accordance with recital 101 of the Directive, to assess for itself to what extent this constitutes grave professional misconduct. The classification as such by the contracting authority is not always foreseeable for the tenderer concerned. Should the tenderer then act on its own initiative or should the contracting authority provide for an adversarial procedure after it has established that, in its own view, there is grave misconduct that could lead to exclusion?

Furthermore, self-cleaning measures can be involved in the assessment of the proportionality of the exclusion measure. The referring court is of the view that an interpretation requiring that provision be made for an adversarial procedure before a decision on exclusion can effectively be taken also seems to promote competition.

On the other hand, by placing the initiative with the tenderer, there is a greater chance that several contracting authorities will have the same information at their disposal when they have to make an award decision and that in that sense there will be greater transparency.

As regards the analogy with the rules on the investigation of abnormally low prices, the referring court finds that Article 69 of the Directive relating to abnormally low prices prescribes a number of active actions for the contracting authority, and that that is not expressly the case with the rules on self-cleaning in Article 57(6) of the Directive. It also refers to the different objectives of the rules on abnormal prices and on self-cleaning.

11 As regards the direct effect of the relevant provisions, the referring court points out that the Court of Justice has not yet ruled on that point. It argues, however, that in order for Article 57(6) of Directive 2014/24 to be applied, it requires additional measures, in particular where it provides that any economic operator may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. The same applies to Article 57(7) of that Directive. For example, the Directive does not specify when the candidate or tenderer must report that corrective measures were taken or how this should be done and to whom the evaluation of those measures is entrusted.

12 On the other hand, it is clear from the case-law of the Court of Justice that the wording of a provision requiring the Member State to ‘put in place the necessary measures’ does not in itself preclude the Directive being able to grant a specific right unconditionally and sufficiently precisely. Thus, according to the referring court, it cannot be ruled out entirely that, although the provisions on self-cleaning do not appear to be capable of having direct effect in their entirety, that may well be the case with regard to certain parts thereof, which serve as minimum guarantees.

If the Court of Justice considers that the possibility afforded to a tenderer in Article 57(6) of Directive 2014/24 to provide evidence of its reliability despite the exclusion due to grave misconduct means that the contracting authority should in some way afford a tenderer that opportunity before excluding it on that ground, the question therefore arises as to whether it can be regarded as a kind of minimum protection which can be precisely established under the Directive.

13 Therefore, since there is doubt about the interpretation of the relevant provisions, the referring court has decided to refer the above questions to the Court of Justice for a preliminary ruling.