



**A contracting authority in a tendering procedure must seek explanations from a tenderer in the case where the tender appears to contain an abnormally low price**

*By contrast, it is not required to seek clarification in respect of a tender which is imprecise or which does not meet the technical requirements of the tender specifications*

Národná diaľničná spoločnosť a.s. ('NDS'), a commercial undertaking wholly controlled by the Slovak State, launched a restricted call for tenders by notice published in the *Official Journal of the European Union* on 27 September 2007, with a view to concluding a public contract having an estimated value in excess of €600 million for the supply of toll collection services on motorways and certain roads in Slovakia.

The groups of undertakings SAG ELV and Others and Slovakpass<sup>1</sup>, among other tenderers, submitted tenders for that contract. Subsequently, NDS asked those tenderers to provide clarification of the technical aspects of their tenders and explanations for the abnormally low prices which they had offered.

Although SAG ELV and Others and Slovakpass replied to those questions, NDS none the less excluded them from the procedure.

The two groups of undertakings brought legal proceedings challenging the administrative decisions ordering their exclusion from the procedure and the disputes have reached the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic). That court has doubts as to whether the decisions taken by NDS comply with the principles of European Union law on non-discrimination and transparency in the award of public contracts. It takes the view that NDS excluded those two groups from the procedure without first having asked them to explain their alleged non-compliance with the technical requirements in the tender specifications and without having questioned them sufficiently clearly on its doubts concerning the abnormally low prices offered in the tenders. In those circumstances, the Slovak court asks the Court of Justice whether the procedure followed by NDS complied with the rules of the directive on public contracts<sup>2</sup>.

In its judgment delivered today, the Court points out, firstly, that the directive requires the awarding authority to examine the details of tenders which contain an abnormally low price and to request tenderers to furnish the necessary explanations to prove that their tenders are genuine. Accordingly, the directive **precludes a contracting authority from claiming that it is not obliged to request a tenderer to clarify an abnormally low price.**

The Court also states **that the contracting authority must set out clearly its request for clarification** so that tenderers are in a position fully and effectively to show that their tenders are genuine. It is, however, for the Slovak court to ascertain whether, in the present case, that requirement was met.

<sup>1</sup> The SAG ELV group comprises the undertakings SAG ELV Slovensko a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe a.s. and TESLA Stropkov a.s., while Slovakpass includes among its members the companies Autostrade per l'Italia SpA, EFKON AG and Stalexport Autostrady SA.

<sup>2</sup> 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).

Next, the Court finds that the directive – in contrast to the situation concerning abnormally low prices – does not expressly sets out the procedure to be followed in the event that the contracting authority finds, in a restricted tendering procedure, that **the tender submitted by a tenderer is imprecise or does not meet the technical requirements of the tender specifications**. According to the Court, that procedure, by its very nature, means that, once the tenderers have been selected and once their tenders have been submitted, in principle those tenders can no longer be amended either at the request of the contracting authority or at the request of the tenderers. The principle of equal treatment of tenderers and the obligation of transparency preclude, in that procedure, any negotiation between the contracting authority and one or other of the tenderers. To allow a 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 that 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. The Court also points out that it is for tenderers to ensure that their tenders are drafted in a sufficiently precise manner.

In those circumstances, the Court replies that **the directive does not oblige a contracting authority to request tenderers, in a restricted tendering procedure, to clarify their tenders in the light of the technical requirements of the tender specifications before rejecting them on the ground that they are imprecise or do not meet those requirements**.

However, the Court states that a contracting authority may request tenderers, in writing, to clarify their tenders provided that this does not entail amendment of those tenders. Similarly, the details of a tender may also be corrected or amplified where appropriate, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender. However, a request for clarification may never favour or place at a disadvantage the tenderer to which the request was addressed and may be made only after the contracting authority has looked at all the tenders. Furthermore, that request must, in principle, 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 are imprecise or not in conformity. Thus, the contracting authority is not entitled to reject a tender because of the lack of clarity of a part thereof which was not covered in the request.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*The [full text](#) of the judgment is published on the CURIA website on the day of delivery.*

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