

Case C-53/22

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:

26 January 2022

Referring court:

Tribunale Amministrativo Regionale per la Lombardia (Italy)

Date of the decision to refer:

7 January 2022

Applicant:

VZ

Defendant:

CA

Other parties to the proceedings:

RT, BO, Regione Lombardia, Regione Liguria

Subject matter of the main proceedings

Refusal to annul the award of a public contract.

Subject matter and legal basis of the request

Article 267 TFEU.

Questions referred for a preliminary ruling

1. Does Article 1(3) of Directive 89/665 preclude a competitor who is definitively excluded from a contractor selection procedure from being denied the possibility of a review of the refusal to annul the award, when it is intended to show that the successful tenderer, and all other shortlisted competitors, are guilty

of grave professional misconduct, consisting of having entered into anticompetitive agreements which were determined by a court only after the competitor had been excluded, in order to have the opportunity to participate in a rerun of the procedure?

2. Does Article 1(3) of Directive 89/665 and the principles [of European Union law] on the safeguarding of competition preclude an administrative court from the scrutiny of a review, requested by a competitor definitively excluded from a contractor selection procedure, of the contracting authority's refusal to review measures which it adopted itself, with regard to the admission of and award to competitors who have entered into anticompetitive agreements, determined by a court, in the same sector as the tender procedure?

Provisions of European Union law and case-law relied on

Article 101 TFEU.

Article 18(1) and Article 57(4)(c) and (d) of Directive 2014/24/EU.

Recitals 3 and 17, Article 1(1) and (3) and Article 2a(2) of Directive 2007/66/EU.

Judgments of the Court of Justice in Cases C-465/11, C-100/12, C-689/13, C-355/15, C-124/17 and C-425/18.

Provisions of national law relied on

Codice dei contratti pubblici (Italian Public Procurement Code) – Decreto Legislativo n. 50/2016 (Legislative Decree No 50/2016), which transposed Directives 2014/23/EU, 2014/24/EU and 2014/25/EU in Italy.

Article 80 sets out the exclusion grounds and, in paragraph 5, provides that contracting authorities must exclude an economic operator from participation in a procurement procedure in any of the situations listed, including, in point (c), where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct such as to render its integrity or reliability questionable.

Article 100 of the Codice di procedura civile (Italian Code of Civil Procedure), which provides that a party bringing or opposing a claim must have an interest in that claim.

Codice del processo amministrativo (Italian Code of Administrative Procedure) – Decreto Legislativo n. 104/2010 (Legislative Decree No 104/2010).

Article 35(1)(b) provides that the court must declare the application inadmissible, even of its own motion, where there is a lack of interest or where there are other reasons preventing a decision on the substance of the case.

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 18 December 2018, CA, the contracting authority (the defendant) issued an open procedure for the provision of a helicopter rescue service.
- 2 On 16 January 2019, the company VZ (the applicant) brought an action against the contract notice, in so far as it required certification that VZ did not possess at that time. The action was dismissed by judgment of the TAR Lombardia (Regional Administrative Court, Lombardy, Italy), upheld by the Consiglio di Stato (Council of State, Italy).
- 3 In the meantime, the Autorità Garante della Concorrenza e del Mercato (Competition Authority, Italy; 'the AGCM') had imposed fines on several undertakings competing in the abovementioned procedure after finding that they had been in serious breach of Article 101 TFEU during the period between 2001 and August 2017, consisting, inter alia, of a price-fixing agreement for helicopter services. Conversely, it did not find any agreement restricting competition. Therefore, on 2 March 2020, the three lots were awarded to RT (lots 1 and 2) and BO (lot 3).
- 4 RT and BO, along with JF, another company which is not a party to the main proceedings, brought actions against the fines imposed on them before the TAR Lazio (Regional Administrative Court, Lazio, Italy). All the actions were dismissed by Lazio Regional Administrative Court and, except for one case which is still pending, by the Council of State.
- 5 On 1 June 2020, VZ notified CA of one of the judgments handed down by Lazio Regional Administrative Court. It also provided documentary evidence that in October 2019, it had obtained the certification required in order to participate in the call for tenders, which it had previously lacked.
- 6 The applicant's interest is not in being awarded the contract, but in the entire tender procedure being annulled, so as to be able to participate in a rerun of that procedure.

The essential arguments of the parties in the main proceedings

- 7 RT and BO claim that the price fixing was not intended to influence the price of the services and had not been used by the contracting authorities to set the reserve price in the call for tenders. They further submit that such price fixing was neither binding on the contracting authorities nor capable of restricting competition.
- 8 VZ contends that the judgment of Lazio Regional Administrative Court that it notified to CA materially affects the assessment of the integrity and reliability of the successful tenderer in the performance of the helicopter rescue service, even though the award had already been made, given that the court had determined the existence of grave professional misconduct.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 9 The applicant was definitively excluded from the tender procedure and so was not entitled to contest the award or indeed any decisions made during the procedure. However, in the present case the referring court has doubts for the following reasons.
- 10 In the light of the case-law that has developed on the basis of the judgments of the Court of Justice in Cases C-100/12 and C-689/13, the Italian courts have held that, in a tender in which only two competitors took part, it is possible to examine a review aimed at obtaining a rerun of the procedure, brought by a participant excluded for not meeting the minimum requirements. However, even with this new approach, the interest in examining such a review requires that the complaints be raised in a single set of review proceedings, and that the competitor has not been definitively excluded before seeking that review, in line with the Court's ruling in Case C-355/15. On that basis, the application should be declared inadmissible in the present case.
- 11 At the time of the procedure, the successful tenderer and all the shortlisted competitors in theory could have been excluded owing to their participation in an anticompetitive agreement. Indeed the Court has previously ruled that an infringement of competition rules, determined and penalised by the AGCM by a decision upheld by the courts, amounts to grave professional misconduct by an economic operator (Case C-425/18). At that point, however, the existence and relevance of the agreement had not yet been determined by a court – a fact that prevented the applicant from contesting the admission of the successful tenderer and the other parties to the agreement. That leads the referring court to doubt the reasonableness of that preclusion, which essentially depends on the time it takes for the agreement to be determined – in other words, on a random set of circumstances.
- 12 Moreover, in Case C-355/15, a competitor who was definitively excluded had challenged the award – and therefore a decision closely linked to its exclusion and issued in the course of those proceedings. In the present proceedings, however, the applicant contests the fact that the contracting authority held as irrelevant – for the purpose of the annulment of the award – a supervening event extraneous to the procedure from which it was excluded (namely the judgment by which Lazio Regional Administrative Court upheld the fines imposed by the AGCM). This leads the referring court to doubt the possibility of applying the principles affirmed in Case C-355/15 to the present case.
- 13 Lastly, in Case C-333/18, the Court held that a review sought by a competitor who was ranked third, contesting the admission of the two highest-ranking candidates, was admissible, even though its bid was deemed to be irregular, and even though there were other competitors below it in the ranking, since if the action by the unsuccessful tenderer were held to be well founded, the contracting authority could decide to cancel the procurement procedure and open a new one

(paragraph 28). The situation of the present applicant, for the purpose of assessing its interest in the review, would thus appear comparable to the one at issue in Case C-333/18.

- 14 The possibility for a competitor who has been definitively excluded of contesting whether the successful tenderer is eligible to participate does not appear to be precluded by Directive 2007/66/EC, which seeks to make review procedures available to any person having or having had an interest in obtaining a particular contract (recital 17 and Article 1(3)), as in the applicant's case. Furthermore, tenderers are deemed to be concerned if they have not yet been definitively excluded (Article 2a(2)), but only for the purpose of identifying those who should be notified of the contract award decision, and not for the purpose of the admissibility of a review.

WORKING DOCUMENT