

Case C-403/21

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:

29 June 2021

Referring court:

Consiliul Național de Soluționare a Contestațiilor (National Council for Dispute Resolution, Romania)

Date of the decision to refer:

22 June 2021

Applicant:

SC NV Construct SRL

Contracting authority:

Județul Timiș (District of Timiș)

Intervening party:

SC Proiect Construct Regiunea Transilvania SRL

Subject matter of the main proceedings

Action seeking, in essence, annulment of the decision of a contracting authority relating to the determination of the outcome of the tendering procedure organised for the award of a public contract for producing the feasibility study and technical design for the construction of a road

Subject matter and legal basis of the request

An interpretation of Articles 58 and 63 of Directive 2014/24/EU, and of the principle of proportionality, the principle of liability and the principle of transparency, is sought pursuant to Article 267 TFEU.

Questions referred

(1) Must Article 58 of Directive [2014/24], the principle of proportionality and the principle of liability be interpreted as meaning that the contracting authority has the right to lay down the criteria relating to technical capacity, that is to say, to determine whether or not it is necessary to include in the procurement documents criteria relating to technical and professional capacity and the capacity to carry out the technical and professional activity arising from the provisions of special laws, in respect of activities of minor importance in the contract?

(2) Do the principles of transparency and proportionality preclude the automatic supplementation of the procurement documents with qualification criteria arising from special laws applicable to activities relating to the contract to be awarded which were not set out in the procurement documents and which the contracting authority decided not to impose on the economic operators?

(3) Do Article 63 of the directive and the principle of proportionality preclude the exclusion from the [tendering] procedure of a tenderer who has not named an operator as a subcontractor for the purpose of demonstrating compliance with certain criteria relating to technical and professional capacity and the capacity to carry out the technical and professional activity arising from the provisions of special laws not set out in the procurement documents in the case where the tenderer in question has chosen a different contractual form of involving specialists in the contract, that is to say [a] contract for the supply/provision of services, or has submitted [a] declaration of willingness on their part? Does the right to determine its organisation and contractual relations within the group lie with the economic operator and is it possible also to involve certain providers/suppliers in the contract in the case where the provider is not one of the entities on whose capacity the tenderer intends to rely in order to demonstrate compliance with the relevant criteria?

Provisions of EU law and EU case-law cited

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, recitals 15 and 90, Articles 58 and 63

Commission Delegated Regulation (EU) 2019/1828 of 30 October 2019 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the thresholds for public supply, service and works contracts, and design contests

Order of 17 October 2018, *Beny Alex*, C-353/18, EU:C:2018:829, and judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404

Provisions of national law cited

Legea nr. 101/2016 privind remediile și căile de atac în materie de atribuire a contractelor de achiziție publică, a contractelor sectoriale și a contractelor de concesiune de lucrări și concesiune de servicii, precum și pentru organizarea și funcționarea Consiliului Național de Soluționare a Contestațiilor (Law No 101/2016 on remedies and appeals relating to the award of public contracts, sectoral contracts and work concession and service concession contracts, as well as the organisation and functioning of the National Council for Dispute Resolution) (the ‘CNSC’), Articles 12 and 14, which confer on the CNSC the power to settle disputes concerning the award of public contracts

Legea nr. 98/2016 privind achizițiile publice (Law No 98/2016 on public contracts), Articles 3, 55, 154, 172, 179, 181 and 218 to 220 relating to the procedure for awarding public contracts

Hotărârea Guvernului nr. 395/2016 pentru aprobarea Normelor metodologice de aplicare a prevederilor referitoare la atribuirea contractului de achiziție publică/acordului-cadru din Legea nr. 98/2016 privind achizițiile publice (Government Decision No 395/2016 approving the detailed rules for the implementation of the provisions relating to the award of public contracts/framework contracts of Law No 98/2016 on public contracts), Articles 29 to 31 and 51

Decisions of a number of national courts from which it follows that there is no uniform practice as regards the possibility of procurement documents being supplemented with provisions of national law relating to various activities coming within the scope of the public contract but which are of minor importance in the contract in question, and also as regards the requirement to name the subcontractors for those activities in the tender

Succinct presentation of the facts and of the main proceedings

- 1 By an application lodged with the CNSC on 16 April 2021, the applicant SC NV Construct SRL, established in Romania, sought, in essence, annulment of the decision of the contracting authority, the Județul Timiș, relating to the determination of the outcome of the tendering procedure organised for the award of a public contract for the drawing up the feasibility study and the technical design for the construction of a road connecting the ‘Traian Vuia’ International Airport in Timișoara to the A1 motorway (Romania).
- 2 SC Proiect Construct Regiunea Transilvania SRL, also established in Romania, has intervened in the proceedings as the successful tenderer in that call for tenders.
- 3 The applicant’s tender was ranked fourth, after those submitted by the intervening party (ranked first) and by two other commercial companies (ranked second and third).

- 4 In the grounds of the action, the applicant claims that the technical proposals submitted by the other tenderers fail to satisfy certain of the requirements set out in the procurement documents since they are not lawfully able to carry out certain activities relating to the contract, including the activity of drawing up the topographic survey, the activity of drawing up the documents necessary for obtaining approval for setting aside the land located outside urban areas, the activity of compiling the valuation report on the property affected by expropriation, the activity of drawing up the documentation necessary for obtaining the approvals of the rail infrastructure manager for the railway crossing, and the activity of drawing up the archaeological survey.
- 5 So far as the successful tender is concerned, the applicant takes the view that it should be declared non-compliant since the tenderer cannot lawfully carry out three of the activities listed above. The applicant claims, *inter alia*, that a subcontractor authorised to provide design services for the railway crossing should also have been mentioned in the tender since the relevant legislation provides that those services are to be provided only by economic operators authorised by the railway infrastructure manager.
- 6 The intervening party contends that the action should be dismissed as unfounded and that the procurement documents do not lay down the requirements on which the respondent relies, and therefore they cannot constitute grounds for exclusion from the procedure by declaring the tenders non-compliant.
- 7 The contracting authority states that, contrary to what the applicant claims, the procurement documents do not require that authorised specialists be indicated in the tender. On the other hand, the fact that the first-ranked tenderer did not initially declare its option to subcontract certain activities if it were declared successful is irrelevant in the present case since the national legislation confers on it the right to have recourse to new subcontractors after the public contract has been signed, during the period of its performance.

Succinct presentation of the grounds for the request

- 8 As a preliminary point, the CNSC points out that its status as a national court or tribunal within the meaning of Article 267 TFEU has already been recognised by the Court of Justice in the order of 17 October 2018, *Beny Alex* (C-353/18, EU:C:2018:829).
- 9 As regards the admissibility of its request for a preliminary ruling, the CNSC expresses the view that there is a certain cross-border interest in the present case both in terms of the value of the service contract to be awarded, in that its estimated value is RON 1 970 967 (equivalent to EUR 421 553), and thus above the threshold laid down in Commission Delegated Regulation (EU) 2019/1828 amending Directive 2014/24, and in terms of the subject matter of the procedure and the source of financing, in that the project in question, which is intended to link the ‘Traian Vuia’ International Airport in Timișoara to Pan-European

Transport Corridor IV, is financed in part by the European Regional Development Fund.

- 10 As to the substance, the CNSC requests the Court of Justice, in essence, to rule on whether the tender documents may be supplemented by the provisions of national law relating to various activities coming within the scope of the public contract but which are of minor importance in the contract, and on the requirement to name subcontractors for those activities in the tender.
- 11 According to the CNSC, this problem is often encountered in its practice and in that of the national courts and has given rise to a non-uniform approach which is liable to limit the participation of a large number of operators in the European area in tender procedures in Romania.
- 12 In this context, the CNSC refers to the judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404), in which the Court of Justice held that an operator cannot be excluded from the procedure on account of requirements not set out in the documentation and that the principles of transparency and equal treatment which govern all procedures for the award of public contracts require that the substantive and procedural conditions concerning participation in a contract be clearly defined in advance, in order that the tenderers may know exactly the obligations resting on them and be sure that the same requirements apply to all candidates.
- 13 The CNSC points out that the contracting authority alone lays down the selection criteria, on the basis of its right of assessment, since the CNSC and the courts cannot assess the need to determine them in its place. On the other hand, operators who have been adversely affected may, in proceedings, contest only procurement documents deemed to be too restrictive but cannot challenge documents on the ground that they are too permissive, that is to say, that they contain supplementary criteria liable to limit access to the procedure for other operators.
- 14 The CNSC considers that, in the light of the non-uniform national practice, it is necessary to determine the extent to which the case-law resulting from the *Pizzo* judgment may be applied as regards the supplementation of the procurement documents with the provisions of national law relating to various activities which come within the scope of the public contract but which are of minor importance in that contract.
- 15 A further matter which the Court of Justice ought to clarify concerns the requirement to name the subcontractors for all the activities of the contract, irrespective of their importance therein, since this issue has significant consequences for competition in major [tendering] procedures for infrastructure in Romania, in which there are many secondary activities which require such authorisations.
- 16 Consequently, irrespective of when and to what extent a subcontractor is involved in the work – that is to say, whether its services are necessary at the start or end of the work, whether they are of major or minor importance in the work, and whether

or not it is certain that those services are necessary – in many situations it is considered that such a subcontractor must be named at the time when the tenders are submitted. For example, in the present case, the applicant states, inter alia, that it was necessary to name a subcontractor for the activity of obtaining approval for setting aside expropriated land located outside urban areas even though the procurement documents use the phrase ‘only where appropriate’ in that regard.

- 17 The CNSC considers that the contracting authority alone is able to lay down the relevant selection criteria, in compliance with the principles of proportionality and transparency. If it were accepted that the procurement documents could be supplemented by criteria the necessity of which arose from special laws which are not relevant to public contracts, the second subparagraph of Article 58(1) of Directive 2014/24 would be infringed since automatic supplementation with such criteria would not comply with the principle of proportionality and the right of the authority to lay down the selection criteria.
- 18 In the view of the CNSC, to require subcontracting as the only form of an activity infringes both contractual freedom and the right of economic operators to organise themselves and Article 63 of Directive 2014/24, under which, in the case where an economic operator wishes to rely on the capacities of other entities, it must prove to the contracting authority that it will have at its disposal the resources necessary, ‘for example, by producing a commitment by those entities to that effect’.
- 19 Consequently, the CNSC takes the view that, in so far as the production of a commitment is sufficient to demonstrate certain selection criteria, a declaration of willingness on the part of authorised specialists is *a fortiori* sufficient in the case where no such criteria are laid down and a series of activities of minor importance in the tender is involved.