Case C-769/23

Request for a preliminary ruling

Date lodged:

13 December 2023

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

5 December 2023

Appellant:

Mara soc. coop. arl

Respondents:

Ministero della Difesa

Gruppo Samir Global Service Srl

[…]

ITALIAN REPUBLIC

Consiglio di Stato (Council of State)

in sede giurisdizionale (Sezione Quinta) (sitting as a Court (Fifth Chamber))

has made the following

ORDER

in relation to the appeal […] brought by

Mara soc. coop. r.l. […];

v

Ministero della Difesa […] Gruppo Samir Global Service s.r.l. […];

for the reversal

[…] of judgment No. 6259/2023 of the Tribunale Amministrativo Regionale per il Lazio, Roma, sez. I (Lazio Regional Administrative Court (First Chamber), Rome, Italy) concerning the parties;

[…] [*standard wording*]

I. FACTS

1. By a contracting decision of 14 July 2022, which was the subject of prior information in the supplement to the Official Journal of the European Union 2021/S 253-672319, of 29 December 2021, the Ministero della difesa (Ministry of Defence, Italy) launched an open procedure within the European Union, pursuant to Article 60 of decreto legislativo n. 50 (Codice dei contratti pubblici) (Legislative Decree No 50 establishing the Public Procurement Code) of 18 April 2016 (applicable at the time), for the procurement of occasional and urgent labour services related, and unrelated, to transport for central and peripheral needs, and not, of the Ministry itself, year 2023 (contract notice 3144713), renewable for three years, divided into nine lots.

The present case concerns the procedure relating to Lot No 6 (CIG 9351659124 – NUTS code ITH41), concerning '*Aeronautica Militare area nord*' (Air Force, northern area), for an amount of EUR 532 786.89 (estimated total amount in the call for tenders: EUR 5 200 565.31 net of VAT and/or other taxes and statutory contributions). For the purposes of the Community threshold, and therefore under Article 35 of Legislative Decree No 50 of 2016, the value of the lot – including the amounts for possible renewals – was indicated in the tender specifications as a total of EUR 3 463 114.72, net of VAT (and the total value of the contract, again for the purposes of the Community threshold, was indicated as EUR 33 803 674.52, net of VAT).

The tender rules laid down the award criterion of the lowest price, in accordance with Article 95(4)(b) of Legislative Decree No 50 of 2016, since it was a service with standardised characteristics. The reduction should have been proposed only on the premium placed on the contract value in the contract notice and, in that regard, the second paragraph of Article 17 of the tender specifications stated as follows: 'in view of the fact that the percentage discount requested will be made only on the premium, labour costs will remain unchanged since the salaries of the workers employed are paid on the basis of the sectoral collective agreement. Consequently, the objectives of Article 50 of Legislative Decree No 50 of 2016, which essentially seek to ensure employment levels and protect workers through the application of the CCNLs [(national collective labour agreements)], are not affected'.

The contract for Lot No 6 was awarded to Mara s.c.r.l., now the appellant, which offered a 100% reduction. Another competitor, Gruppo SAMIR Global Service

s.r.l., had also offered a 100% reduction; and so had another competitor. However, the contract was awarded to Mara by drawing lots […].

II. THE JUDGMENT AT FIRST INSTANCE

2. Gruppo SAMIR Global Service s.r.l. therefore challenged, before the Lazio Regional Administrative Court, the award decision in favour of the competitor […]. [*Other documents challenged which are not relevant to the question referred for a preliminary ruling*]. The applicant raised complaints against the tender submitted by the successful tenderer and, in the alternative, seeking the annulment of the entire call for tenders.

[…]. [*National proceedings*].

3. By judgment No 6259 of 11 April 2023, the Lazio Regional Administrative Court, sez. I-bis (First-*bis* Chamber), Rome, upheld the main appeal of Gruppo SAMIR, within the limits of the interest which it claims, and, consequently, annulled the contract notice in relation to Lot No 6 […]. [*National proceedings*].

III. THE APPEAL

4. By the appeal currently being considered, Mara has sought to have the judgment at first instance […] set aside. It has submitted two grounds of appeal. The company Gruppo SAMIR Global Service s.r.l. has cross-appealed.

By its first ground of appeal, in particular, the main appellant has alleged that Article 95(3)(a) of Legislative Decree No 50 of 2016 has been infringed, claiming that the rule laid down therein – which does not allow for the choice of the criterion of the lowest price for labour-intensive contracts – does not apply to those contracts which, as in the present case, also have standardised characteristics. Otherwise, that provision – according to the appellant – would be contrary to EU law and, in particular, to Article 67 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 (Text with EEA relevance). The appellant notes that the abovementioned EU provision pursues the objective of favouring the best quality of performance (which is also in line with the resolution of 25 October 2011 on modernisation of public procurement (2011/2048(INI)), which preceded the adoption of the 2014 Directive) and establishes the preference for the criterion of the most economically advantageous tender; even from that perspective, however, the national provision allegedly infringes the principle of proportionality, in so far as it goes beyond what is necessary to achieve the objectives set out in the Directive, as the criterion of the lowest price may well be accepted in the case of highly standardised goods or services, there being no real need in such cases to acquire differentiated technical offers. The appellant has therefore requested that the Chamber refers a question to the Court of Justice of the European Union for a preliminary ruling.

5. […] [*national proceedings*].

IV. FACTS AT ISSUE AND APPLICABLE LAW

6. The matter at issue, which remains after the partial decision in the present appeal proceedings, concerns whether a public call for tenders (in this case, for the award of a service contract for the provision of labour services related to the transport of goods) which is labour-intensive but, at the same time, has standardised characteristics, must be carried out in accordance with the award criterion of the most economically advantageous tender or whether, on the contrary, there remains a margin of discretion, on the part of the contracting authority, as to the possible choice of the criterion of the lowest price.

The relevant national provisions provide as follows:

- Article 95(3)(a) of Legislative Decree No 50 of 2016 (applicable *ratione temporis* to the contract at issue) provides that: 'The following shall be awarded exclusively on the basis of the criterion of the most economically advantageous tender determined on the basis of the best price-quality ratio:

a) contracts relating to social services, and hospital, care and school catering services, as well as labour-intensive services, as defined in Article 50(1), without prejudice to awards within the meaning of Article 36(2)(a);

b) contracts relating to the award of engineering and architectural services and other services of a technical and intellectual nature for an amount of EUR 40 000 or more;

b-*bis*) service and supply contracts for an amount of EUR 40 000 or more that have significant technological content or are innovative';

- in turn, the provisions referred to in (a) provide that (Article 50(1)): 'for the award of concession contracts and contracts for works and services other than those of an intellectual nature, in particular those relating to labour-intensive contracts, contract notices, notices and invitations shall include, in compliance with the principles of the European Union, specific social clauses aimed at promoting occupational stability of employed staff, providing for the application by the successful tenderer of the collective sectoral agreements referred to in Article 51 of decreto legislativo n. 81 (Legislative Decree No 81) of 15 June 2015. Labour-intensive services are those in which the labour cost is at least equal to 50% of the total amount of the contract'; […] [*text of Article 36(2)(a), not relevant in the present dispute*];

- Article 95(4)(b) of Legislative Decree No 50 of 2016 provides as follows:

‘The criterion of the lowest price may be used: […] (b) for services and supplies with standardised characteristics or whose conditions are defined by the market, with the exception of labour-intensive services referred to in paragraph 3(a)’.

The latter exception was introduced into the text of the law by Article 1(20)(t)(3) of decreto-legge n. 32 (Disposizioni urgenti per il rilancio del settore dei contratti pubblici, per l’accelerazione degli interventi infrastrutturali, di rigenerazione urbana e di ricostruzione a seguito di eventi sismici) (Decree-Law No 32 on urgent provisions for the relaunch of the public contracts sector, for the acceleration of infrastructural interventions, urban regeneration and reconstruction following seismic events)) of 18 April 2019, converted, with amendments, into legge n. 55 (Law No 55) of 14 June 2019.

The law, however, does not provide a definition of services (or supplies) with ‘standardised characteristics’, but it may be considered that it intended to refer, at least as regards services, to performance that is characterised by a high degree of repetitiveness and does not have customisable elements (for example, of technological or innovative scope), in relation to which it is difficult to envisage that a contribution by the competitor could affect the expectation of uniform performance; accordingly, for reasons of economic efficiency and expeditiousness of the procedure, the use of the criterion of the lowest price is permitted, there being no particular need to use the criterion of best technical quality in the competitive comparison.

7. It therefore follows from the above national legal framework that, for services or supplies with standardised characteristics, the administration is entitled to (‘may’)) provide for the criterion of the lowest price (Article 95(4)(b) of Legislative Decree No 50 of 2016); however, this is subject to the express exception for ‘labour-intensive services’, that is to say, those for which the labour cost is at least half of the total amount of the contract (as in the present case). In the latter case, Article 95(3)(a) imposes exclusively the criterion of the most economically advantageous tender.

The plenary session of the Council of State, which has jurisdiction in the national legal system to settle disputes in the case-law concerning the application of the rules and to set out the principles of law relating thereto […], was called upon to examine – in the context of a case which, as in the present case, concerned a contract with standardised, but labour-intensive, characteristics – the relationship between the provision of Article 95(3) of Legislative Decree No 50 of 2016, which lays down the criterion of the most economically advantageous tender for labour-intensive services, and the provision of [Article 95](4), which allows the use of the criterion of the lowest price for services and supplies with standardised characteristics. That is to say, before the legislature, in 2019, amended the text of [Article 95](4)(b), cited above, by adding the exception concerning labour-intensive services.

In that regard, the plenary session pointed out that the rationale for imposing the criterion of the most economically advantageous tender, for the award of labour-intensive services, is that of pursuing the objectives – which are overriding objectives, according to the Constitution and EU law, in the field of public contracts – of protection of workers. At the same time, it warned that those objectives cannot be sacrificed for technical requirements and discretionary determinations of the authorities. In resolving the apparent conflict between Article 95(3) and (4), the following principle of law was therefore established: 'contracts for labour-intensive services within the meaning of Articles 50(1) and 95(3)(a) of the Public Procurement Code are, in any event, awarded on the basis of the criterion of best price-quality ratio, even when they also have standardised characteristics within the meaning of [Article 95](4)(b) of that code' (judgment No 8 of 21 May 2019).

8. Applying that principle, as further confirmed by the subsequent administrative case-law at first instance, the Lazio Regional Administrative Court therefore took the view, in the context of the present case, that the contract at issue – precisely because it is labour-intensive, albeit with standardised characteristics – should necessarily have laid down the award criterion of the most economically advantageous tender. Consequently, the Regional Administrative Court held that the *lex specialis* clause which provided for the award criterion of the lowest price was unlawful and, consequently, annulled the entire call for tenders.

In particular, the call for tenders at issue in this case – on the one hand – is aimed at the award of 'occasional labour' services, with indisputably standardised characteristics, consisting merely of 'loading and unloading operations, assembling and breaking-up packages, stacking and unstacking incoming and outgoing materials, moving materials and anything else defined as ordinary labour for the needs of warehouses, factories, entities, naval vessels and/or military airports and military entities' (see Article 17, page 33, of the tender specifications), to be rendered in favour of the Ministry of Defence. The same call for tenders – on the other hand – is characterised, just as indisputably, by the labour-intensive nature of the workforce, which consists of the workforce to be dedicated to the described loading, unloading and transport of goods operations: the fact that the labour cost is, in the case, at least equal to 50% of the total amount of the contract, as defined in the second sentence of Article 50(1) of Legislative Decree No 50 of 2016, is a matter of fact in the present case which is not in dispute between the parties.

9. The appellant criticises the conclusions reached by the Regional Administrative Court, claiming that, as regards the envisaged merely physical and handling of packages operations – operations which, by their nature, are repetitive and standardised – there can be no real need to give rise to the acquisition of differentiated technical tenders, which would unnecessarily increase the tender procedure and violate the constitutional principle of sound public administration.

In the present case, moreover – as the appellant submits – the reduction in the tender had to be made not on a base price including labour costs, but rather, exclusively, on the premium; the latter must be calculated, however, already net of labour costs. The penultimate paragraph of Article 17 of the tender specifications provided as follows: 'Even though the contract is to be awarded at the lowest price, in view of the fact that the percentage discount requested will be made only on the premium, the labour costs will remain unchanged in so far as the wages of the workers employed are paid under the sectoral collective agreement. Consequently, the objectives of Article 50 of Legislative Decree 50/2016, which essentially seek to ensure employment levels and to protect workers through the application of the CCNLs, are not affected'.

The reduction, therefore, could only be made on the potential profit of the undertaking, with unchanged labour costs: this therefore left intact the guarantees relating to the necessary protection of workers employed in the contract. In this way, according to the appellant, protection was ensured both for the needs of the contracting public administration and for the economic and safety conditions at work.

9.1. Under EU law, the appellant refers to the provisions of the last subparagraph of Article 67(2) of Directive 2014/24/EU, according to which 'Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts'. That provision should be read in accordance with the principle of proportionality, which is a general principle of Union law, according to which the rules laid down by the Member States, in implementing the provisions of Directive 2014/24/EU, should not go beyond what is necessary to achieve the objectives of that directive.

The objective of favouring the best quality of performance, in the light of recital 92 of the directive, according to which 'contracting authorities should be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs' is also important. As regards the practicability of the criterion of the lowest price, despite the preference for the criterion of the most economically advantageous tender, the appellant also refers to the resolution of 25 October 2011 on modernisation of public procurement (2011/2048(INI)), which preceded the approval of the 2014 directives, by which the European Parliament, while taking the view that 'the criterion of lowest price should no longer be the determining one for the award of contracts, and that it should, in general, be replaced by the criterion of most economically advantageous tender, in terms of economic, social and environmental benefits – taking into account the entire life-cycle costs of the relevant goods, services or works' stresses, in any event, 'that this would not exclude the lowest price as a decisive criterion in the case of highly standardised goods or services'.

The Italian legislature, therefore, allegedly exercised the option provided for in Article 67 of Directive 2014/24/EU, by prohibiting the use of the criterion of the lowest price for the specific type of labour-intensive services (Article 95(4)(b) of Legislative Decree No 50 of 2016), but even where the contract has, at the same time, standardised characteristics, that is to say, where the qualitative aspects of the services are not relevant. To impose, in the latter case, the criterion of the best price-quality ratio allegedly manifestly goes beyond what is necessary to achieve the objectives, referred to above, pursued by the directive and is, therefore, contrary to the principle of proportionality.

10. The Chamber is of the view that the question for a preliminary ruling, as proposed by the appellant, must be referred to the Court of Justice of the European Union, especially since the referring court is a court of last instance within the meaning of Article 267 TFEU.

After reiterating that the nature of the contract at issue, which has as its object a labour-intensive service, but at the same time has standardised characteristics (as regards the performance requested from the workforce, which is characterised by the repetitive nature of the work), is not in dispute between the parties, the appellant's complaint, which refers to the violation of the principle of proportionality, is particularly significant in the light of the provisions of the tender rules which, in the present case, set as the award criterion the highest reduction, to be calculated exclusively on the premium, without prejudice to the labour costs.

In addition, it is important to note that, in the present case, compliance with the economic conditions and safety at work has already been ascertained both by the contracting authority, in the context of the sub-proceedings for verifying anomalies in the tenders, and by the national court, which rejected the pleas, put forward by the applicant at first instance, by which the lawfulness of the successful tenderer's tender had been challenged precisely in relation to the violation of minimum wages.

The strict application of the internal rules, which (through what is permitted by Article 67 of Directive 2014/24/EU) introduced the prohibition of the criterion of the maximum reduction for situations corresponding to the present case, should allegedly therefore lead to the annulment of the call for tenders for failure to provide for the criterion of the most economically advantageous tender, for which there is an indisputable preference in the sources of EU law cited by the appellant.

In the present case, the typical advantages, linked to the protection of workers, which normally arise from the use of such an award criterion, were achieved to the same extent, despite the provision at issue, in the tender rules, of the different criterion of the maximum reduction, as set out according to the conditions summarised above. The reduction applied only to the premium, without prejudice to the labour costs, especially in light of the finding, in the context of administrative and judicial proceedings, that there had been no violation of the

protections which must accompany the provision of labour, which therefore leads to the conclusion that the obligation to provide for the award criterion of the best price-quality ratio is disproportionate, since it does not take into consideration any aspects of technical improvement which could, in principle, have characterised the tenders relating to standardised provision.

It follows that the preference in EU law for the criterion of the most economically advantageous tender does not appear to coincide, in the present case, with the reasons on which it is allegedly based and that, consequently, the imposition of that criterion appears to be a manifestly excessive, disproportionate and unjustified measure.

V. THE QUESTION REFERRED TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING

11. In the light of the foregoing considerations, in view of the importance – for the purposes of deciding on the last remaining complaint, raised in the present case – of the issue of the compatibility of the abovementioned national legislation with the provisions of EU law referred to, the Chamber asks the Court of Justice of the European Union to give a preliminary ruling on the following question:

‘*do the principles of freedom of establishment and freedom to provide services, referred to in Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU), the [EU] principle of proportionality and Article 67(2) of Directive 2014/24/EU preclude the application of national legislation on public procurement, such as the Italian legislation in Article 95(3)(a) and (4)(b) of Legislative Decree No 50 of 18 April 2016, and in Article 50(1) of that legislative decree, as also arising from the principle of law laid down by the Plenary Session of the Council of State in judgment No 8 of 21 May 2019, according to which, in the case of contracts concerning services with standardised characteristics and, which are, at the same time, labour-intensive, the contracting authority is prohibited from providing for, as an award criterion, the lowest price, even where the tender rules provide for the reduction only on the premium or potential profit of the undertaking, without prejudice to the labour costs?*’.

12. […]. [*List of documents sent to the Registry*].

[…] [*stay of proceedings*].

FOR THOSE REASONS

The Council of State (Fifth Chamber), sitting as a court

refers the question set out in the grounds of this order to the Court of Justice of the European Union for a preliminary ruling and […] stays the proceedings.

[…] [*transmission of documents*] […]. Thus decided in Rome […] 12 October 2023 […].