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The European Court of Justice has given a liberal interpretation to the articles 47, 2 and 48, 3 of the directive 2004/18/EG

In its decision "Ostas celtnieks SIA v. Talsu novada pašvaldiba, Iepirkumu uzraudzibas birojs[1] of 14 January 2016, the European Court of Justice (hereafter "ECJ") ruled that a tenderer who relies on the capacities of other entities cannot, under articles 47 (2) and 48 (3) of Directive 2004/18/EC [2], be obliged by means of the call for tenders to conclude a cooperation agreement or set up a partnership with these entities prior to the awarding of the contract.

The occasion for this decision was a request for a preliminary ruling submitted by the Latvian Supreme Court, which was faced with a dispute between a tenderer and the Administration of the Municipality of Talsi. The latter had issued a call for tenders on a public procurement contract for works intended to improve the road infrastructure so as to make the municipality more accessible. In the specifications it had included the following provision:

'... in the event of the tenderer relying on the capacities of other contractors, it must mention all those contractors and provide evidence that it has the necessary resources at its disposal. If that tenderer is to be awarded the contract, it must have concluded a cooperation agreement with the contractors concerned before the award and forwarded this to the contracting authority. [That agreement] must include the following:

(1) a clause stipulating that each party is to be jointly and severally liable for the performance of the contract;

(2) the indication of the main operator authorised to sign the public contract and to direct its performance;

(3) a description of the part of the works to be completed by each of the participants;

(4) the volume of the works which each participant is to carry out, expressed as a percentage.

The conclusion of a cooperation agreement may be replaced by the setting up of a partnership.'

The Latvian Supreme Court was already the third instance to deal with this tender provision. While the Office for the Supervision of Public Contracts had ruled that such a condition was perfectly legitimate, the Local Administrative Court and afterwards the Supreme Court saw the

potential problem with such a provision. They wondered whether a contracting authority may indeed impose the manner in which tenderers integrate the resources of other contractors into the assignment, or whether they may freely determine this themselves. Conversely, the administration of the Municipality of Talsi argued that its interest in reducing the risk of non-performance justified such a provision.

The ECJ thus had to focus on the interpretation of articles 47(2) and 48(3) of the Directive 2004/18/EC, since these provisions make it possible for a tenderer to rely for specific contracts on the capacities of other entities, regardless of the legal nature of its relationships with those entities. Moreover, the tenderer must demonstrate to the contracting authority that, for the execution of the contract, it can actually dispose of the necessary resources of these entities, for example, as the directive provides, by producing undertakings on this from these entities.

The 1999 Holst Italia[3] decision served, together with the objective of opening up public procurement contracts for the greatest possible competition, as the basis for the ultimate assessment by the ECJ. By analogy with this decision, it decided that articles 47(2) and 48(3) do not allow the contracting authority, in examining the tenderer´s suitability, to assume that such a tenderer does or does not have the resources necessary to perform the contract[4], just as it is not allowed to exclude a priori certain types of proof. Consequently, the ECJ decided that 'the tenderer is free to choose, on the one hand, the legal nature of the links it intends to establish with the other entities on whose capacities it relies in order to perform a particular contract and, on the other, the type of proof of the existence of those links'. Moreover, it decided that this also explicitly follows from the examined articles, given that they provide that 'by way of example that the production of an undertaking by other entities to make available to the tenderer the resources necessary for the performance of the contract is acceptable proof of the fact that it actually has those resources'.

[1]ECJ 14 January 2016, no. C-234/14, ECLI:EU:C:2015:365

[2]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 Official Journal L no. 32004L0018 of 31 March 2004

[3]ECJ 2 December 1999, no. C-176/98, ECLI:EU:C:1999:593

[4]See on this the Council of State, 9 February 2012, Heijmans v. Belgian State, no. 217/835, 8 and 10 in which the court ruled that the mere fact that a tenderer belongs to a group of enterprises does not suffice to demonstrate that it can also rely on their capacities or resources necessary for the execution of the contract, nor does it allow one to presume that there exists an undertaking vis-à-vis this tenderer on the part of these other enterprises.

For more information on this topic, you can consult Kato Verbouwe (author) and Kris Lemmens (Public Procurement and PPP department head).

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