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SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

JUDGMENT OF THE COURT (Fourth Chamber)

18 November 2010 *

(Failure of a Member State to fulfil obligations – Directive 2004/18/EC – Public procurement procedures – Award of a contract for interpretation and translation services – Services falling within the ambit of Annex II B of the Directive – Services not subject to all the requirements of the Directive – Weighting of the award criteria determined after tenders have been submitted – Weighting altered following an initial review of the tenders submitted – Compliance with the principle of equal treatment and the obligation of transparency)

In Case C-226/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 19 June 2009,

European Commission, represented by M. Konstantinidis and A.-A. Gilly, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, and A.M. Collins, SC, with an address for service in Luxembourg,

defendant,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen (Rapporteur), C. Toader and A. Prechal, Judges,

Advocate General: P. Mengozzi,

* Language of the case: English.

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 29 June 2010,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by attributing weightings to the criteria for the award of a contract for the provision of interpretation and translation services after the closing date for the submission of tenders and by altering those weightings following an initial review of the tenders submitted, Ireland has failed to fulfil its obligations under the principles of equal treatment and transparency, as interpreted by the Court of Justice of the European Union.

Legal context

- 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 (OJ 2004 L 134, p. 114) ('the Directive') provides, in Chapter III of Title II thereof, for a 'two-tier' approach to public service contracts.
- 3 Article 20 of the Directive provides that contracts which have as their object services listed in Annex II A to the Directive are to be awarded in accordance with the provisions laid down in Articles 23 to 55 of the Directive.
- 4 Those articles set out the specific rules governing specifications and contract documents (Articles 23 to 27), procedures (Articles 28 to 34), advertising and transparency (Articles 35 to 43) and the conduct of the procedure (Articles 44 to 55).
- 5 Article 21 of the Directive, on the other hand, provides that '[c]ontracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4)'.
- 6 Since interpretation and translation services are not listed in Annex II A to the Directive, they fall within Category 27, entitled 'Other services', of Annex II B.
- 7 Article 23 of the Directive lays down rules governing the technical specifications to be set out in the contract documentation.

8 Article 35(4) of the Directive provides that, after a contract has been awarded, the contracting authorities which have awarded the contract are to send the Commission a notice of the results of the award procedure.

9 Article 37 of the Directive provides as follows:

‘Contracting authorities may publish in accordance with Article 36 notices of public contracts which are not subject to the publication requirement laid down in this Directive.’

10 Article 53 of the Directive, entitled ‘Contract award criteria’, which does not apply to the award of contracts listed in Annex II B to the Directive, provides in paragraph 2 thereof as follows:

‘Without prejudice to the provisions of the third subparagraph, in the case [where the award is made to the most economically advantageous tender] the contracting authority shall specify in the contract notice or in the contract documents ... the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

...

Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents ... the criteria in descending order of importance.’

The factual background to the case and the pre-litigation procedure

11 On 16 May 2006, the Irish Department of Justice, Equality and Law Reform (‘the contracting authority’) published contract notice No 2006/S 92-098663 in the *Official Journal of the European Union* (OJ 2006 S 92) for the award of a contract for the provision of interpretation and translation services to a number of competent institutions dealing with asylum matters (‘the contract at issue’).

12 Section IV.2.1 of the contract notice stated that the contract would be awarded to the most economically advantageous tender on the basis of the following seven criteria:

- ‘1. Completeness of tender documentation.
2. Stated ability to meet requirements.
3. Range of lots [the contract was subdivided into several lots], services and languages.
4. Qualifications, relevant experience.

5. Cost.
 6. Suitability of proposed arrangements.
 7. Reference sites.’
- 13 Section VI.3 of the notice stated that the seven criteria were not listed in descending order of importance.
- 14 The invitation to tender document set out the criteria in a similar manner and they were numbered 1 to 7. However, unlike the contract notice, that document did not expressly state that the criteria were not listed in descending order of importance.
- 15 Accordingly, the relative weighting to be attributed to each of the seven criteria selected to determine the most economically advantageous tender from the point of view of the contracting authority was not specified either in the contract notice or in the invitation to tender document. Nor was it stated in those documents whether relative weightings would subsequently be attributed to those criteria.
- 16 Twelve companies, three of which are established outside Ireland, submitted a tender before the closing date set for that purpose, which was 9 June 2006.
- 17 On that day, the members of the evaluation committee received an evaluation matrix suggesting that the following relative weightings should be applied to the seven criteria in question:
- ‘1. Completeness of tender documentation: 0%.
 2. Stated ability to meet requirements: 7%.
 3. Range of lots, services and languages: 25%.
 4. Qualifications, relevant experience: 30%.
 5. Cost: 20%.
 6. Suitability of proposed arrangements: 10%.
 7. Reference sites: 8%.’
- 18 The purpose of the evaluation matrix was to enable each member of the evaluation committee to carry out an initial review, on an individual basis, of the tenders submitted.
- 19 On 13 June 2006, after examining some of the tenders in that manner, one of the members of the committee sent an email to the member of the contracting authority’s services who had drawn up the evaluation matrix and communicated

the tenders received to the committee, in which he proposed varying the weightings attributed to the award criteria.

- 20 On 22 June 2006, at its first meeting, the evaluation committee decided, before evaluating, collectively, the tenders submitted, to alter the relative weighting of the criteria by reducing to 25% the weighting to be attributed to the fourth criterion (previously set at 30%), and by raising to 15% the weighting to be attributed to the sixth criterion (previously set at 10%). The weighting attributed to the remaining evaluation criteria remained unchanged.
- 21 The committee then went on to evaluate the tenders and to award the contract, applying to the seven criteria the new weightings which had just been approved.
- 22 After receiving a complaint, the Commission exchanged correspondence with Ireland during May 2007.
- 23 In the light, inter alia, of Ireland's replies to both the letter of formal notice of 17 October 2007 and the reasoned opinion of 18 September 2008, the Commission took the view that the procedure for the award of the contract at issue had been conducted in breach of the principle of equal treatment and the consequent obligation of transparency and it therefore decided to bring the present action.

The action

- 24 First, it is not disputed that the contract at issue comes within the scope of the Directive and that the interpretation and translation services in question belong to the category of non-priority services listed in Annex II B thereto.
- 25 It should be recalled that Article 21 of the Directive provides that '[c]ontracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4)'.
- 26 It is clear from a reading of Article 21 in conjunction with Articles 23 and 35(4) of the Directive that where, as in the present case, the contracts relate to services falling within the ambit of Annex II B to the Directive, the contracting authorities are required to comply only with the rules governing technical specifications and to send the Commission a notice setting out the results of the award procedure for those contracts.
- 27 By contrast, the other rules laid down by the Directive in relation to the coordination of procedures, in particular those applicable to the requirements to put out contracts to competition by means of prior advertising and those laid down in Article 53 of the Directive relating to the contract award criteria, are not applicable to such contracts.

- 28 As far as concerns the services listed in Annex II B to the Directive, full application of the Directive should, as stated in recital 19 in the preamble thereto, be limited for a transitional period to contracts where its provisions will permit the full potential for increased cross-frontier trade to be realised.
- 29 However, even though contracting authorities which conclude contracts listed in Annex II B to the Directive are not subject to the rules laid down in the Directive relating to the requirements to put contracts out to competition by means of prior advertising, they nevertheless remain subject to the fundamental rules of the European Union, in particular to the principles laid down by the Treaty on the Functioning of the European Union (TFEU) on the right of establishment and the freedom to provide services (Case C-507/03 *Commission v Ireland* [2007] ECR I-9777, paragraph 26).
- 30 According to settled case-law, the purpose of coordinating at European Union level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in another Member State (*Commission v Ireland*, paragraph 27 and the case-law cited).
- 31 It follows that the system established by the European Union legislature for contracts relating to services falling within the ambit of Annex II B to the Directive cannot be interpreted as precluding application of the principles deriving from Articles 49 TFEU and 56 TFEU, in the event that such contracts are nevertheless of certain cross-border interest (see, to that effect, *Commission v Ireland*, paragraph 29) or, therefore, of the requirements designed to ensure transparency of procedures and equal treatment of tenderers (see, to that effect, Case C-91/08 *Wall* [2010] ECR I-0000, paragraph 37).
- 32 The obligation of transparency applies where the contract for the provision of services in question may be of interest to an undertaking located in a Member State other than that in which the contract is to be awarded (see, to that effect, *Commission v Ireland*, paragraph 29).
- 33 That the contract at issue in the present case may have been of interest to undertakings located in a Member State other than Ireland is apparent both from the publication of a notice for that contract in the *Official Journal of the European Union* and from the fact that three of the tenderers were undertakings established in a Member State other than Ireland (see, to that effect, *Wall*, paragraph 35).
- 34 It is in the light of those considerations that it is necessary to examine the merits of the two complaints raised by the Commission, which do not refer to either of the two provisions of the Directive laying down the rules governing the award of a contract falling within the ambit of Annex II B thereto, namely Articles 23 and 35(4), but are based on two requirements under European Union primary law,

namely respect for the principle of equal treatment and the consequent obligation of transparency.

The first complaint: weightings were attributed to the award criteria after the closing date for the submission of tenders

Arguments of the parties

- 35 The Commission submits that Ireland has infringed the principles of equal treatment and transparency by not attributing relative weightings to the seven award criteria for the contract at issue until after the closing date for the submission of tenders.
- 36 According to the Commission, the belated weighting significantly altered the relative importance of the criteria by comparison with that attached to the criteria as originally published and with the weighting which tenderers could reasonably have expected on the basis of the contract documents.
- 37 In that connection, Ireland submits, first, that, contrary to what the Commission stated in its application initiating proceedings, at no time prior to the submission of the tenders did the contracting authority state, either impliedly or expressly, that the award criteria set out in the contract notice and the invitation to tender were listed in descending order of importance.
- 38 To the contrary, the contract notice stated that the award criteria were not listed in descending order of importance and at no time did the contracting authority subsequently give any indication to suggest that that position had changed.
- 39 Moreover, while it acknowledges that the evaluation committee appointed by the contracting authority attributed relative weighting to the award criteria after the closing date for the submission of tenders, Ireland disputes that that determination of the relative weighting of the various criteria infringed the principles of equal treatment and transparency.

Findings of the Court

- 40 First, the fact that Ireland requested the publication of the relevant notice in the *Official Journal of the European Union*, as permitted under Article 36 of the Directive, does not mean that that Member State is under any obligation to award that contract in accordance with the provisions of the Directive which are applicable to public contracts falling within the ambit of Annex II A thereto (see, by analogy, concerning a public contract outside the scope of a directive, Case 45/87 *Commission v Ireland* [1988] ECR I-4929, paragraphs 9 and 10).
- 41 In order for it to be accepted that the first complaint is well founded, it would be necessary for the specific rule governing the prior weighting of the award criteria for a contract falling within the ambit of Annex II A to the Directive to be

regarded as constituting a direct consequence of the fact that the contracting authorities are required to comply with the principle of equal treatment and the consequent obligation of transparency.

- 42 It is true that, according to the Court's case-law relating to public contracts awarded in accordance with all the provisions of the various public procurement directives which preceded the adoption of the Directive, the purpose of the requirement to inform tenderers in advance of the award criteria and, where possible, of their relative weighting, is to ensure that the principles of equal treatment and transparency are complied with (see, *inter alia*, Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 98, and Case C-331/04 *ATI EAC and Viaggi di Maio and Others* [2005] ECR I-10109, paragraphs 22 to 24).
- 43 However, while the requirement to state the relative weighting for each of the award criteria at the stage of publication of the contract notice, as now provided for under Article 53(2) of the Directive, meets the requirement of ensuring compliance with the principle of equal treatment and the consequent obligation of transparency, it cannot legitimately be argued that the scope of that principle and that obligation extends, in the absence of a specific provision to that effect in the Directive, to requiring that, in the context of contracts not subject to a provision such as Article 53 of the Directive, the relative weighting of criteria used by the contracting authority is to be determined in advance and notified to potential tenderers when they are invited to submit their bids. Indeed, as the Court indicated by the use of the phrase 'where possible' in the case-law referred to in the paragraph 42 above, the reference to the weighting of the award criteria in the case of a contract that is not subject to a provision such as Article 53(2) of the Directive does not constitute an obligation for the contracting authority.
- 44 It follows that Ireland, which had granted potential tenderers access to appropriate information concerning the contract at issue prior to the closing date for the submission of tenders, did not infringe the principle of equal treatment or the consequent obligation of transparency by attributing weightings to the award criteria without granting the tenderers access to those weightings before the closing date for the submission of tenders.
- 45 Specifically, in the call for tenders at the origin of this case, the contracting authority provided more information than is required by the Directive and the award criteria for the contract at issue were not formulated in the contract documentation in such a way that there could be held to be a difference in treatment to the detriment of undertakings located in a Member State other than Ireland which might have been interested in the contract.
- 46 By attributing weightings to those criteria, the contracting authority simply set out the terms on which the tenders submitted were to be evaluated, without in any

way infringing the obligation to interpret the award criteria in the same way, since they were not listed in descending order of importance.

- 47 It cannot be assumed from the fact that the award criteria have been listed without any indication of a relative weighting for each individual criterion that they are necessarily listed in descending order of importance or that the award criteria have the same weighting.
- 48 Moreover, the relative weighting of the award criteria communicated to the members of the evaluation committee in the form of a matrix would not have provided potential tenderers, had they been aware of that weighting at the time the bids were prepared, with information which could have had a significant effect on that preparation and did not constitute an alteration of those criteria (see, to that effect, *ATI EAC and Viaggi di Maio and Others*, paragraph 32).
- 49 It should be added that there is no evidence in the present action, as presented before the Court, that the relative weighting of the award criteria was fixed after the envelopes containing the tenders submitted were opened.
- 50 Accordingly, the first complaint relied on by the Commission in support of its action must be rejected as unfounded.

The second complaint: the weighting of the criteria was altered after an initial review

Arguments of the parties

- 51 The Commission submits that, by altering the relative weighting of the award criteria for the contract at issue, as set out in the evaluation matrix, after the initial review of the tenders submitted, Ireland infringed the principles of equal treatment and transparency.
- 52 It states that such an alteration, made after an initial review of the tenders, constitutes an infringement of the principle of equal treatment, without there being any need to ascertain whether the initial review of the tenders was carried out on an individual basis by the various members of the evaluation committee or collectively by all the committee members.
- 53 Ireland maintains that the weighting was altered only once and before the committee had even carried out a collective evaluation of a single tender.
- 54 Consequently, in its view, the weighting thus attributed to the criteria was applied consistently throughout the procedure for the award of the contract at issue and the procedure did not therefore infringe the principle of equal treatment.
- 55 Moreover, Ireland states that there was only a minor alteration of the relative weighting of the award criteria and that could not have given rise to

discrimination against any of the tenderers. A retrospective analysis demonstrated that the successful tenderer would have won the contract even if it had been awarded on the basis of the criteria as originally weighted.

Findings of the Court

- 56 The Commission claims that the Court should declare that the alteration of the relative weighting of the award criteria infringes the principle of equal treatment deriving from the provisions of the TFEU.
- 57 With regard, first, to the conduct of the procedure for the award of the contract at issue, it should be noted that the weighting of the award criteria for that contract was indeed altered after the contracting authority had communicated the relative weighting of the criteria in the form an evaluation matrix to the members of the evaluation committee in order to enable them to carry out an initial review of the tenders submitted.
- 58 Not only did the members of the evaluation committee have the opportunity to review the tenders, on an individual basis, before the committee first met as a collective body, but they were also encouraged to carry out such an initial review in order to facilitate the collective evaluation within the committee.
- 59 Next, it should be noted that, in such a factual context, as the Court has already held, the principles of equal treatment and transparency of tender procedures imply an obligation on the part of contracting authorities to interpret the award criteria in the same way throughout the procedure (see, by analogy, Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 92).
- 60 As far as the award criteria themselves are concerned, it is *a fortiori* clear that they must not be amended in any way during the tender procedure (see, by analogy, *EVN and Wienstrom*, paragraph 93).
- 61 A stage during which the tenders submitted are reviewed by the members of the evaluation committee, on an individual basis, before the committee meets, forms an integral part of the procedure for the award of the contract in question.
- 62 In those circumstances, if the award criteria are altered after that stage, during which the tenders were reviewed for the first time, the criteria on the basis of which the initial review was carried out would effectively be altered. Such conduct is not consistent with the principle of equal treatment or the consequent obligation of transparency.
- 63 Lastly, it should be noted, first, that, contrary to Ireland's submissions, the second complaint relied on by the Commission can be held to be well founded without there being any need to demonstrate that the alteration of the relative weighting discriminated against one of the tenderers. It is sufficient for that purpose that it

cannot be ruled out that, at the time the alteration was made, it might have had such an effect.

- 64 Second, as the finding of a failure by a Member State to fulfil its obligations is not bound up with a finding as to the damage flowing therefrom (Case C-263/96 *Commission v Belgium* [1997] ECR I-7453, paragraph 30), Ireland cannot rely on the fact that no tenderer suffered damage, arguing that, even if the initial weighting of the award criteria had been used, the contract at issue would not have been awarded to a contractor other than the one who was chosen at the conclusion of the procedure.
- 65 The second complaint relied on by the Commission in support of its action must therefore be upheld.
- 66 In the light of all the foregoing considerations, it must be held that, by altering the weighting of the award criteria for the contract at issue following an initial review of the tenders submitted, Ireland has failed to fulfil its obligations under the principle of equal treatment and the consequent obligation of transparency, as interpreted by the Court.
- 67 The action is dismissed as to the remainder.

Costs

- 68 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of those rules, the Court may order that the costs should be shared or that the parties are to bear their own costs where each party succeeds on some and fails on other heads.
- 69 Since the Commission's application has been upheld only in part, each party must be ordered to bear its own costs.

On those grounds, the Court (Fourth Chamber) hereby:

- 1. Declares that, by altering the weighting of the award criteria for a contract for the provision of interpretation and translation services following an initial review of the tenders submitted, Ireland has failed to fulfil its obligations under the principle of equal treatment and the consequent obligation of transparency, as interpreted by the Court of Justice of the European Union;**
- 2. Dismisses the action as to the remainder;**
- 3. Orders the European Commission and Ireland to bear their own costs.**

[Signatures]