



Vastuivõtmissè kuupäev : 22/11/2022

**Case C-652/22****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:**

18 October 2022

**Referring court:**

Visoki upravni sud Republike Hrvatske (Croatia)

**Date of the decision to refer:**

10 October 2022

**Applicant:**

Kolin İnşaat Turizm Sanayi ve Ticaret A.Ş.

**Defendant:**

Državna komisija za kontrolu postupaka javne nabave

**Subject matter of the main proceedings**

The administrative court proceedings brought before the referring court by the applicant Kolin İnşaat Turizm Sanayi ve Ticaret A.Ş. ('the applicant') (Republic of Turkey) against the Državna komisija za kontrolu postupaka javne nabave (State Commission for Supervision of Public Procurement Procedures, 'the defendant') (Republic of Croatia), challenging the lawfulness of the defendant's decision of 15 June 2022 ('the contested decision'), by which the defendant dismissed the applicant's appeal against the contract award decision of 28 April 2022 made by the contracting entity HŽ Infrastruktura d.o.o. ('the contracting entity') (Republic of Croatia) in the procedure for the award of a public works contract for the construction of a railway infrastructure and electrical power subsystem within the framework of the project entitled 'Upgrade of the existing track and construction of a second track on the Hrvatski Leskovac-Karlovac section' ('the Hrvatski Leskovac-Karlovac infrastructure upgrade project').

## Subject matter and legal basis of the request

An application for an interpretation of EU law pursuant to Article 267 TFEU, concerning the question whether Article 76 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC<sup>1</sup> ('Directive 2014/25'), read in conjunction with Article 36 thereof, allows a request to be made for the documentation to be supplemented with a new reference to construction work carried out ('the new reference'), that is to say, to take into account a new reference from the selected group of contractors, after the original contract award decision in the previous procedure was set aside and the case was referred back to the contracting entity for a re-examination and re-evaluation of the tenders in order for the original tender documentation to be supplemented.

## Questions referred for a preliminary ruling

1. Does Article 76 [of Directive 2014/25], read in conjunction with Article 36 of that directive, permit the contracting entity to take into account documents that the tenderer provided for the first time after the time limit for the submission of tenders, where those documents were not included in the original tender and demonstrate circumstances that the tenderer did not indicate in the original tender?
2. If the answer to the first question is in the affirmative, must Article 76 [of Directive 2014/25], read in conjunction with Article 36 of that directive, be interpreted as precluding the contracting authority from requesting, after the first contract award decision has been set aside and the case has been referred back to the contracting entity for a re-examination and re-evaluation of the tenders, additional documents from the contractor demonstrating compliance with the conditions for participation in the public procurement procedure that were not included in the original tender, such as a list of works carried out supplemented by a reference that was not included in the original list of works, that is to say, a reference that was not part of the original tender?
3. Must Article 76 [of Directive 2014/25], read in conjunction with Article 36 of that directive, be interpreted as precluding a contractor from providing to the contracting entity, after the first contract award decision has been set aside and the case has been referred back to the contracting entity for a re-examination and re-evaluation of the tenders, documents demonstrating compliance with the conditions for participation in the public procurement procedure that were not included in the original tender, such as a list of works carried out supplemented by a reference that was not included in the original list of works, that is to say, a reference that was not part of the original tender?

<sup>1</sup> OJ 2014 L 94, p. 243.

**Provisions of European Union law relied on**

Recital 38, Article 1, Article 11(1), Article 15(1)(b), Article 36(1) and Article 76(4) of Directive 2014/25.

**Provisions of national law relied on**

Article 1 (Subject matter), Article 2 (Laws of the European Union), Article 4(1) (Principles of public procurement), Article 263(2) (Supplementing and clarifying the documents received), Article 290(1) (Tender examination and evaluation procedure), Article 293(1) and (2) (Grounds for supplementing information or documentation, and prohibition on negotiation in regard to the contract award criterion or subject matter), Article 335(1) and (2) (Scope), Article 342 (Transportation Services), Article 398(1) (Jurisdiction to hear appeals), Article 399(3) (Legal nature and rules of appeal procedure), Article 401(1) (Right to appeal), Article 403(3) (Rules of evidence), and Article 434(1), (3) and (4) (Judicial protection) of the Zakon o javnoj nabavi (Public Procurement Law, ‘the ZJN’).<sup>2</sup>

**Succinct presentation of the facts and procedure in the main proceedings**

- 1 On 7 September 2020, the contracting entity published a contract notice in the electronic public procurement bulletin of the Republic of Croatia together with contract documents related to the open procedure for the award of a construction works contract for the Hrvatski Leskovac-Karlovac infrastructure upgrade project. The successful tender was to be selected on the basis of the criterion of the most economically advantageous tender, with individual elements given the following weightings: price – 90%, the supply period for parts for railway points and their replacement – 5%, the supply period for all necessary parts for the electrical power subsystem and their replacement – 5%. The maximum score was 100. The estimated value of the subject matter of the contract was HRK 2 042 900 000.00.
- 2 A total of 15 tenders were submitted in the public procurement procedure at issue. As a result of the examination and evaluation of tenders, the contracting entity found that six tenders were valid. On 25 January 2022, the contracting entity issued a contract award decision in which it selected the tender submitted by the following group of contractors: Strabag AG, Spittal an der Drau, Republic of Austria, Strabag d.o.o. Zagreb, Republic of Croatia, and Strabag Rail a.s., Usti nad Labem, Czech Republic (‘the group of contractors’) as the most economically advantageous.
- 3 The applicant lodged an appeal with the defendant against that contract award decision.

<sup>2</sup> *Narodne novine* [Official Gazette] No 120/16.

- 4 The defendant considered the appeal and on 10 March 2022 issued a decision setting aside the contract award decision of 25 January 2022. In its decision, the defendant considered that the contracting entity had failed to demonstrate the basis for its finding that the ‘Upgrade of the Pragersko-Hodoš Railroad Crossings’ reference (‘the Pragersko-Hodoš reference’) met the conditions laid down in Section 4.3.a of the instructions for tenderers concerning procurement documents (‘the instructions for tenderers’), that is to say, that the contracting entity had failed to demonstrate the basis for its finding that Strabag AG had carried out the entire works related to the construction of one to three bridges, viaducts, road overpasses or (rail or road) underpasses with a total value of at least HRK 30 000 000.00 (excluding VAT); the reference in question was indicated in the European Single Procurement Document (ESPD) submitted by the selected group of contractors.
- 5 In Section 4.3 of the instructions for tenderers, the contracting entity specified the minimum level of technical and professional capacity and the manner in which it should be demonstrated. Pursuant to Section 4.3.a of the instructions for tenderers, the contractor must demonstrate technical and professional capacity by submitting a list of works in which it must demonstrate that in the year in which the public procurement procedure began and in the 10 years preceding that year it duly performed the entire works related to the construction of one to three bridges, viaducts, road overpasses or (rail or road) underpasses with a total value of at least HRK 30 000 000.00 (excluding VAT).
- 6 In the same section of the contract documentation, the contracting entity specified that as preliminary evidence of its technical and professional capacity set out in Sections 4.3.a to 4.3.d, the contractor is required to enclose with its tender the ESPD form with Part IV (Selection criteria, C: Technical and professional ability, Section 1a) completed. With respect to the information provided in the ESPD form, the contractor must demonstrate compliance with the eligibility criteria set out in Sections 4.3.a to 4.3.d by means of a list of completed works that must be the same or similar to the subject matter of the contract, together with confirmation of the proper execution and result of the works received from the other contracting party. The list of completed works and the confirmation of their proper execution and result must include a detailed specification of the completed works so that the contracting entity is able to determine whether the documents provided demonstrate compliance with the individual eligibility criteria specified.
- 7 On 6 April 2022, the contracting entity requested, pursuant to Article 263(2) of the ZJN, that the selected group of contractors provide, where possible, a supplemented list of completed works referred to in Section 4.3.a, together with confirmation of the proper execution and result of the works issued by the other contracting party.
- 8 On 7 April 2022, the selected group of contractors provided the contracting entity with a supplemented list of completed works together with confirmation of the proper execution and result of the works received from the other contracting party.

Compared to the earlier list, the list of completed works dated 7 April 2022 was supplemented with the addition of the reference in respect of ‘A9 Pyhrn Autobahn Tunnelkette Klaus Vollausbau Baulos 1 Talubergang Steyr und Rampenbruck – Lot 1 (complete construction of the Klaus tunnel chain along the A9 Pyhrn motorway, a viaduct over the Steyr River valley and an arch bridge)’ (‘the A9 Pyhrn Autobahn reference’).

- 9 On 13 April 2022, the contracting entity requested the selected group of contractors, pursuant to Article 263(2) of the ZJN, to correct or supplement the confirmation received from the other contracting party, which would show the exact value of the completed works for the ‘arch bridge’ and ‘Steyr viaduct’ projects, or alternatively, to include in the amended list of completed works a statement by an authorised representative of the contracting entity certifying the group’s claim that it completed the construction projects in question, namely the arch bridge and the Steyr viaduct.
- 10 On 21 April 2022, the selected group of contractors provided the contracting entity with a supplemented confirmation, which showed the exact value of the works completed in connection with the projects in question, and also a supplemented list of completed works. On 22 April 2022, the selected group of contractors provided the contracting entity with supplemented up-to-date evidence relating to the A9 Pyhrn Autobahn reference.
- 11 On 28 April 2022, the contracting entity, after re-examining and re-evaluating the tenders, issued a new contract award decision in which the tender submitted by the group of contractors was selected again. The report concerning the re-examination and re-evaluation of the tenders shows that, with respect to the selected group of contractors, the contracting entity once again included the Pragersko-Hodoř reference as valid for the purposes of meeting the conditions set out in Section 4.3.a of the instructions for tenderers. In addition to that reference, the contracting entity also accepted the new A9 Pyhrn Autobahn reference, having found that the new reference, due to the value of the project, met on its own the condition set out in Section 4.3.a of the instructions for tenderers.
- 12 The applicant lodged another appeal with the defendant against the new contract award decision of 28 April 2022, in which it challenged the lawfulness of the re-examination and re-evaluation of the selected tender. Among numerous other objections, the applicant claimed that in the case at issue, the contracting entity had no legal basis, when re-examining and re-evaluating the tenders, to call on the selected group of contractors to supplement the up-to-date evidence already provided regarding the demonstration of their technical and professional capacity as set out in Section 4.3.a of the instructions for tenderers.
- 13 In the appeal, the defendant concluded that the contracting entity, in re-examining and re-evaluating the tenders, had incorrectly assessed that the Pragersko-Hodoř reference met the technical and professional capacity conditions set out in Section 4.3.a of the instructions for tenderers. However, the defendant believes that while

the applicant’s claim is justified, it does not affect the outcome of the administrative procedure at issue, as there are no statutory obstacles to the inclusion of the new A9 Pyhrn Autobahn reference, which meets the conditions set out in Section 4.3.a of the instructions for tenderers. Therefore, the defendant dismissed the applicant’s appeal in the contested decision.

- 14 The applicant initiated administrative court proceedings against the defendant before the referring court, challenging the lawfulness of the contested decision.

**Essential arguments of the parties in the main proceedings**

- 15 The applicant challenges the lawfulness of the contracting entity’s actions relating to the procedure for examining and evaluating tenders following the defendant’s first decision, including in particular with regard to:

- the contracting entity calling on the selected group of contractors (pursuant to Article 263(2) of the ZJN) to supplement the up-to-date evidence already provided regarding the demonstration of their technical and professional capacity as set out in Section 4.3.a of the instructions for tenderers;
- accepting a new reference that was not included in the successful tenderer’s original tender.

- 16 The applicant believes that accepting a new reference that was not included in the successful tenderer’s original tender de facto constitutes an amended tender. In the applicant’s view, the contracting entity acted unlawfully through its conduct as described above; it infringed applicable EU law, specifically the principle of equal treatment.

- 17 The defendant emphasises that Article 263(2) of the ZJN stipulates that the contracting entity may call on contractors to supplement or clarify the current evidence it has received. The defendant also stresses that the re-examination and re-evaluation of tenders is a separate procedure in which the contracting entity is entitled to request additional clarification or supplementation of the up-to-date evidence already provided in order to properly assess the technical and professional capacity of the contractor in question. When re-examining and re-evaluating tenders, the contracting entity is bound by the defendant’s decision. Pursuant to the ZJN, the contracting entity is obliged to examine and evaluate the tenders received in terms of the conditions and requirements set out in the procurement documents, using all the powers granted to it by the legislature, and – on the basis of the established facts – issue a new decision, which must be properly justified. In order to make such determinations, that is to say, to gather evidence and relevant facts in order to examine the validity of all references in the most economically advantageous tender under a given public procurement procedure, the contracting entity is authorised under Article 263 of the ZJN to request that the documentation received be supplemented or clarified. The defendant believes that Article 263(2) of the ZJN does not provide a basis for

concluding that the contracting entity may only request clarification or supplementation of current evidence once. In the light of the above, the applicant's claim that the contracting entity, in calling on the selected group of contractors to supplement the up-to-date evidence, acted in breach of the provisions of Article 263 of the ZJN and the principles of public procurement, was considered unfounded.

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

- 18 It is clear to the referring court that in the case at issue, after the defendant had set aside the first contract award decision, the contracting entity was authorised to request additional documents from the selected group of contractors in order to determine the validity of the Pragersko-Hodoř reference contained in the original tender submitted by the selected group of contractors, validity which was subject to review in the first appeal proceedings before the defendant. In addition, given the reasons for the setting aside of the first contract award decision, that obligation on the part of the contracting entity resulted from the defendant's decision of 10 March 2022.
- 19 The referring court agrees with the defendant's conclusion in the contested decision that even after the selected group of contractors' documents regarding the Pragersko-Hodoř reference had been supplemented, that is to say, even after the contracting entity's additional justification for including that reference, the group did not meet the conditions set out in Section 4.3.a of the instructions for tenderers and therefore should not have been selected. It follows from the above that the contracting entity, in re-examining and re-evaluating the tenders, incorrectly assessed that that reference met the technical and professional capacity conditions set out in Section 4.3.a of the instructions for tenderers.
- 20 Meanwhile, in the proceedings following the defendant's first decision, as a result of which the first contract award decision was set aside, the contracting entity called on the selected group of contractors to provide a supplemented list of completed works as set out in Section 4.3.a of the instructions for tenderers, together with confirmation received from the other contracting party concerning the proper execution and result of the works, and subsequently also requested that that confirmation be corrected or supplemented. The selected group of contractors provided a list of completed works, which, compared to the previous list, was supplemented with a new reference, and with a supplemented confirmation. The contracting entity included the new A9 Pyhrn Autobahn reference, which meets the requirements set out in Section 4.3.a of the instructions for tenderers.
- 21 The referring court has doubts as to whether it is permissible to request a supplement to the list of completed works within the meaning of Section 4.3.a of the instructions for tenderers (in addition to the reference that was part of the original tender) as well as other documents relating to the new reference. Additionally, the referring court has doubts as to whether taking into account a



new reference that was not indicated in the original tender, but was only provided after the contracting entity had called for supplementary documentation (after the time limit for the submission of tenders), is lawful. The contracting entity accepted the reference from the selected group of contractors, which was not included in the original tender, and the defendant considered the tender submitted by the selected group of contractors to be valid, having reached that conclusion precisely on the basis of the new reference, which meets the requirements set out in Section 4.3.a of the instructions for tenderers.

- 22 The referring court refers to the Court’s judgment of 4 May 2017, *Esaprojekt* (C-387/14, EU:C:2017:338) where the facts were very similar to those of the present case. In that case, 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<sup>3</sup> (‘Directive 2004/18’) was applicable.
- 23 Although the Court’s judgment in *Esaprojekt* also applies to the interpretation 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<sup>4</sup> (‘Directive 2004/18’), which replaced Directive 2004/18, the referring court considers that with respect to the present public procurement proceedings there is a need to interpret EU law, namely Directive 2014/25, which is applicable in this case.
- 24 Indeed, in this particular case of public procurement, there is a sectoral contracting entity that manages railway infrastructure in the Republic of Croatia and is engaged in organising and regulating railway traffic, providing access to, and enabling the use of, railway infrastructure by all railway operators that meet the conditions set out in the *Zakon o željeznici*<sup>5</sup> (Railway Act), organising public transport and transport for own needs, maintaining, upgrading and protecting railway infrastructure, and investment in the construction of railway infrastructure.
- 25 The contracting entity’s procurement documents demonstrate that the case at issue concerns sectoral procurement, that is to say, it is a sectoral contracting entity, and the estimated value of the public contract is HRK 2 042 900 000.00 (excluding VAT), which is equivalent to EUR 271 139 425.31 (excluding VAT). It follows from the above that Directive 2014/25 applies in the present case.
- 26 The referring court is unsure whether the Court’s findings in *Esaprojekt* apply to the interpretation of Directive 2014/25, which is applicable to the public procurement at issue. Indeed, Directive 2014/25 does not contain a provision that

<sup>3</sup> OJ 2004 L 134, p. 114.

<sup>4</sup> OJ 2014 L 94, p. 65.

<sup>5</sup> *Narodne novine* Nos 39/19, 20/21, 114/22.

corresponds to Article 51 of Directive 2004/18, which, read in conjunction with Article 2 of that directive, was interpreted by the Court in *Esaprojekt*.

- 27 The referring court considers that in this particular case of public procurement, Article 76 of Directive 2014/25 applies, which, read in conjunction with Article 36 thereof, governs the rules of public procurement with respect to equal treatment.
- 28 Since, according to the available information, the Court has not clearly established whether the case-law concerning Directive 2014/24, which replaced Directive 2004/18, also applies to Directive 2014/25, the referring court considers it necessary to refer the above questions in connection with the interpretation of that directive.