

A TECHNICAL SPECIFICATION: HOW PRECISE?

Pieter H.L.M. Kuypers and Martine J. Gruppen*

ABSTRACT. Article 23 Directive 2004/18 requires that procuring entities formulate its standards ‘sufficiently precise’. This implies a specification requirement for government contracts. The question that remains is what the scope of the specification requirement is. In other words, how precise should a standard be formulated. The scope of the specification requirement should be interpreted in the light of the general principles of EC law and more particular Directive 2004/18. All products and services should be granted access to the common market and therefore accepted by the contract documents. Consequently, standards cannot be too specific as this would exclude a lot of products and services. For this article we analysed our experiences with article 23 Directive 2004/18 and its corresponding case law.

INTRODUCTION

Procuring entities enjoy a substantial discretionary power to formulate tender documentation. However, it is important to prevent discrimination and favouritism as this would endanger the competition in the common market. Furthermore, EC Directive 2004/18¹ entails that products and services are granted an immediate access to the public market. This general principle of the Directive is also reflected in its Article 23 through the requirement to accept equivalent products or services.²

* *Pieter H.L.M. Kuypers, LL.D., is a lawyer at AKD Prinsen Van Wijmen, specialised in European and competition law. Martine J. Gruppen, LL.M., is a lawyer at AKD Prinsen Van Wijmen, specialised in European and competition law.*

Copyright © 2008 by Pieter H.L.M. Kuypers and Martine J. Gruppen

¹ Council Directive 2004/18 of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts OJ L 134, 30th of April 2004, p.114 (hereafter: ‘Directive 2004/18’)

² Article 23 par 8 Directive 2004/18/EC.

In this article we shall describe in a nutshell the scope of the specification requirement for technical specifications in government tender documentation. Several obligations and consequences of article 23 Directive 2004/18 and the corresponding case law are considered to examine the scope of the requirement of specification. Central in these examinations is the principle of transparency. This principle implies the tender documentation to be clear and unambiguous. Procurement relating to the special sectors is not discussed in this article.³

ARTICLE 23 DIRECTIVE 2004/18

Article 23 Directive 2004/18 sets out the rules on technical specifications relating to the tender documentation. Primarily the article focuses on the technical specifications of products. Procuring entities have the choice to formulate these specifications either by reference to technical specifications defined in Annex VI of Directive 2004/18 or in terms of performance or functional requirements. The procuring entity can only refer to technical specifications, when it uses the words ‘or equivalent’. This obligates the procuring entity to accept alternatives.⁴ In order to illustrate that the product is equivalent, tenderers are allowed to use any form of evidence.⁵ A decision of the procuring entity that the product is not equivalent must be accompanied by a reason. Formulating tender documentation with performance or functional requirements has to be done ‘sufficiently precise’.⁶ These terms imply a specification requirement for the tender documentation.

The former Directives⁷ did not provide any rules on technical specifications. The obligation to specify could have been implied by the

³ Contracts relating to the procurement of entities working in the water, energy, transport and postal services sectors are not discussed in this article. The rules on procurement for these sectors are set out in Council Directive 2004/17 EG of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. OJ L 134, 30th of April 2004, p.1

⁴ Recital 29 in the preamble of the Directive 2004/18.

⁵ *Idem*.

⁶ Article 23 (3) sub b Directive 2004/18.

⁷ Council Directives 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (5), 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (6) and 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ L 199, 9th of August 1993, p. 54.

principles of procurement, amongst which the transparency principle that is discussed in the next paragraph. Under the regime of the former Directives the procuring entity was in principle obliged to use relevant European standards if these standards existed.⁸ Consequently, in certain situations the choice of procuring entities was limited to products meeting these European standards.

In the new Directive the underlying objective has changed. Under the former regime the objective was to spread European standards in the Member States.⁹ However the new Directive allows the procuring entity the choice to refer to European standards. In the preamble the new objective of the Directive is clearly stated: “The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition.”¹⁰

This illustrates that the Directive’s aim is to open up the common market for all products and services. The new option to formulate in terms of performance or functionality enables procuring entities to not only use products with European standards. Consequently, the range of products which a procuring entity can choose from has expanded.

The new Directive appears to embed the core European principle of free movement of goods and services. Article 23 (3) Directive 2004/18 emphasizes that equal access to the common market must be granted. Furthermore the second paragraph of this Article emphasizes that technical specifications cannot create unjustified obstacles to the opening up of public procurement to competition. By changing the underlying principle in the new Directive 2004/18 procuring entities are free to specify their requirements without referring to standards. As a consequence procuring entities enjoy a substantial discretionary power to formulate tender documentation.

PRINCIPLE OF TRANSPARENCY

As pointed out in the previous paragraph, the principle of transparency can imply an obligation to specify. It must be noted that the

⁸ See Article 14 Directive 92/50/EEC, article 8 Directive 93/36/EEC and article 10 Directive 93/37/EEC.

⁹ Arrowsmith, S. (2005). *The Law of Public and Utilities Procurement* (2nd ed.). London, Sweet & Maxwell Limited: 46

¹⁰ Recital 29 in the preamble of Directive 2004/18.

principle of transparency can have other implications, however these implications will not be addressed in this article. Recently the principle has taken a much more prominent place in public procurement.¹¹

In *Commission v. Belgium*¹² the ECJ lays down the first grounds for the principle of transparency.¹³ Every stage of the procuring procedure had to comply with the transparency principle.¹⁴ This principle was further specified in the *Succhi di Frutta*-case¹⁵. The ECJ found that the principle intended to preclude any risk of favouritism or subjective assessment of the offers. Furthermore the transparency principle implied that: "...all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents, so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way..."¹⁶

This formula is still used by national courts to determine whether a tender documentation is appropriately drafted. In other words the tender documentation must be clear, precise and univocal so that reasonable well-informed and diligent tenderers can understand the precise scope and interpret in the same manner.

The transparency principle is no longer the basis for the requirement of specification. It can now be seen as a restriction to the use of the discretionary power that the procuring entities enjoy from article 23 Directive 2004/18. For the reason that the transparency principle obliges procuring entities to specify their tender documentation clear, precise and in a univocal manner. The court's benchmark is to examine whether a well-informed tenderers interpret the tender documentation in the same manner. If this is not the case, then the principle of transparency is infringed and mostly the procuring entity has to reissue a tender. This can be illustrated by case law that will be discussed in the next paragraph.

¹¹ Trepte, P. (2007). *Public Procurement in the EU: A Practitioner's Guide* (2nd ed.). New York, Oxford University Press: 15-27.

¹² ECJ 25 april 1996, Case 87/94 *Commission v. Belgium*, ECR I-02043.

¹³ Prechal, S., de Leeuw, M. (2007). "Dimensions of Transparency: The Building Blocks for a New Legal Principle?" *Review of European Administrative Law*, 0 (1): 57

¹⁴ Case 87/94 *Commission v. Belgium*, supra note 11, para. 54

¹⁵ ECJ 24 October 2002, Case 496/99, *Commission/Cas Succhi di Frutta*, ECR I-3801.

¹⁶ *Idem*, para. 111

CASE LAW

In the following paragraph the above rules on technical specifications drawn from article 23 Directive 2004/18 and the transparency principle will be placed in the context of practice. In order to do so we shall discuss two Dutch cases.

Firstly, we shall discuss a case between a company Translift Nederland BV and the municipality of Kampen.¹⁷ A European procurement procedure was held by the municipality of Kampen for the delivery and maintenance of two waste collection vehicles (side loaders) including six containers. Two tenderers, Translift Nederland BV and Hüffermann Entsorgungssystemen GmbH, sent their offers to the municipality. Based on the award criteria price and quality the municipality decided to award the contract to Hüffermann. Translift was of the opinion that the procurement was not held in accordance with the procurement rules.

The two main points of discussion in this case were an automatic system in order to change the containers and the measures restricting the collected waste from being blown out. Hüffermann offered waste collection vehicles that would automatically couple and uncouple the container. Therefore the driver did not have to get out of his cabin to couple the containers manually. On the contrary the waste collection vehicles of Translift required certain manual acts to couple the containers. Translift argued that the municipality did not specify in their tender documentation that an automatic system was desired or preferred. The court considered that the municipality has a certain amount of discretionary power to decide for an automatic system. However, in the light of the transparency principle the municipality had to specify this preference in the tender documentation. Since the municipality failed to prescribe the preference for an automatic system in the tender documentation, the municipality infringed the principle of transparency.

The second point of discussion was the requirement of '*measures to restrict waste from blowing out*'. The municipality requested in the tender documentation that tenderers indicate which measures they have taken. Translift indicated that it used certain screws that would enable the waste to go directly into the container. The municipality found that these

¹⁷ Rechtbank Zwolle-Lelystad 19 September 2006, *Translift Nederland B.V./Gemeente Kampen*, KG ZA 06-360.

screws were not measures that restrict waste from blowing out the container. According to the court, the transparency principle implies that tender documentation must be formulated that a reasonable well-informed and diligent tenderers are capable of interpreting the criteria in the same manner. Accordingly the court applied the *Succhi di Frutta* formula to assess whether the tender documentation was appropriately specified. The court continued by taking into consideration that the municipality failed to specify which measures could restrict waste from blowing out the container. Also on this point the municipality infringed the principle of transparency.

All in all, the court reached the conclusion in this case that the municipality infringed the transparency principle, because it had failed to specify their criteria in the tender documentation. Consequently, the municipality had to retender the contract. A Contracting party must clearly describe in the tender documentation which criteria the product must have. If the Contracting party desires an automatic system, then it must be prescribed in the tender documentation. When using criteria in tender documentation procuring entities must ensure that the criteria are appropriately specified so that all informed tenderers interpret the criteria in the same manner.

Secondly, we will discuss a case concerning a delivery of ambulances.¹⁸ The Regional ambulance provider (hereafter: 'RAV') instructed the Dutch Purchase-centre (hereafter: 'NIC') to procure ambulances. Five companies sent their offers to the NIC, amongst whom plaintiff Miesen. Via a letter NIC informed Miesen participated in the tender, but did not obtain the assignment to deliver the ambulances. Miesen started summary proceedings in order to stop NIC from awarding the contract to another tenderer.

Miesen was of the opinion that the NIC had ascribed the technical specifications in the tender documentation to a one tenderer. When assessing the argument, the court considered not only the principle of transparency but also the principle of equality. In the light of these two principles, the court found that ascribing tender documentation to one party is not allowing tenderers to compete in a procurement procedure. However whether the tender documentation was ascribed to one tenderer must be proven by the plaintiff. The court found that in this case Miesen

¹⁸ Rechtbank Breda 23rd of April 2003, *C. Miesen Nederland B.V/ Regionale Ambulance Voorziening, Nederlands Inkoopcentrum*, KG ZA 03-100.

had not sufficiently proven that the tender documentation could apply only to one tenderer.

Another argument of Miesen was that NIC did not specify what a 'high model' ambulance was. NIC requested in the tender documentation for the delivery of 'high model' ambulances, however Miesen offered 'container model' ambulances. According to Miesen a container model fell under the scope of the 'high model'. On the contrary the NIC argued that the branch of industry made a difference between a high, low and container model. Furthermore no other tenderer offered a container model. The court followed the reasoning of the NIC and concluded that the plaintiff should provide more proof that this specification was necessary.

The court decided that the arguments of Miesen were insufficiently founded and Miesen's claims were rejected. As said by the court, ascribing tender documentation to one party infringes the principle of transparency and equality. It is therefore important to note that tender documentation is not solely formulated on the basis of the former deliverer. However, it is the tenderer that has to prove that tender documentation is ascribed to one party. Delivering evidence for this statement can be very difficult, because a competitor will normally not have access to secret business information regarding technical specifications. Another interesting point in this case is the inclusion of criteria that are used in the branch of the industry in the tender documentation. It can be concluded that criteria used in a branch of industry with a commonly known definition do not have to be specified in the tender documentation.

CONCLUSION

Due to the different objective of the Directive for public procurement, the procuring entities are no longer limited to products with European standards. Procuring entities now have a choice because of Article 23 Directive 2004/18. It can either refer to a technical standard or formulate in terms of performance or functional requirements. Consequently the procuring entities have a substantial discretionary power to formulate the tender documentation. This power is however restricted by the principle of transparency. A Contracting party must formulate a clear, precise and univocal tender documentation in order to

enable reasonable well-informed and diligent tenderers can understand the precise scope and interpret in the same manner.

Article 23 Directive 2004/18 supplemented by the restriction of the transparency principle forms the framework of the requirements of technical specifications. Nevertheless how precisely tender documentation must be formulated depends on the assessment on a case by case basis. It is almost inevitable that questions arise from the interpretation of tender documentation, especially when so much depends on the award of the procuring contracts. However, when looking at case law the framework of specification can be given more substance. In the first case the court recognized the discretionary power to choose a certain system, but obliged that this was clearly specified in the tender documentation. When criteria have a common definition in the industry branch like in the second case, then the procuring entity does not have to specify these criteria. Unfortunately, we could not examine more case law in this article and describe only in a nutshell the requirement of specification.

In conclusion it can be said that the scope of the specification requirement should be interpreted in the light of the general principle of Directive 2004/18. All products and services should be granted access to the common market and therefore similar products and services should be accepted by the procuring entity. Therefore standards cannot be too specific as this would exclude a lot of products and services. The tender documentation must be specified to the extent that a tenderer has enough information to submit an offer. In enhancing best practices the drafting process of tender documentation should focus on the general principle of the Directive and on the provision of information.

REFERENCES

- Arrowsmith, S. (2005). *The Law of Public and Utilities Procurement* (2nd ed.). London, UK: Sweet & Maxwell Limited.
- De Koninck, C., & Flamey, P. (2007). *Overheidsopdrachtenrecht* (3rd ed.). Antwerpen, The Netherlands: Maklu.
- Prechal, S., de Leeuw, M. (2007). "Dimensions of Transparency: The Building Blocks for a New Legal Principle?" *Review of European Administrative Law*, 10 (1): 51-62.

Trepte, P. (2007). *Public Procurement in the EU: A Practitioner's Guide* (2nd ed.). New York, Oxford University Press.