ECLI:EU:C:2022:888

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

17 November 2022 (*)

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Principles of awarding contracts – Article 18 – Transparency – Article 21 – Confidentiality – Insertion of those principles in the national legislation – Right of access to the essential content of the information provided by tenderers concerning their experience and references, concerning the persons proposed to carry out the contract and concerning the design of the proposed projects and the manner of performance – Article 67 – Contract award criteria – Criteria relating to the quality of the proposed work or services – Requirement of precision – Directive 89/665/EEC – Article 1(1) and (3) – Right to an effective remedy – Remedy in the event of infringement of that right on account of the refusal to grant access to non-confidential information)

In Case C-54/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland), made by decision of 22 December 2020, received at the Court on 29 January 2021, in the proceedings

Antea Polska S.A.,

Pectore-Eco sp. z o.o.,

Instytut Ochrony Środowiska – Państwowy lnstytut Badawczy

v

Państwowe Gospodarstwo Wodne Wody Polskie,

intervening parties:

Arup Polska sp. z o.o.,

CDM Smith sp. z o.o.,

Multiconsult Polska sp. z o.o.,

Arcadis sp. z o.o.,

Hydroconsult sp. z o.o. Biuro Studiów i Badań Hydrogeologicznych i Geofizycznych,

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, L.S. Rossi, J.-C. Bonichot, S. Rodin and O. Spineanu-Matei, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Siekierzyńska, Administrator,

having regard to the written procedure and further to the hearing on 16 March 2022,

after considering the observations submitted on behalf of:

– Antea Polska S.A., Pectore-Eco sp. z o.o. and Instytut Ochrony Środowiska – Państwowy Instytut Badawczy, by D. Ziembiński, radca prawny,

– Państwowe Gospodarstwo Wodne Wody Polskie, by P. Daca, M. Klink and T. Skoczyński, radcowie prawni,

– CDM Smith sp. z o.o., by F. Łapecki, adwokat, and J. Zabierzewski,

– the Polish Government, by B. Majczyna and M. Horoszko, acting as Agents,

– the Austrian Government, by A. Posch, acting as Agent,

– the European Commission, by P. Ondrůšek, J. Szczodrowski and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 May 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 18(1) and Article 21(1) 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 (OJ 2014 L 94, p. 65), Article 2(1) of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ 2016 L 157, p. 1), and of Article 1(1) and (3) and Article 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2017 L 94, p. 1).

2 The request has been made in proceedings between Antea Polska S.A., Pectore-Eco sp. z o.o. and Instytut Ochrony Środowiska – Państwowy Instytut Badawczy, acting together as a single

tenderer (‘Antea’), and the Państwowe Gospodarstwo Wodne Wody Polskie (National Water Management Authority, Poland; ‘the contracting authority’), supported by Arup Polska sp. z o.o. (‘Arup’), by CDM Smith sp. z o.o. (‘CDM Smith’), and by Multiconsult Polska sp. z o.o., Arcadis sp. z o.o. and Hydroconsult sp. z o.o. Biuro Studiów i Badań Hydrogeologicznych i Geofizycznych, acting together as a single tenderer (‘Multiconsult’), concerning the award of a public contract to CDM Smith.

Legal context

European Union law

Directive 89/665

3 Article 1 of Directive 89/665, entitled ‘Scope and availability of review procedures’, provides:

‘1. This Directive applies to contracts referred to in Directive [2014/24] …

…

Member States shall take the measures necessary to ensure that … decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

…’

Directive 2014/24

4 Recitals 90 and 92 of Directive 2014/24 state:

‘(90) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender. It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only. It is furthermore appropriate to recall that contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions.

…

…

(92) When assessing the best price-quality ratio contracting authorities should determine the economic and qualitative criteria linked to the subject matter of the contract that they will use for that purpose. Those criteria should thus allow for a comparative assessment of the level of performance offered by each tender in the light of the subject matter of the contract, as defined in the technical specifications. In the context of the best price-quality ratio, a non-exhaustive list of possible award criteria which include environmental and social aspects is set out in this Directive. …

The chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective and fair competition and be accompanied by detailed rules that allow the information provided by the tenderers to be effectively verified.

…'

5 Article 18 of that directive, entitled 'Principles of procurement', provides in paragraph 1:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

…'

6 Article 21 of that directive, entitled 'Confidentiality', provides:

'1. Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 50 and 55, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

2. Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.'

7 Article 50 of that directive, entitled 'Contract award notices', states:

'1. Not later than 30 days after the conclusion of a contract or of a framework agreement, following the decision to award or conclude it, contracting authorities shall send a contract award notice on the results of the procurement procedure.

Those notices shall contain the information set out in Annex V Part D …

…

4. Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular

economic operator, public or private, or might prejudice fair competition between economic operators.'

8 Article 55 of Directive 2014/24, entitled 'Information to candidates and tenderers', provides:

'1. Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system …

2. On request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform:

…

(b) any unsuccessful tenderer of the reasons for the rejection of its tender …;

(c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected, as well as the name of the successful tenderer or the parties to the framework agreement;

…

3. Contracting authorities may decide to withhold certain information referred to in paragraphs 1 and 2, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.'

9 Article 58 of that directive, entitled 'Selection criteria', provides:

'1. Selection criteria may relate to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

…

4. With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. …

In procurement procedures for supplies requiring siting or installation work, services or works, the professional ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability.

…’

10 Under Article 59 of that directive, entitled ‘European Single Procurement Document’:

‘1. At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions:

(a) it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded;

(b) it meets the relevant selection criteria that have been set out pursuant to Article 58;

(c) where applicable, it fulfils the objective rules and criteria that have been set out pursuant to Article 65.

Where the economic operator relies on the capacities of other entities pursuant to Article 63, the ESPD shall also contain the information referred to in the first subparagraph of this paragraph in respect of such entities.

The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority. …

…

4. A contracting authority may ask tenderers and candidates at any moment during the procedure to submit all or part of the supporting documents where this is necessary to ensure the proper conduct of the procedure.

…’

11 Article 60 of that directive, entitled ‘Means of proof’, states:

‘1. Contracting authorities may require the certificates, statements and other means of proof referred to in paragraphs 2, 3 and 4 of this Article and Annex XII as evidence for the absence of grounds for exclusion as referred to in Article 57 and for the fulfilment of the selection criteria in accordance with Article 58.

Contracting authorities shall not require means of proof other than those referred to in this Article and in Article 62. In respect of Article 63, economic operators may rely on any appropriate means to prove to the contracting authority that they will have the necessary resources at their disposal.

…

3. Proof of the economic operator’s economic and financial standing may, as a general rule, be provided by one or more of the references listed in Annex XII Part I.

…

4. Evidence of the economic operators' technical abilities may be provided by one or more of the means listed in Annex XII Part II, in accordance with the nature, quantity or importance, and use of the works, supplies or services.

…'

12 Article 63 of Directive 2014/24, entitled 'Reliance on the capacities of other entities', provides in paragraph 1:

'With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

…'

13 In accordance with Article 67 of that directive, entitled 'Contract award criteria':

'1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender.

2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost …, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject matter of the public contract in question. Such criteria may comprise, for instance:

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;

(b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or

(c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

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.

…

4. Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.

5. The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

…'

14 Annex V to that directive, entitled 'Information to be included in the notices', lists in Part D, entitled 'Information to be included in contract award notices (referred to in Article 50)':

' …

12. For each award, name, address …, telephone, fax number, email address and internet address of the successful tenderer(s) including:

(a) information whether the successful tenderer is small and medium enterprise,

(b) information whether the contract was awarded to a group of economic operators (joint venture, consortium or other).

13. Value of the successful tender (tenders) or the highest tender and lowest tender taken into consideration for the contract award or awards.

14. Where appropriate, for each award, value and proportion of contract likely to be subcontracted to third parties.

…

19. Any other relevant information.'

15 Under Annex XII to that directive, entitled 'Means of proof of selection criteria':

'Part I: Economic and financial standing

Proof of the economic operator's economic and financial standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;

(b) the presentation of financial statements or extracts from the financial statements, where publication of financial statements is required under the law of the country in which the economic operator is established;

(c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

Part II: Technical ability

Means providing evidence of the economic operators' technical abilities, as referred to in Article 58:

(a) the following lists:

(i) a list of the works carried out over at the most the past five years, accompanied by certificates of satisfactory execution and outcome for the most important works; where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant works carried out more than five years before will be taken into account;

(ii) a list of the principal deliveries effected or the main services provided over at the most the past three years, with the sums, dates and recipients, whether public or private, involved. Where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services delivered or performed more than three years before will be taken into account;

(b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;

(c) a description of the technical facilities and measures used by the economic operator for ensuring quality and the undertaking's study and research facilities;

(d) an indication of the supply chain management and tracking systems that the economic operator will be able to apply when performing the contract;

(e) where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, …

(f) the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff, provided that they are not evaluated as an award criterion;

(g) an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;

(h) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years;

(i) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;

(j) an indication of the proportion of the contract which the economic operator intends possibly to subcontract;

…'

Directive 2016/943

16 Article 1 of Directive No 2016/943, entitled 'Subject matter and scope', provides, in paragraph 1:

'This Directive lays down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets.

…'

17 Article 2 of that directive, entitled 'Definitions', provides:

'For the purpose of this Directive, the following definitions apply:

(1) "trade secret" means information which meets all of the following requirements:

(a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) it has commercial value because it is secret,

(c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;

…'

Polish law

The Law on public procurement

18 The Ustawa Prawo zamówień publicznych (Law on public procurement) of 29 January 2004 (Dz. U. 2015, item 2164), in the version applicable to the dispute in the main proceedings ('the Law on public procurement'), provides in Article 8:

'1. The procurement procedure shall be public.

2. The contracting authority may restrict access to information relating to the procurement procedure only in the cases determined by law.

2a. The contracting authority may set out in the tender specifications requirements that must be met in order to maintain the confidentiality of information provided to the economic operator in the course of the procedure.

3. Information constituting trade secrets within the meaning of the provisions on combating unfair competition shall not be disclosed if the tenderer so requested before the expiry of the

deadline for submission of tenders or applications to take part in the procedure and demonstrated that it constitutes trade secrets. The tenderer may not designate as confidential the information referred to in Article 86(4). …'

19 Under Article 86(4) of that law:

'The name (company name) and the address of tenderers, as well as information on the price, the period for performance of the contract, the guarantee period and the conditions of payment contained in the tenders, shall be disclosed when the tenders are opened.'

20 Article 96 of that law provides:

'1. In the course of the procedure for the award of the contract, the contracting authority shall draw up a report containing at least:

…

(5) the name or company name of the tenderer whose tender was accepted as the most advantageous and the justification for that choice, and, if known, the part of the contract or framework agreement which that tenderer intends to subcontract to third parties; and where that information is known at that stage, the names or company name of the potential subcontractors;

…

(7) where applicable, the results of the examination of the grounds for exclusion, assessment of compliance with the conditions for participation in the selection procedure or criteria, including:

(a) the name or company name of tenderers who have not been excluded, have demonstrated that they meet the conditions for taking part in the procedure or have fulfilled the selection criteria, along with the reasons justifying their selection;

(b) the name or company name of the unsuccessful tenderers who have been excluded, have not demonstrated that they meet the conditions for taking part in the procedure or have not fulfilled the selection criteria, and the reasons why they were not invited to participate in the procedure;

(8) the reasons for the rejection of tenders;

…

2. Tenders, expert reports, statements,… notices, requests, other documents and information submitted by the contracting authority and tenderers, as well as the public contract concluded, take the form of annexes to the report.

3. The report and the annexes thereto shall be public. The annexes to the report shall be made available after the most advantageous tender has been selected or the procedure cancelled, subject to the proviso that tenders shall be made available from the time of their opening, the initial tenders from the time of the invitation to tender, and requests to participate in the procedure, from the date on which the results of the examination of compliance with the conditions for participation in the procedure are communicated.'

Law on combating unfair competition

21 Article 11(2) of the Ustawa o zwalczaniu nieuczciwej konkurencji (Law on combating unfair competition) of 16 April 1993 (consolidated text, Dz. U. 2020, item 1913), states:

'A "trade secret" shall be construed as technical, technological, scientific and organisational information of an undertaking or other information of economic value that is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons normally dealing with that type of information, provided that the entity authorised to use or dispose of such information has taken reasonable measures to keep it confidential.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

22 In 2019, the contracting authority published a public contract notice, within the scope of Directive 2014/24, for the purposes of developing projects relating to the environmental management of certain river basin districts in Poland. The tender specifications set out the conditions for participation in the procedure, the documents required and the criteria for the award of that contract.

23 In the latter regard, the tender specifications stated that the tenders would be evaluated on the basis of three criteria, namely price (40% weighting), project development design (42% weighting) and the description of the manner of performance of the contract (weighting of 18%), the latter two criteria relating to the quality of the tender which were themselves subject to a number of sub-criteria.

24 Following the evaluation of the four tenders submitted, the contract was awarded to CDM Smith. Although the price of the Antea tender was lower than that of CDM Smith's tender, Antea obtained an overall score lower than that obtained by that other tenderer, more points having been awarded to that tenderer in respect of the quality criteria.

25 Antea brought an action before the referring court seeking, inter alia, annulment of the decision awarding the contract to CDM Smith, a fresh examination of the tenders and the disclosure of certain information.

26 In support of that action, Antea complains, in particular, that the contracting authority failed to disclose the information communicated to it by CDM Smith, Multiconsult and Arup concerning their tenders. This includes, in particular, lists of services previously provided, lists of persons who, if the contract were awarded, would be assigned to the performance of the contract, information relating to subcontractors or other third parties providing resources and, more generally, the project development design and the description of the manner of performance of the contract.

27 Antea claims that, by agreeing to treat that information confidentially, the contracting authority infringed the Law on public procurement and the Law on combating unfair competition. It wrongly considered that CDM Smith, Multiconsult and Arup had established that that information constituted trade secrets.

28 Moreover, the contracting authority failed to fulfil its obligation to give adequate reasons, on the basis of the sub-criteria set out in the tender specifications, for the scoring of each of the tenders.

29 Antea submits that it was deprived of its right to an effective remedy on account, first, of the excessive nature of the confidential treatment accorded to the information contained in its competitors' tenders and, second, of the lack of an adequate statement of reasons for the scores awarded. In the light of the principles of equal treatment and transparency, the right to confidential

treatment of certain information should be interpreted strictly. Economic operators who decide to participate in a public procurement procedure should agree that certain information about their activities might be disclosed.

30 The contracting authority disputes those arguments.

31 It considers that the project development design and the description of the manner of performance of the contract contain studies based on experience acquired over the years and refined for the procedure in question. Those studies thus form part of the intellectual property of their author.

32 The contracting authority maintains that disclosure of that information could, in any event, undermine the legitimate interests of the tenderer. Thus, the information contained in CDM Smith's tender has commercial value and, by means of internal rules, contractual clauses and instructions for the organisation of work and security of documents, that tenderer took the necessary measures for them to remain secret. Their disclosure would enable competitors to use the tenderer's know-how and the technical or organisational solutions which it has developed.

33 In the present case, the contracting authority maintains that each tenderer provided credible and coherent explanations concerning the classification of the information as trade secrets, on the basis of which it was decided to grant the confidential treatment requested. It considers, in that regard, that the principle of transparency does not override the right to protection of trade secrets.

34 Confidentiality extends, in particular, to the lists of persons assigned to perform the contract. The disclosure of such lists, which contain information enabling experts to be identified, would expose tenderers to loss of staff, since competitors might attempt to recruit those experts. Information on subcontractors or other third parties also includes information relating to their experts.

35 The contracting authority submits, moreover, that each of the award criteria was applied in accordance with the tender specifications and that the evaluation of the tenders in relation to those criteria took place in an exhaustive manner.

36 According to CDM Smith and Multiconsult, the information on the organisation and manner of performance of their services, such as that sent to the contracting authority, constitutes an intangible asset forming part of the tenderer's 'intellectual capital'. In the event of disclosure of that information, competitors could make use of the ideas and solutions presented therein. Moreover, and in any event, information on human resources is of high commercial value and constitutes a trade secret.

37 The referring court notes that it follows from Article 96 of the Law on public procurement that, in principle, tenderers have full access to the documents submitted in the context of public procurement procedures. The absence of such access would, according to that court, have a negative impact on the confidence of tenderers in the decisions of contracting authorities and on the exercise of the right to an effective remedy.

38 That court states that many tenderers seek confidential treatment of the documents that they submit to the contracting authorities, asserting that the information contained in them is a trade secret. Under Article 8(3) of the Law on public procurement, contracting authorities are prohibited from disclosing such information if the tenderer has made such a request and adduced the necessary evidence.

39 There is uncertainty as to the scope of Article 21(1) of Directive 2014/24 and as to the relevance, in that context, of Article 2(1) of Directive 2016/943. It is necessary, in order to ensure as far as possible uniformity of practice in the field of public procurement, to provide an interpretation of Article 21 which is consistent, in particular, with the principles of fair competition, equal treatment, transparency and proportionality.

40 According to the referring court, information provided by the tenderers to the contracting authority cannot all be regarded as being a trade secret or, more generally, as confidential. If the EU legislature had taken the view that all the information referred to in Articles 59 and 60 of Directive 2014/24 and Annex XII thereto is a trade secret, it would have indicated this. To facilitate, on the basis of an excessively broad interpretation of the concept of trade secrets, the grant of confidential treatment of the information transmitted by the tenderers would undermine the abovementioned principles.

41 That court presents an overview of the information and, in particular, of the design elements which each tenderer was required, in this instance, in accordance with the tender specifications, to submit to the contracting authority. It observes that, while the technical and methodological solutions thus submitted to the contracting authority have intellectual value and may therefore fall within the scope of a work protected by copyright, it does not necessarily follow that those elements constitute trade secrets.

42 Nor is that court convinced by the relevance of the risk of 'poaching' of experts relied on by the contracting authority. It is true that such a risk exists, but it is not problematic. It is natural for employees to look for new jobs and for employers to look for new employees, particularly in areas where expertise is required.

43 By contrast, the fact that a tenderer has very little information about the tenders which its competitors have submitted to the contracting authority is problematic, since that would have the effect of impeding or even preventing the effective use of remedies. In that regard, that court asks whether, in the event that it finds that certain documents should not have been treated as confidential, it would be necessary to allow the applicant to bring a new action.

44 The referring court also raises the issue of the award criteria relating to the 'project development design' and the 'description of the manner of performance of the contract'. It asks whether such criteria are too broad and vague. Any criterion laid down by the contracting authority should enable the contracting authority to take a decision on the basis of objective data which are easily comparable and quantifiable.

45 In those circumstances, the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive [2014/24] permit Article 21(1) of Directive 2014/24 and Article 2(1) of Directive [2016/943], including in particular the terms "is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible" and "has commercial value because it is secret" and the indication that "the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential", to be interpreted in such a manner that an economic operator can reserve, as a trade secret, any information on the ground that it does not wish to disclose that information to competing economic operators?

(2) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24/EU permit Article 21(1) of Directive 2014/24/EU and Article 2(1) of Directive 2016/943 to be interpreted in such a manner that economic operators competing for a public contract may reserve the documents referred to in Articles 59 and 60 of Directive 2014/24 and in Annex XII to Directive 2014/24 in whole or in part as trade secrets, including in particular the description of their experience, the list of references, the list of persons proposed to perform the contract and their professional qualifications, the names and capacities of the entities whose capacities they rely on or of their subcontractors, where those documents are required in order to prove fulfilment of the conditions for participation in the procedure or for the purpose of conducting an evaluation in accordance with the criteria for the evaluation of tenders or for ascertaining the compliance of the tender with the other requirements of the contracting authority contained in the procedure documentation (contract notice, tender specifications)?

(3) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24/EU, read in conjunction with Articles 58(1), 63(1) and 67(2)(b) thereof, permit the contracting authority to accept the economic operator's declaration that it has at its disposal the personal resources required by the contracting authority or declared by the economic operator, the entities on whose resources it wishes to rely or their subcontractors, which it must demonstrate to the contracting authority in accordance with applicable laws, and at the same time the economic operator's declaration that the mere disclosure to competing economic operators of the details of those persons or entities (their names, experience and qualifications) may result in their being "poached" by those economic operators, with the result that it is necessary to treat that information as a trade secret? In the light of the foregoing, may such an impermanent link between the economic operator and those persons and entities be regarded as evidence of the availability of the resource in question and, in particular, may the economic operator be awarded additional points under the tender evaluation criteria?

(4) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24 permit Article 21(1) of Directive 2014/24 and Article 2(1) of Directive 2016/943 to be interpreted in such a manner that economic operators competing for a public contract may reserve as trade secrets documents required for the purpose of examining the compliance of their tender with the requirements of the contracting authority contained in the tender specifications (including the description of the subject matter of the contract) or for the purpose of evaluating the tender under the tender evaluation criteria, particularly where those documents relate to the fulfilment of the requirements of the contracting authority laid down in the tender specifications, in applicable laws or in other documents which are generally available or accessible to interested parties, and in particular where that evaluation does not take place according to objectively comparable schemes and mathematically or physically measurable and comparable indicators, but rather according to an individual assessment by the contracting authority? Consequently, are Article 21(1) of Directive 2014/24/EU and Article 2(1) of Directive 2016/943 to be interpreted as meaning that a declaration made by an economic operator in the context of its tender that it will perform the subject matter of the contract in accordance with the contracting authority's requirements included in the tender specifications, compliance with which is monitored and assessed by the contracting authority, can be regarded as a trade secret of the economic operator in question, even though it is for the economic operator to choose the methods intended to achieve the result required by the contracting authority (the subject matter of the contract)?

(5) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24, read in conjunction with

Article 67(4) thereof, which provides that award criteria must not have the effect of conferring an unrestricted freedom of choice on the contracting authority, must ensure the possibility of effective competition and must allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria, permit the contracting authority to establish a tender evaluation criterion, including in particular a criterion evaluated according to the contracting authority's own judgment, even though it is known at the time at which the criterion is established that economic operators will designate the part of their tender relating to that criterion as a trade secret, to which the contracting authority does not object, with the result that competing economic operators, being unable to verify their competitors' tenders and compare them with their own tenders, may have the impression that the contracting authority examines and evaluates tenders in an entirely discretionary manner?

(6) Are the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24/EU, read in conjunction with Article 67(4) thereof, which provides that award criteria must not have the effect of conferring an unrestricted freedom of choice on the contracting authority, must ensure the possibility of effective competition and must allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria, to be interpreted as permitting the contracting authority to establish a tender evaluation criterion such as, in the present case, the criterion concerning the "[project development design]" and the criterion concerning the "description of the manner of performance of the contract"?

(7) Is Article 1(1) and (3) of [Directive 89/665], requiring the Member States to ensure that economic operators have effective remedies against decisions taken by contracting authorities and that review procedures are available to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement, to be interpreted as meaning that a finding by the adjudicating authority that documents reserved by the economic operators in a particular procedure are not trade secrets, which results in the contracting authority being obliged to disclose them and to make them available to competing economic operators – if such an effect is not directly provided for in applicable laws – imposes an obligation on the adjudicating authority to make a ruling enabling the economic operator in question to lodge an appeal again – within the scope arising from the content of those documents which the economic operator did not know beforehand, as a result of which it was not in a position to make effective use of a legal remedy – against an action with respect to which it would not be entitled to lodge an appeal on account of the expiry of the period for doing so, for instance by declaring invalid the examination and evaluation of tenders to which the documents in question reserved as trade secrets pertained?'

Consideration of the questions referred

The first question

46 By its first question, the referring court asks, in essence, whether Article 18(1) and Article 21(1) of Directive 2014/24 must be interpreted as precluding national legislation on public procurement which requires that, with the sole exception of trade secrets, information sent by the tenderers to the contracting authorities must be published in its entirety or communicated to the other tenderers, and a practice on the part of contracting authorities whereby requests for confidential treatment in respect of trade secrets are accepted as a matter of course.

47 In that regard, it should be noted at the outset that Article 18 of Directive 2014/24 establishes the principles governing the award of public contracts referred to in that directive. As follows from

paragraph 1 of that provision, contracting authorities must treat economic operators ‘equally and without discrimination’ and must act ‘in a transparent … manner’.

48 However, notwithstanding the obligation of the contracting authorities to act in a transparent manner, under Article 21(1) of that directive, such an entity may not disclose ‘information forwarded to it by economic operators which they have designated as confidential’.

49 In that regard, the Court has repeatedly held that the principal objective of the EU rules on public procurement is to ensure undistorted competition, and that, in order to achieve that objective, it is important that the contracting authorities do not release information relating to public procurement procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures. Since public procurement procedures are founded on a relationship of trust between the contracting authorities and participating economic operators, those operators must be able to communicate any relevant information to the contracting authorities in such a procedure, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to those operators (judgments of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraphs 34 to 36, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 115).

50 That said, the principle of the protection of confidential information must be reconciled with the requirements of effective judicial protection. To that end, the prohibition laid down in Article 21(1) of Directive 2014/24 must be weighed against the general principle of good administration, from which the obligation to state reasons stems. That balancing exercise must take account of the fact that, in the absence of sufficient information enabling it to ascertain whether the decision of the contracting authority to award the contract is vitiated by errors or unlawfulness, an unsuccessful tenderer will not, in practice, be able to rely on its right, referred to in Article 1(1) and (3) of Directive 89/665, to an effective review (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraphs 121 to 123).

51 In the present case, it is apparent from the order for reference that the request made by the applicant in the main proceedings for access to the information submitted to the contracting authority by CDM Smith, Arup and Multiconsult was examined on the basis of the Law on public procurement. In accordance with Article 8 of that law, trade secrets are, at the request of the tenderers holding them, to be treated confidentially, while any other information submitted by the tenderers to the contracting authority must, pursuant to Article 96 of that law, be made public in an annex to the report drawn up by that entity.

52 It is also apparent from the order for reference that the concept of ‘trade secrets’, which is defined in Polish law in Article 11(2) of the Law on combating unfair competition, refers to information which has commercial value and is not generally known to persons who normally deal with the kind of information in question or is not easily accessible to them, provided that the person authorised to use or dispose of that information diligently took steps to preserve its confidentiality.

53 That definition corresponds essentially to that of the concept of trade secrets in Article 2(1) of Directive 2016/943.

54 It must be held that it does not follow either from the wording or objective of Directive 2014/24 that it precludes the use, by the legislature of a Member State, of such a concept to define the scope of Article 21(1) of that directive.

55 It is true that the concept of ‘trade secret’, as defined in Article 2(1) of Directive 2016/943, or in a corresponding provision of national law, overlaps only in part with the words ‘information forwarded to it … designated as confidential’ contained in Article 21(1) of Directive 2014/24. According to the very wording of that provision, the information referred to therein includes ‘but [is] not limited to, technical or trade secrets and the confidential aspects of tenders’ which indicates, as the Advocate General noted in points 34 and 35 of his Opinion, that the scope of the protection of confidentiality set out in Directive 2014/24 is broader than that of protection covering trade secrets alone. The Court has, moreover, already held that the rules on the unlawful acquisition, use or disclosure of trade secrets, within the meaning of Directive 2016/943, do not release public authorities from the confidentiality obligations which may arise under Directive 2014/24 (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraphs 97 and 99).

56 However, Article 21(1) of Directive 2014/24 states that the prohibition on disclosure of information communicated in confidence applies ‘unless otherwise provided … in the national law to which the contracting authority is subject’.

57 It follows from that indication that it is permissible for each Member State to strike a balance between the confidentiality referred to in that provision of Directive 2014/24 and the rules of national law pursuing other legitimate interests, including that, expressly mentioned in that provision, of ensuring ‘access to information’, in order to ensure the greatest possible transparency in public procurement procedures.

58 However, if the effectiveness of EU law is not to be undermined, the Member States, when exercising the discretion conferred on them by Article 21(1) of that directive, must refrain from introducing regimes which do not ensure full respect for the purpose of that provision, referred to in paragraph 49 of the present judgment, which undermine the balancing exercise referred to in paragraph 50 of the present judgment or which alter the regime relating to the publicising of awarded contracts and the rules relating to information to candidates and tenderers set out in Article 50 and 55 of that directive.

59 In that regard, it should be noted that any regime relating to confidentiality must, as Article 21(1) of Directive 2014/24 expressly states, be without prejudice to the abovementioned regime and to those rules laid down in Articles 50 and 55 of that directive.

60 Under Article 50(1) of that directive, the contracting authority must, at the end of the procurement procedure, issue, for publication, a contract award notice containing, in accordance with Part D of Annex V to that directive, certain information relating, inter alia, to the successful tenderer and to the tender submitted by that tenderer. However, Article 50(4) of Directive 2014/24 also provides that that information may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of an economic operator, public or private, or might prejudice fair competition.

61 Similarly, although Article 55(2) of Directive 2014/24 expressly allows any tenderer that has made an admissible tender to request the contracting authority to inform it of the reasons for the rejection of its tender, the characteristics and relative advantages of the tender selected and the name of the successful tenderer, it is nevertheless provided, in paragraph 3 of that article, that the contracting authority may decide to withhold certain information, where its release would impede law enforcement, would otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of an economic operator or might prejudice fair competition.

62 National legislation which requires publicising of any information which has been communicated to the contracting authority by all tenderers, including the successful tenderer, with the sole exception of information covered by the concept of trade secrets, is liable to prevent the contracting authority, contrary to what Articles 50(4) and 55(3) of Directive 2014/24 permit, from deciding not to disclose certain information pursuant to interests or objectives mentioned in those provisions, where that information does not fall within that concept of a trade secret.

63 Consequently, Article 21(1) of Directive 2014/24, read in conjunction with Articles 50 and 55 of that directive, first, does not preclude a Member State from establishing a regime that limits the scope of the obligation to treat information as confidential on the basis of a concept of trade secrets corresponding, in essence, to that contained in Article 2(1) of Directive 2016/943. Second, it precludes such a regime where it does not contain an adequate set of rules allowing contracting authorities, in circumstances where Articles 50 and 55 apply, exceptionally to refuse to disclose information which, while not covered by the concept of trade secrets, must remain inaccessible pursuant to an interest or objective referred to in Articles 50 and 55.

64 As regards, lastly, the practice, described by the referring court, whereby, in the Member State concerned, contracting authorities accept requests from tenderers to classify as trade secrets any information that they do not wish to disclose to competing tenderers as a matter of course, it must be stated that such a practice, on the assumption that it has actually been put into effect, which it is not for the Court to ascertain, is liable to undermine not only the balance between the principle of transparency set out in Article 18(1) of Directive 2014/24 and the principle of confidentiality referred to in Article 21(1) of that directive, but also the requirements, recalled in paragraph 50 of this judgment, of effective judicial protection, and the general principle of good administration, which derives from the obligation to state reasons.

65 In that regard, it must be borne in mind that the contracting authority cannot be bound by an economic operator's mere claim that the information submitted is confidential but must require that that operator demonstrate the genuinely confidential nature of the information which it claims should not be disclosed (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 117).

66 Furthermore, in order to comply with the general principle of good administration and to reconcile the protection of confidentiality with the requirements of effective judicial protection, the contracting authority must not only state the reasons for its decision to treat certain data as confidential but must also communicate in a neutral form – to the extent possible and in so far as such disclosure is capable of preserving the confidentiality of the specific elements of that data which merit protection on that basis – the essential content of that data to an unsuccessful tenderer which requests it, and in particular the content of the data concerning the decisive aspects of its decision and of the successful tender (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraphs 122 and 123).

67 Thus, the contracting authority may, inter alia and in so far as it is not precluded from doing so by the national law to which it is subject, communicate in summary form certain aspects of an application or tender and their technical characteristics, in such a way that the confidential information cannot be identified. In addition, assuming that the non-confidential information is adequate in order to ensure that the unsuccessful tenderer's right to an effective review is respected, the contracting authority may request the successful tenderer to provide it with a non-confidential version of the documents containing confidential information (judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centra*s, C-927/19, EU:C:2021:700, paragraphs 124 and 125).

68 In the light of all the foregoing considerations, the answer to the first question is that Article 18(1) and Article 21(1), read in conjunction with Article 50(4) and Article 55(3) of Directive 2014/24 must be interpreted as precluding national legislation on public procurement which requires that, with the sole exception of trade secrets, information sent by the tenderers to the contracting authorities must be published in its entirety or communicated to the other tenderers, and as precluding a practice of contracting authorities whereby requests for confidential treatment in respect of trade secrets are accepted as a matter of course.

The second to fourth questions referred

69 The second to fourth questions, which it is appropriate to examine together, concern, in particular, the interpretation of Article 18(1) and Article 21(1) of Directive 2014/24.

70 That said, as stated in paragraph 59 of this judgment, the latter provision is without prejudice, in particular, to the regime on informing candidates and tenderers laid down in Article 55 of that directive.

71 Independently of the scope of Article 21(1) of that directive, Article 55(2) expressly allows any tenderer that has made an admissible tender to request the contracting authority to inform it of the reasons for the rejection of its tender, the characteristics and relative advantages of the tender selected and the name of the successful tenderer, subject, only, to the possibility granted in paragraph 3 of that article to the contracting authority to decide to withhold certain information, where its release would impede law enforcement, would otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of an economic operator or might prejudice fair competition.

72 In the light of the relevance of all those provisions, it must be held that, by its second to fourth questions, the referring court asks, in essence, whether Article 18(1), Article 21(1) and Article 55 of Directive 2014/24 must be interpreted as meaning that a contracting authority must allow or, on the contrary, refuse to allow a tenderer whose admissible tender has been rejected access to the information that the other tenderers submitted concerning their relevant experience and the references relating to that experience, concerning the identity and professional qualifications of the persons proposed to perform the contract or the sub-contractors, and concerning the design of the projects to be carried out under the contract and the manner of performance of that contract.

73 As regards, first of all, the tenderers' relevant experience and the reference material which they attach to their tenders, by way of demonstration of that experience and their capacities, it must be held that such information, which largely corresponds to that referred to in Annex XII to Directive 2014/24, to which Articles 60 and 63 thereof refer, cannot be classified as confidential in its entirety.

74 Where an economic operator participates in a public procurement procedure, it cannot legitimately request that the list of contracts obtained or projects carried out, pursuant to which it acquired the relevant experience for the public contract in question, and the references used to demonstrate such experience, be treated as confidential in whole or in part.

75 Since the experience of a tenderer is not, as a general rule, secret, its competitors cannot, in principle, be deprived of information relating to that experience, on the basis of the concept of 'trade secrets' contained in the law of the Member State concerned in order to define the scope of the confidentiality referred to in Article 21(1) of Directive 2014/24, or on the basis of the protection

of ‘legitimate commercial interests’ or the preservation of ‘fair competition’ within the meaning of Article 55(3) of that directive.

76 In any event, in accordance with the principles deriving from the Court’s case-law recalled in paragraphs 66 and 67 of the present judgment, tenderers must, in the interests of transparency and in order to ensure compliance with the requirements of good administration and effective judicial protection, enjoy access, at the very least, to the essential content of the information provided by each of them to the contracting authority concerning their relevant experience for the public contract in question and the references used to demonstrate that experience. Such access is, however, without prejudice to particular circumstances relating to certain contracts for sensitive products or services which may exceptionally justify a refusal of disclosure on one of the other grounds mentioned in Article 55(3) of Directive 2014/24, relating to compliance with a prohibition or requirement laid down by law or the protection of the public interest.

77 As regards, next, information on natural and legal persons, including subcontractors, on which a tenderer indicates that it may rely in order to perform the contract, a distinction must be made between information enabling those persons to be identified and that which relates, without the possibility of making such an identification, to the qualifications or professional capacities of those persons.

78 The contracting authority must determine whether the disclosure of the identity of the experts or subcontractors engaged by a tenderer to contribute to the performance of that contract in the event that it is awarded, is likely to undermine the confidentiality protection referred to in Article 21(1) of Directive 2014/24 in respect of that tenderer, as well as those experts or subcontractors. To that end, that contracting authority should take into account all relevant circumstances, including the subject matter of the public contract in question, and the interest of that tenderer and those experts and subcontractors in taking part, with the same commitments negotiated in confidence, in subsequent procurement procedures. The disclosure of information sent to the contracting authority in the context of a public procurement procedure cannot be refused if that information, although relevant to the procurement procedure in question, has no commercial value in the wider context of the activities of those economic operators.

79 In the light of those considerations and in so far as it is plausible that the tenderer and the experts or subcontractors proposed by it have created a synergy with commercial value, it cannot be ruled out that access to the name-specific data relating to those commitments must be refused on the basis of the prohibition on disclosure laid down in Article 21(1) of Directive 2014/24 or may be refused under Article 55(3) of that directive.

80 As regards non-name-specific data, indicating, without the possibility of personal identification, the qualifications or professional capacities of the natural or legal persons engaged to perform the contract, the size and format of the workforce thus created, or the share of performance of the contract that the tenderer intends to assign to subcontractors, it must be held, in view of the importance of that information for the award of the contract, that the principle of transparency and the right to an effective remedy require, at the very least, that the essential content of the information be accessible to all tenderers.

81 As regards, finally, the design of the projects planned to be carried out under the public contract and the description of the manner of performance of the contract, it is for the contracting authority to examine whether those projects constitute elements or contain elements which can be protected by an intellectual property right, in particular by copyright, and thus fall within the scope

of the ground for refusal of disclosure set out in Article 55(3) of Directive 2014/24, relating to the application of laws.

82 In that regard, it should however be borne in mind that, even where that design and description, or a part thereof, are regarded as constituting works protected by copyright, which implies that they are regarded as original in the sense that they constitute intellectual creations specific to their author, reflecting the author's personality (see, to that effect, judgment of 29 July 2019, *Funke Medien NRW*, C-469/17, EU:C:2019:623, paragraph 19 and the case-law cited), that protection is reserved for elements which are the expression of such a creation and does not extend to ideas, procedures, operating methods or mathematical concepts as such (see, to that effect, judgment of 13 November 2018, *Levola Hengelo*, C-310/17, EU:C:2018:899, paragraphs 37 and 39 and the case-law cited). That protection does not therefore relate to technical or methodological solutions such as those works may include.

83 In addition, and irrespective of whether they constitute or contain elements protected by an intellectual property right, the design of the projects planned to be carried out under the public contract and the description of the manner of performance of the relevant works or services may, as the case may be, have a commercial value which would be unduly undermined if that design and that description were disclosed as they stand. Their publication may, in such a case, be liable to distort competition, in particular by reducing the ability of the economic operator concerned to distinguish itself using the same design and description in future public procurement procedures.

84 It is therefore possible that full access to information relating to the design of the projects planned to be carried out under the public contract and to the description of the manner of performance of the contract should be refused on the basis of the prohibition on disclosure laid down in Article 21(1) of Directive 2014/24 or may be refused under Article 55(3) of that directive. However, it is excessively difficult, if not impossible, for other tenderers to exercise their right to an effective remedy against decisions of the contracting authority concerning the evaluation of tenders if they have no information on that design or manner of performance. Consequently, the essential content of that part of the tenders must be accessible, in accordance with the principles arising from the case-law referred to in paragraphs 66 and 67 of the present judgment.

85 In the light of all the foregoing considerations, the answer to the second, third and fourth questions is that Article 18(1), Article 21(1) and Article 55 of Directive 2014/24 must be interpreted as meaning that the contracting authority must, in order to determine whether it will refuse a tenderer whose admissible tender has been rejected access to the information which other tenderers submitted concerning (i) their relevant experience and the references relating thereto, (ii) the identity and professional qualifications of the persons that they have proposed to perform the contract or the sub-contractors and (iii) the design of the projects to be performed under the public contract and the manner of performance of that contract, assess whether that information has a commercial value outside the scope of the public contract in question, where its disclosure might undermine legitimate commercial concerns or fair competition. The contracting authority may, moreover, refuse to grant access to that information where, even though it does not have such commercial value, its disclosure would impede law enforcement or would be contrary to the public interest. A contracting authority must, where full access to information is refused, grant that tenderer access to the essential content of that information, so that observance of the right to an effective remedy is ensured.

The fifth question

86 The fifth question is based on the factual premiss that, in the Member State of the referring court, contracting authorities as a matter of course accept requests from tenderers to treat as confidential information contained in tenders which is decisive in terms of the contract award criteria chosen by the contracting authority. It follows that no tenderer is in a position to form an opinion on the quality of its competitors' tenders. In such circumstances, it is impossible for each tenderer to know whether the award of the contract is based on an objective or arbitrary comparison.

87 Although it is not for the Court, in the context of a reference for a preliminary ruling, to examine whether that premiss actually corresponds to a practice of contracting authorities in that Member State, it must be noted that it is apparent from paragraphs 71 to 85 of the present judgment that the information contained in the tenders which is relevant for the evaluation of those tenders and the award of the contract on the basis of the criteria set out in the contract notice and the contract documents cannot systematically and entirely be classified as confidential. It follows that Directive 2014/24 precludes a practice such as that described in the fifth question in respect of its factual premiss. Consequently, there is no need to answer that question, which relates to the contract award criteria that may be used where such a practice in respect of confidential treatment is followed.

The sixth question

88 By its sixth question, the referring court asks, in essence, whether Article 18(1) of Directive 2014/24, read in the light of Article 67(4) thereof, must be interpreted as precluding the 'project development design' to be carried out under the public contract in question and the 'description of the manner of performance of the contract' for that contract from being included among the criteria for the award of the contract.

89 Those provisions of Directive 2014/24 require compliance with the principles of transparency and equal treatment, which allow the conditions of effective competition to be ensured.

90 As stated, moreover, in recital 90 of that directive, public contracts should be awarded on the basis of criteria which ensure compliance with those principles, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine which tender is the most economically advantageous tender on the basis of the best price-quality ratio. To that end, contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions. In the same vein, recital 92 of that directive states that the economic and qualitative criteria determined by the contracting authority should allow for a comparative assessment of the level of performance offered by each tenderer.

91 It is therefore important that the award criteria do not confer an unrestricted freedom of choice on the contracting authority (judgment of 20 September 2018, *Montte*, C-546/16, EU:C:2018:752, paragraph 31 and the case-law cited). Therefore, as is apparent from Article 67(4) of Directive 2014/24, those criteria must be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet those criteria.

92 Therefore, where, as in the present case, the contracting authority establishes award criteria intended to measure the quality of the tenders, those criteria cannot merely refer to the design of the projects to be performed under the public contract and the manner of performance of that contract described by the tenderer, but must be accompanied by indications which allow a sufficiently concrete comparative assessment of the level of service offered to be made. In a case such as that at

issue in the main proceedings, where the quality criteria correspond, in total, to 60% of the points that may be allocated for the purposes of awarding the tender, it is all the more important, in order to guarantee an objective comparison and to eliminate the risk of arbitrary treatment, that those criteria be clearly set out.

93 Such indications may, in particular, be provided by establishing sub-criteria.

94 Where the service which is the subject of the contract relates, as in the case in the main proceedings, to a project development service, account should be taken, in particular, of the training and professional experience of the members of the team proposed to perform the contract in question (see, to that effect, judgment of 26 March 2015, *Ambisig*, C-601/13, EU:C:2015:204, paragraphs 31 to 34).

95 In the present case, it is for the referring court to ascertain whether the sub-criteria relating to the 'project development design' and the 'description of the manner of performance of the contract' were sufficiently clear to enable the contracting authority to make a concrete and objective assessment of the tenders submitted.

96 In the light of the foregoing, the answer to the sixth question referred is that Article 18(1) of Directive 2014/24, read in the light of Article 67(4) thereof, must be interpreted as not precluding the 'project development design' planned to be carried out under the public contract in question and the 'description of the manner of performance of the contract' for that contract from being included among the criteria for the award of the contract, provided that those criteria are accompanied by indications enabling the contracting authority to make a specific and objective assessment of the tenders submitted.

The seventh question

97 As is apparent from the elements of the dispute in the main proceedings summarised in paragraphs 25 to 27 of the present judgment, Antea brought an action seeking annulment of the contract award decision on the ground, inter alia, that it did not have access, after that decision was adopted, to information that its competitors, including the successful tenderer, had forwarded to the contracting authority.

98 By its seventh question, the referring court asks, in essence, whether Article 1(1) and (3) of Directive 89/665 must be interpreted as meaning that, in the event of a finding, when dealing with an action brought against a decision awarding a public contract, of an obligation on the part of the contracting authority to disclose to the applicant information which was wrongly treated as confidential, that finding must also lead to the adoption, by that contracting authority, of a new award decision in order to enable the applicant to bring a fresh action.

99 It follows from Article 1(1) of Directive 89/665 that decisions taken by a contracting authority in a procurement procedure that falls under EU law must be capable of being reviewed effectively and, in particular, as rapidly as possible; that review makes it possible to challenge the compliance of those decisions with EU law or national rules transposing EU law. Article 1(3) states, moreover that those review procedures must be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

100 Article 1 is thus intended to protect economic operators against arbitrary decisions by a contracting authority by ensuring that there are, in all the Member States, effective remedies, so as

to ensure the effective application of EU rules on public procurement, in particular at a stage where infringements can still be rectified. The purpose of Directive 89/665 is therefore to ensure full respect for the right to an effective remedy and to a fair trial, as enshrined in the first and second paragraphs of Article 47 of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraphs 127 and 128).

101 In order to observe that right to an effective remedy, the national court hearing an action relating to a procedure for the award of a public contract must ascertain, taking into account the obligation on the part of the contracting authority to provide the unsuccessful tenderer with sufficient information to safeguard that right to an effective remedy and the right of other economic operators to protection of confidentiality, that the contracting authority rightly considered that the information it refused to disclose to the applicant was confidential. To that end, that court must carry out a full examination of all the relevant matters of fact and law. Accordingly, it must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraphs 129 and 130).

102 Where, at the end of that verification, the national court finds that certain information was wrongly classified as confidential, that court must be able to annul the contracting authority's decision refusing to disclose that information and, as the case may be, the decision dismissing the administrative appeal against that refusal. Furthermore, if it is permitted to do so under national law, that court must itself be able to take a new decision in that regard (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 136).

103 As regards the effects of failure to disclose that information on the legality of the procurement procedure and, thus, on the contract award decision, the provisions of Directive 89/665 do not make it possible to determine the detailed procedural rules under which the national court must examine those effects. It is therefore for each Member State to determine those detailed rules, which must, in accordance with Article 1(3) of that directive, enable any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement to challenge effectively and rapidly decisions taken by contracting authorities (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 136).

104 Therefore, in a case such as that at issue in the main proceedings, in which the applicant seeks annulment of the contract award decision on the ground, inter alia, that certain information was wrongly classified as confidential, it is for the court hearing the case to examine whether that information should have been disclosed and, if so, to assess whether the failure to disclose that information deprived the applicant of the possibility of bringing an effective action against that award decision.

105 It is then for that court to ensure that any infringement of any established right to an effective remedy is remedied.

106 In that context, that court must in particular take into account the settled case-law of the Court to the effect that the purpose, set out in Article 1 of Directive 89/655, of guaranteeing effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing such proceedings start to run only from the date on which the applicant knew, or ought to have known, of the alleged

infringement of those provisions (judgments of 28 January 2010, *Uniplex (UK)*, C-406/08, EU:C:2010:45, paragraph 32, and of 8 May 2014, *Idrodinamica Spurgo Velox and Others*, C-161/13, EU:C:2014:307, paragraph 37, and order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 45).

107 Consequently, in the event that national procedural law does not allow the court before which an action has been brought against a decision to award a public contract to take, during the proceedings, measures restoring observance of the right to an effective remedy, that court must, where it transpires that that right has been infringed as a result of the failure to disclose information, either annul that award decision or find that the applicant may bring a fresh action against the award decision already taken, the time limit for doing so running only from the time that that applicant has access to all the information that was wrongly classified as confidential.

108 Accordingly, the answer to the seventh question is that Article 1(1) and (3) of Directive 89/665 must be interpreted as meaning that, in the event of a finding, when dealing with an action brought against a decision awarding a public contract, of an obligation on the part of the contracting authority to disclose to the applicant information which was wrongly treated as confidential and of a breach of the right to an effective remedy on account of the failure to disclose that information, that finding does not necessarily have to lead to the adoption, by that contracting authority, of a new contract award decision, provided that the national procedural law permits the court hearing the case to adopt, during the proceedings, measures which restore compliance with the right to an effective remedy or allow it to find that the applicant may bring a new action against the award decision that has already been made. The time limit for bringing such an action must not start to run until the applicant has access to all the information which had been wrongly classified as confidential.

Costs

109 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Article 18(1) and Article 21(1), read in conjunction with Article 50(4) and Article 55(3) of 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC,**

must be interpreted as precluding national legislation on public procurement which requires that, with the sole exception of trade secrets, information sent by the tenderers to the contracting authorities must be published in its entirety or communicated to the other tenderers, and as precluding a practice of contracting authorities whereby requests for confidential treatment in respect of trade secrets are accepted as a matter of course.

2. **Article 18(1), Article 21(1), and Article 55(3) of Directive 2014/24,**

must be interpreted as meaning that the contracting authority

– **must, in order to determine whether it will refuse a tenderer whose admissible tender has been rejected access to the information which other tenderers submitted concerning (i) their relevant experience and the references relating thereto, (ii) the identity and professional**

qualifications of the persons that they propose will perform the contract or the sub-contractors and (iii) the design of the projects to be performed under the contract and the manner of performance of that contract, assess whether that information has a commercial value outside the scope of the public contract in question, where its disclosure might undermine legitimate commercial or fair competition;

– **may, moreover, refuse to grant access to that information where, even though it does not have such commercial value, its disclosure would impede law enforcement or would be contrary to the public interest; and**

– **must, where full access to information is refused, grant that tenderer access to the essential content of that information, so that observance of the right to an effective remedy is ensured.**

3. **Article 18(1) of Directive 2014/24, read in the light of Article 67(4) of that directive,**

must be interpreted as not precluding the 'project development design', planned to be carried out under the public contract in question and the 'description of the manner of performance of the contract' for that contract from being included among the criteria for the award of the contract, provided that those criteria are accompanied by indications enabling the contracting authority to make a specific and objective assessment of the tenders submitted.

4. **Article 1(1) and (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014,**

must be interpreted as meaning that, in the event of a finding, when dealing with an action brought against a decision awarding a public contract, of an obligation on the part of the contracting authority to disclose to the applicant information which was wrongly treated as confidential and of a breach of the right to an effective remedy on account of the failure to disclose that information, that finding does not necessarily have to lead to the adoption, by that contracting authority, of a new contract award decision, provided that the national procedural law permits the court hearing the case to adopt, during the proceedings, measures which restore observance of the right to an effective remedy or allow it to find that the applicant may bring a new action against the award decision that has already been made. The time limit for bringing such an action must not start to run until the applicant has access to all the information which had been wrongly classified as confidential.

[Signatures]

---

* Language of the case: Polish.