

Case C-327/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

19 April 2019

Referring court:

Korkein hallinto-oikeus (Finland)

Date of the decision to refer:

15 April 2019

Applicant:

Nobina Finland Oy

Other parties to the proceedings:

Helsingin seudun liikenne-kuntayhtymä

Oy Pohjolan Kaupunkiliikenne Ab

Subject matter of the main proceedings

Public contract — Division of a contract into lots — Limitation of that contract's lots for which a single tenderer can be awarded a contract — Lot award limitation clause — Invitation to tender — Bus transport

Subject matter and legal basis of the reference

By way of a contract notice in the utilities sector, the Helsingin seudun liikenne-kuntayhtymä (Helsinki Regional Transport Authority, 'the HSL') published in the Official Journal of the European Union of 25 August 2015 a call for competition for a bus transport contract to be awarded under the open procedure.

The HSL is a contracting authority that falls within the scope of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors ('2004 Utilities Directive').

The bus transport contract in question falls into category 2 of Annex XVII A to the 2004 Utilities Directive, ‘Land transport services, including armoured car services, and courier services, except transport of mail’. The estimated total value of the contract excluding value-added tax is approximately EUR 60 million and exceeds the threshold laid down in Article 16 of the 2004 Utilities Directive.

The present case concerns the question of whether the contracting entity was permitted to limit, pursuant to a clause used by it in the invitation to tender, the number of lots in that contract for which a single tenderer can be awarded a contract (‘the lot award limitation clause’).

The inclusion of the lot award limitation clause in the call for competition had the result that it was Oy Pohjolan Kaupunkhad siliikenne Ab (‘Pohjolan Kaupunkiliikenne’), which had submitted the second-best tender, and not Nobina Finland Oy (‘Nobina’), which had submitted the best tender, that was awarded the contract for component 210 of the subject matter of the contract in question.

Questions referred for a preliminary ruling

1. Does Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (‘2004 Utilities Directive’) preclude an interpretation according to which, in a situation in which a tender can be submitted for several or all of the lots of a contract, a contracting authority can limit, by means of a clause included in the invitation to tender, the number of lots for which a single tenderer can be awarded a contract (‘a lot award limitation clause’)?

2. Pursuant to the lot award limitation clause included in the call for competition for bus transport at issue, if the components of the subject matter of a contract that are won by a tenderer exceed the maximum number of vehicle days laid down in the clause, then the subject matter of the contract for which the points difference between the best and the second-best tender, multiplied by the number of vehicles of that subject matter of the contract, is the smallest is transferred to the tenderer that submitted the second-best tender. The use of the lot award limitation clause can mean that, on the basis of the call for competition, the tenderer that submitted the best tender for the subject matter of the contract in question is awarded a contract for fewer vehicle days in total than the tenderer that submitted the second-best tender for the subject matter of the contract.

a) Can the specific outcome to which the inclusion of the lot award limitation clause in the call for competition could lead be taken into account when assessing the permissibility of the lot award limitation clause, or must this be assessed on an abstract basis, so that the inclusion of a lot award limitation clause such as that in question in the main proceedings is either permissible or not permissible pursuant to the 2004 Utilities Directive?

b) Are the circumstances specified in the invitation to tender as justification for the clause — which are related to the preservation of the competitive situation in public bus transport in the Helsinki region and the reduction of the operational risk that the assumption of responsibility for a high volume of transport and the establishment of transport on changed lines entail for the quality of the transport service — relevant to the assessment of the permissibility of a lot award limitation clause such as that in question in the main proceedings?

Provisions of EU law cited

Articles 10, 17 and 55 and Annex XII of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

Annex VII to Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

Article 65 and recital 88 of Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

The period prescribed in Directive 2014/25/EU for the transposition of the directive into domestic law expired on 18 April 2016, but the directive had not yet been transposed in Finland when the HSL initiated the procurement procedure on 25 August 2015. Although the directive is not applicable *ratione temporis* in this case, the Korkein hallinto-oikeus (Supreme Administrative Court, Finland) believes that it is useful to refer to the provisions of that directive.

Provisions of national law cited

Paragraphs 2 and 54 of Law 349/2007 on the procurement procedures of entities operating in the water, energy, transport and postal services sectors

Law 349/2007 transposed Directive 2004/17/EC into Finnish law.

Brief summary of the facts and procedure

- 1 The invitation to tender relates to public service contracts. The call for competition is based on performance and costs, whereby the bus transport operator submits a tender for the operation of the lines of a component of the subject matter of the contract in accordance with the schedule and scheduling concept prescribed by the contracting authority.
- 2 The invitation to tender covered twelve components of the subject matter of the contract, three of which contained optional components of the subject matter of

the contract. The components of the subject matter of the contract were made up of one or several bus lines in the Helsinki region. According to the invitation to tender, the volume of transport for which tenders were invited is 13.6-14.7 million kilometres of routes per year, for which 198-206 buses are required on working days. The proportion of the transport for which tenders were invited is approximately 15% of the bus route kilometres commissioned by the HSL and approximately 16% of the number of vehicles of the HSL. The number of vehicle days specified in the individual components of the subject matter of the contract in the invitation to tender, that is to say the number of vehicles required to operate the transport service on working days, was 5 to 39 vehicles.

- 3 According to the invitation to tender, the contract for the components of the subject matter of the contract is awarded for a period of seven years. Furthermore, the contracts contained an option clause, pursuant to which the contracts can be extended for a maximum of three years.
- 4 It is clear from the invitation to tender that component 210 of the subject matter of the contract, which was transferred from Nobina to Pohjolan Kaupunkiliikenne due to the application of the lot award limitation clause, covers three lines for the operation of which 26 vehicles are required on working days, via which approximately 1.87 million kilometres are travelled per year.
- 5 The invitation to tender stated that tenders can be submitted for one or several components of the subject matter of the contract. Each tender had to be drawn up for the entire subject matter of the contract and division of the components of the subject matter of the contract into lots was not permissible. Overall economic advantageousness was specified as the award criterion, which is assessed by taking account of the overall costs of providing the transport service and the characteristics of the public transport bus fleet as quality factors.
- 6 The lot award limitation clause introduced into the round of tenders in question contained a limitation on the maximum transport volume that a tendering company or a company belonging to the same group of companies or tendering consortium can win in the round of tenders. The content of the lot award limitation clause was as follows:

In this round of tenders, a single tenderer can be awarded components of the subject matter of the contract for the operation of a maximum of 110 public transport buses. If, based on a comparison of the tenders for all components of the subject matter of the contract in this round of tenders, a tenderer wins components of the subject matter of the contract for which the number of vehicle days specified in the definition of the subject matter of the contract exceeds 110 in total, a difference shall be calculated for those components of the subject matter of the contract. The difference is obtained by multiplying the points difference between the best and the second-best tender in the comparative assessment of the tenders by the number of vehicles in the component of the subject matter of the contract. The components of the subject matter of the contract are ranked on the

basis of the difference. Components of the subject matter of the contract with the lowest difference are awarded to the second-best tender in the ranking list based on the difference until the overall number of vehicles of the components of the subject matter that are won by a tenderer is less than or equal to 110. This limitation shall be applied in such a way that the combined effect of the modified results is minimised for the contracting authority with regard to the overall economic advantageousness of the contract.'

- 7 The HSL justified the lot award limitation clause on the ground that the overall transport volume to be awarded in the round of tenders in question was extraordinarily high. The aim of the limitation was to ensure that the competitive situation in the bus transport market in the Helsinki region was preserved and to reduce the operational risk that the assumption of responsibility for a high volume of transport and the establishment of transport on changed lines entailed for the quality of the management of the transport service. The contracting authority took the view that the limitation was compatible with the objectives and procedures of the 2014 Public Procurement Directive.
- 8 According to the award decision documents, Nobina submitted the best tender for six components of the subject matter of the contract. The number of vehicles in the components of the subject matter of the contract concerned was 120, which exceeded the transport volume of 110 public transport buses provided for in the lot award limitation clause. The number of public transport buses in the two components of the subject matter of the contract that were won by Pohjolan Kaupunkiliikenne was 72. According to the lot award limitation clause regarding a transport volume of 110 public transport buses that was applied in the invitation to tender, component 210 of the subject matter of the contract was transferred, on account of the smallest difference, from Nobina, which had submitted the best tender for that component, to Pohjolan Kaupunkiliikenne, which had submitted the second-best tender. After the lot award limitation clause had been applied, the number of public transport buses was 94 for Nobina and 98 for Pohjolan Kaupunkiliikenne.

Summary of the previous course of the proceedings and principal arguments of the parties

Markkinaoikeus (Market Court, Finland)

- 9 The Market Court, before which the case was pending at first instance, took the view that the lot award limitation clause in question was not to be regarded as discriminatory, unbalanced or otherwise in breach of the provisions regarding procurement. The Market Court dismissed the action of Nobina as regards the plea relating to the lot award limitation clause.
- 10 It took the view that the objectives specified by the HSL for the lot award limitation clause used by it could not be regarded as in breach of the rules on

procurement. On the basis of those objectives, it was possible to restrict — as is clear from the preparatory work for the 2014 public procurement directives — the participation of a tenderer in relation to the lots of a contract.

- 11 In respect of the aforementioned preparatory work, the Market Court was referring to the Proposal for a Directive of the European Parliament and of the Council on public procurement, 18966/11 MAP 10 MI 686, of 21 February 2012, regarding Cluster 5 on SME access to public procurement. It was clear from the proposal that contracting entities could already limit the tenderer's participation in the lots of a contract before the entry into force of the 2004 Utilities Directive. According to the proposal, contracting entities could have a legitimate interest in avoiding selecting one single supplier for all the lots of a contract. A legitimate interest could relate to the preservation of a broader supplier base in order to avoid the emergence of dominant suppliers or the strengthening of dominant economic operators, or relate to concerns of security of supply.
- 12 In its decision, the Market Court stated that the lot award limitation clause had been published in the invitation to tender and was sent to all tenderers. It could not be assumed that, with regard to the requirement of overall economic advantageousness, the lot award limitation clause differed from the situation — which was deemed to be permissible — in which a contract was divided into lots and the participation of one single tenderer in a procurement procedure was restricted in relation to the lots.

Korkein hallinto-oikeus (Supreme Administrative Court, Finland)

- 13 In its appeal, *Nobina* took the view that the use of the lot award limitation clause did not lead to the selection of the most economically advantageous tender.
- 14 *Nobina* asserts that only prior division of a contract into lots was permissible on the basis of the 2004 Utilities Directive. The HSL did not limit in advance the number of lots for which a tenderer could submit a tender, but rather the limitation was based on a subsequent reduction. Prior limitation and subsequent lot award limitation clauses are not comparable procedures from the perspective of overall economic advantageousness.
- 15 In any event, the lot award limitation clause infringed EU law procurement principles. It breached the principles of proportionality, transparency, impartiality and non-discrimination and was capable of distorting competition.
- 16 The subsequent limitation of components of the subject matter of the contract that had been won led to pointlessly optimised tenders and the use of public resources for the second-best tender. The clause was not required to preserve the competitive situation and the reduction of operational risk. It did not promote the competitive situation in the longer term, but rather could hamper competition and increase the price level.

- 17 By way of the lot award limitation clause, the contracting entity interfered with the competition conditions in the market. The clause could be used in an unpredictable and random manner and thus have a disproportionate effect on the final placement of a tenderer in the tender. Despite the lot award limitation clause, it had been possible for operators other than Nobina to increase their market share in the transport sector in the Helsinki region.
- 18 The HSL asserts that, by taking the lot award limitation clause into account, the most economically advantageous tenders had been selected for the lots of the contract, and the contracting entity had not acted in breach of the procurement rules.
- 19 The 2014 directives contained provisions condoning the inclusion of a lot award limitation clause. They expand on the principle of preserving competition that was applicable under the previous public procurement regime. Although previous legislation did not contain provisions on the division of contracts, such provisions were also left to the discretion of the public contracting authority under that legislation.
- 20 It can be concluded from Annex VII A to the 2004 Utilities Directive, the preparatory work mentioned in the decision of the Market Court and Commission Working Document SEC(2008) 2193 of 25 June 2008 that the inclusion of the lot award limitation clause in question was permissible under the 2004 Directive.
- 21 Pursuant to the lot award limitation clause used by the HSL, the tenderer submitted a tender for all the lots of the contract and could be selected for several lots of the contract. Compared with a limitation on the number of lots, the lot award limitation clause was the less stringent alternative from the perspective of the tenderer.
- 22 Although the 2004 Utilities Directive had not been transposed into national law when the procurement procedure was initiated, the HSL was entitled to use the less stringent lot award limitation clause, as the use of the clause did not infringe national legislation.
- 23 The use of opportunities for competition also in future calls for competition and the fact of the contracting authority not being overly dependent on the security of supply guaranteed by a single supplier can be regarded as legitimate objectives obtainable by means of a lot award limitation clause. The lot award limitation clause has not been used in breach of procurement principles.

Brief summary of the basis for the reference

- 24 The Supreme Administrative Court takes the view that the contract in question falls within the scope of the 2004 Public Procurement Directive, meaning that the permissibility of the lot award limitation clause must be decided on the basis of the provisions of that directive. However, the question of whether the 2004

Utilities Directive or the 2004 Public Procurement Directive is applicable is not relevant to the legal assessment of the present dispute, as the provisions in the aforementioned directives correspond with one another with regard to the question to be assessed.

- 25 The Supreme Administrative Court considers that there is a need for a preliminary ruling in the present case. There is a need for interpretation as to whether, in a situation in which a tenderer can submit a tender for several or all of the lots of a contract pursuant to the invitation to tender, the 2004 Utilities Directive precludes the contracting authority from being able to limit, also pursuant to the invitation to tender, the number of lots of the contract for which a single tenderer can be awarded a contract in its award decision.
- 26 Furthermore, there is a need for interpretation as to the relevance, for the purposes of the legal assessment of the permissibility of the lot award limitation clause, of the fact that the 2004 Utilities Directive does not contain an express provision on the division of contracts into lots and that the award criteria under that directive must consist of the most economically advantageous tender or the lowest price.
- 27 An interpretation is also required as to whether the assessment of the permissibility of the lot award limitation clause can take account of the specific outcome to which the use of the clause in the call for competition could lead.
- 28 The Supreme Administrative Court takes the view that there are no cases in the case-law of the Court of Justice that concerned the question as to whether the number of lots for which a single tenderer can be awarded a contract can be limited under the 2004 Directives.
- 29 As far as can be ascertained by the Supreme Administrative Court, there are also no requests for a preliminary ruling relating to Article 65(2) of the 2004 Utilities Directive or the corresponding provision of the Public Procurement Directive pending before the Court of Justice.
- 30 The 2004 Directives do not contain an express provision as to whether the contracting authority can divide the contract into lots and limit the number of lots for which a tender can be submitted. The Supreme Administrative Court takes the view that, taking into account Article 17(6)(a) and point 5(b) of Annex XIII to the 2004 Utilities Directive and the corresponding provisions of the 2004 Public Procurement Directive, it is clear that such a division of the contract is possible.
- 31 The limitation of the number of lots for which a tenderer can submit a tender and the limitation of the number of lots of the contract for which a single tenderer can be awarded a contract are not entirely comparable. In the first case, the tenderer must choose, when actually submitting the tender, the lot for which the tender is being submitted, and the most economically advantageous tender or the tender with the lowest price is selected. In the latter case, the tenderer may, if he so desires, submit a tender for all the lots of a contract, but, owing to the use of the lot award limitation clause, the second-most economically advantageous tender or

the tender with the second-lowest price may be selected for an individual lot of the contract.

- 32 On the other hand, the lot award limitation clause to be applied only after the tenders have been submitted may be more favourable for the tenderer than a prior limitation of the tenders, as, if he so desires, the tenderer may submit a tender for several or all of the lots of the contract and the lot award limitation clause may not even be applied.
- 33 The tenderers or the contracting authority do not know in advance to which components of the subject matter of the contract of the invitation to tender or to which lot of the contract the lot award limitation clause may be applied. In practice, the situation per se is no different from a call for competition without a lot award limitation clause, as, in that case too, the tenderer does not know in advance whether or not his tender will be successful.
- 34 According to the HSL's invitation to tender, tenders could be submitted for the individual components of the subject matter of the contract in the call for competition. However, it was not the number of components of the subject matter of the contract won by the tenderer that was used as the threshold for application of the lot award limitation clause, but rather the number of public transport bus days won by the tenderer. The Supreme Administrative Court assumes that the number of vehicle days won was specified as a maximum number in the clause, because the size of the individual components of the subject matter of the contract differs with regard to transport volume.
- 35 If the lot award limitation clause is applied, the subject matter of the contract or the components of the subject matter of the contract in the call for competition is/are transferred to the second-best tenderer in their entirety and not only in relation to the vehicle days that exceed the threshold. The subject matter of the contract or the components of the subject matter of the contract in the call for competition, for which the points difference between the best and the second-best tender multiplied by the number of vehicles of the subject matter of the contract is the smallest, is/are transferred to the tenderer who submitted the second-best tender. According to the HSL, the clause was designed in such a way that the effects of its application on the overall economic advantageousness of the contracts are as small as possible.
- 36 However, due to the application of the lot award limitation clause, the outcome of the call for competition in the present case was that Nobina's total number of vehicles on the public transport bus days was reduced from 120 to 94 vehicles and therefore to a lower value than Pohjolan Kaupunkiliikenne's total number of public transport bus days, which was increased from 72 to 98. The transfer of the subject matter of the contract from the tenderer who had submitted the best tender in that regard to the tenderer who had submitted the second-best tender meant that the former tenderer was awarded a contract for fewer public transport bus days in total than the latter tenderer on the basis of the call for competition. Despite the

application of the lot award limitation clause, Nobina won more components of the subject matter of the contract than Pohjolan Kaupunkiliikenne.

- 37 The application of a lot award limitation clause such as that at issue in the main proceedings, could lead to even more substantial changes — compared with the present case — in the outcome of the call for competition, and, under the clause, it would be more favourable for the tenderer to be ranked second in the tender comparison under certain circumstances. If the number of vehicle days won by the tenderer were 111, for example, and the lowest difference, measured as the number of vehicles, were found in the largest component of the subject matter of the contract, that is to say the component with 39 vehicles, exceeding the established threshold by a single vehicle day would result in the loss of the entire component of 39 vehicles. As the determination of the subject matter of the contract that is transferred to the second-best tenderer is affected not only by the points difference between the tenderers but also the number of vehicles of the subject matter of the contract, however, it is more likely that a component other than the largest component of the subject matter of the contract in terms of the number of vehicles is transferred from the winning tenderer to another tenderer.
- 38 In the light of the foregoing considerations, the Supreme Administrative Court also considered whether the permissibility of the lot award limitation clause should be assessed in an abstract manner, such that the inclusion of the clause in the contract notice and the invitation to tender is either permissible or not permissible on the basis of the 2004 Utilities Directive, or whether the assessment of the permissibility of the lot award limitation clause can take account of the specific outcome to which the use of the clause in the call for competition would specifically lead. The Supreme Administrative Court takes the view that, for reasons of legal certainty and foreseeability, it would be problematic in principle if the assessment of the legal permissibility of a lot award limitation clause which is contained in the invitation to tender and of which the tenderers are therefore aware were to take place on a case-by-case basis due to the outcome of the invitation to tender.
- 39 Were the use of the lot award limitation clause not compatible with the provisions on award criteria contained in Article 55(1) of the 2004 Utilities Directive, the 2014 directive, in which limiting the number of lots for which a single tenderer can be awarded a contract is expressly allowed, would also contain such incompatibility.
- 40 The reasons specified for the use of the lot award limitation clause in the contract notice and in the invitation to tender are in line with the reasons for the provision in the directive that are mentioned in recital 88 of the 2004 Utilities Directive, pursuant to which the contracting authority is allowed to limit the number of lots that may be awarded to any one tenderer. The use of the lot award limitation clause protects the preservation of competition. The preservation of effective competition in the market helps to ensure that the contracts of the contracting authority are more economically beneficial overall in the long term.