

**Case C-367/19**

**Request for a preliminary ruling**

**Date lodged:**

8 May 2019

**Referring court:**

Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (Slovenia)

**Date of the decision to refer:**

30 April 2019

**Contracting authority:**

Ministrstvo za notranje zadeve

**Applicant for review:**

Tax-Fin-Lex d. o. o.

**Successful tenderer:**

LEXPERA, d. o. o.

**Republic of Slovenia**

**Državna revizijska komisija za revizijo postopkov oddaje javnih naročil  
(National Commission for the Review of Public Procurement Procedures,  
Slovenia)**

[...]

**REQUEST FOR A PRELIMINARY RULING**

***Status of the referring body***

- 1 The Državna revizijska komisija za revizijo postopkov oddaje javnih naročil<sup>1</sup> (National Commission for the Review of Public Procurement Procedures, Slovenia, ‘the Državna revizijska komisija’), as the body making the reference, is, within the meaning of the Zakon o pravnem varstvu v postopkih javnega

<sup>1</sup> [...]

naročanja (Law on review in public procurement procedures [...],<sup>2</sup> ‘the ZPVPJN’), a special, independent and autonomous national body, which decides on the legality of the award of public contracts at all stages of the award procedure (Article 60(1) ZPVPJN).

- 2 According to Article 2 of the ZPVPJN, the right of appeal against infringements committed in procedures for the award of public contracts is guaranteed in the Republic of Slovenia in the framework of the following:
- a preliminary review procedure, which is carried out by the contracting authority,
  - a review procedure before the Državna revizijska komisija, and
  - legal proceedings, which at first instance are conducted before the Okrožno sodišče (Regional Court, Slovenia) designated as the sole competent authority by the law governing the judicial system.

The appeal before the Okrožno sodišče is limited to the assessment of liability for damages and to hearing actions for a declaration of invalidity of contracts,<sup>3</sup> but does not extend to reviewing the legality of decisions of the Državna revizijska komisija, which are final.<sup>4</sup>

3. The Court of Justice of the European Union has already recognised the Državna revizijska komisija as a ‘national court or tribunal’ within the meaning of Article 267 TFEU in the judgment of 8 June 2017, *Medisanus*, C-296/15, EU:C:2017:431.
4. The circumstances justifying the decision to grant the Državna revizijska komisija the status of ‘national court or tribunal’ within the meaning of Article 267 TFEU have not changed since the above-mentioned judgment of the Court of Justice. However, independently of the above, the Državna revizijska komisija, in Annex No 1 to the present request for a preliminary ruling, refers in more detail to the circumstances justifying the recognition of its status as ‘national court or tribunal’ within the meaning of Article 267 TFEU.

#### ***Parties to the main proceedings***

5. The Državna revizijska komisija, in a formation composed of [...], is called upon to rule on a dispute between the Ministrstvo za notranje zadeve (Ministry of the Interior) [...], Ljubljana, Slovenia (‘the contracting authority’), and the company TAX-FIN-LEX, d. o. o. [...] Ljubljana, Slovenia (‘the applicant’) concerning the

<sup>2</sup> [...]

<sup>3</sup> [...]

<sup>4</sup> [...]

conduct of the procedure for the award of the public contract entitled 'Public contract for the award of access services to the legal information system', in respect of Lot 1 entitled 'Access to the legal information system'. Given that the conduct of the contracting authority, at issue between the two parties, also affects the situation of the company LEXPERA, d. o. o., [...] Ljubljana, Slovenia ('the successful tenderer'), to which the contracting authority awarded the public contract at issue, and given that the successful tenderer has the same rights and obligations as a party,<sup>5</sup> that tenderer must also be accorded the status of party to the dispute in the main proceedings.

***Subject-matter of the case in the main proceedings and relevant facts***

6. On 7 June 2018, the contracting authority, which is a body of the Republic of Slovenia, adopted a decision to initiate the procedure for awarding the public contract for access to the legal information system for a period of 24 months.
7. The estimated value of the public contract in question, as determined by the contracting authority, is EUR 39 959.01, which is below the value threshold set by Article 4 of Directive 2014/24.<sup>6</sup>
8. The contracting authority awards the public contract in question – which is divided into two lots – according to the procedure for awarding low-value contracts. This procedure is a nationally regulated procedure for the award of public contracts,<sup>7</sup> which contracting authorities may use for the purposes of awarding public service contracts below the value threshold laid down in Article 4 of Directive 2014/24.
9. Only the applicant and the successful tenderer submitted a bid for Lot 1 in good time. Following negotiations, the applicant offered to provide access to the legal information system (for a period of 24 months) at a price of EUR 0.00.
10. By virtue of the public procurement decision of 11 January 2019, the applicant was informed that its bid for Lot 1 had been refused (because it had offered a final price of EUR 0.00 which, in the opinion of the contracting authority, was contrary to the rules on the award of public procurement contracts) and that the contracting authority had awarded the contract for Lot 1 to the successful tenderer.
11. On 17 January 2019, the applicant lodged an appeal against that decision, in respect of which the successful tenderer did not submit any observations. In the course of the procedure preceding the review, the contracting authority rejected the request for review by decision of 5 February 2019. On 11 February 2019, the

<sup>5</sup> [...]

<sup>6</sup> 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. 64).

<sup>7</sup> [...]

contracting authority referred the case to the Državna rezijska komisija, which led to the initiation of the review procedure.

12. The parties disagree on the merits of the contracting authority's decision to reject the applicant's bid. The sole reason cited by the contracting authority for the decision to reject the applicant's bid is that the latter offered a final price of EUR 0.00.
13. It should be noted, as a legally relevant circumstance, that the contracting authority does not criticise the applicant for having submitted an abnormally low bid (although the contracting authority initially verified the abnormally low bid, it did not reject the applicant's bid because the latter had not explained the price offered by giving details). Nor does the contracting authority criticise the applicant for the fact that the bid does not comply with the obligations applicable in the fields of environmental, social and labour law. Furthermore, the contracting authority does not argue that the applicant's bid does not comply with the requirements, conditions and criteria set out in the contract notice and in the documentation relating to the award of the public contract, namely that there are grounds for excluding the applicant or that the applicant does not comply with the selection criteria established by the contracting authority.
14. The applicant claims that the submission of a bid with a total value of EUR 0.00 is not inadmissible. While the rules on the award of public contracts do apply to the conclusion of contracts for pecuniary interest, this does not mean that the contracting authority can reject the bid of a tenderer that offers services free of charge. The tenderer has the right to freely determine the proposed price and therefore also has the right, in the context of a procurement procedure, to offer services free of charge. Furthermore, if the applicant had been awarded the public contract and had allowed free access to the legal information system, it would have obtained a benefit in the sense of acquiring a new market or new users, which is impossible to express in monetary terms but which can be defined as consideration received for the performance of the public contract in question.
15. The contracting authority contends that a bid with a total value of EUR 0.00 is incompatible with the concept of a public contract. A public contract is a contract for consideration between a contracting authority and an economic operator. The bid with a unit value of EUR 0.00 would affect the pecuniary nature of the (future) contract, since the gratuitous nature of the subject matter of the bid would make it a transaction free of charge and not for pecuniary interest. The free provision of services does not constitute a public services contract. Obtaining a new market does not constitute consideration for the performance of the public contract in question, since it represents an added value for (all) economic operators which is not possible to express a monetary terms and for which it is therefore not possible to issue an invoice to the contracting authority.

## The relevant provisions

### *EU law*

16. Article 1 of Directive 2014/24 provides:

‘1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.’

17. Article 2(1) of Directive 2014/24 provides:

‘For the purposes of this Directive, the following definitions apply:

...

(5) “public contracts” means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services’.

18. Article 4 of Directive 2014/24 is worded as follows:

‘This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

...

(b) EUR 144 000 for public supply and service contracts awarded by central government authorities ...

...’

### *Slovenian law*

12. Article 2(1) of the Law on Public Procurement [...] (Zakon o javnem naročanju, ‘the ZJN-3’), which applies in the main proceedings, provides as follows:

‘The definitions used in this Law shall have the following meaning:

1. ‘public contract’ means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting

authorities and having as its object the execution of works, the supply of products or the provision of services;

...’

### ***Grounds for the request for a preliminary ruling***

#### ***Application of EU law***

19. The estimated value of this public contract is below the threshold set out in Article 4 of Directive 2014/24.
20. The Court has already held on several occasions that it is competent to rule on a request for a preliminary ruling concerning the provisions of an act of EU law in circumstances where, although the facts in the main proceedings do not fall directly within the scope of that act, those provisions are applicable under national law since that act referred to the content of those provisions in order to lay down rules applicable to a purely domestic situation (see, for example, judgments of 13 March 2019, E, C-635/17, ECLI:EU:C:2019:192; of 17 May 2017, *ERGO poistovna*, C-48/16, ECLI:EU:C:2017:377, and of 28 October 2010, *Volvo Car Germany*, C-203/09, ECLI:EU:C:2010:647).
21. It follows from the settled case-law of the Court that, where national legislation adopts the same solutions as those adopted in EU law in order, in particular, to avoid discrimination against foreign nationals or any distortion of competition, it is clearly in the European Union’s interest that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see, for example, judgment of 3 December 2015, *Quenon K.*, C-338/14, EU:C:2015:795, paragraph 17 and the case-law cited therein).
22. This case also concerns such a situation. Although Directive 2014/24 does not directly govern the situation in the main proceedings, it should be noted that, when transposing the provisions of Directive 2014/24 into national law, the Slovenian legislature decided that the concept of ‘public contract’ would cover both contracts with a value above the threshold defined in that directive and those with a lower value.
23. The ZJN-3, by which Directive 2014/24 has been transposed into Slovenian law, applies both to public contracts that meet the threshold defined in Article 4 of Directive 2014/24 and to those that do not.
24. The definition of the concept of ‘public contract’ in ZJN-3 is identical to that in Directive 2014/24. That definition is the same for public contracts with a value above the threshold defined in Article 4 of Directive 2014/24 and for those with a value below that threshold. Therefore, under Slovenian law, the provision of Article 2(1)(5) of Directive 2014/24, which defines the concept of ‘public

contract', also applies directly and unconditionally to situations in which that Directive is not applicable.

25. Whereas, for public contracts which do not reach the threshold laid down in Article 4 of Directive 2014/24, the ZJN-3 allows a purely national award procedure (which Directive 2014/24 does not provide for, that is, a procedure for low-value public contracts), with regard to the concept of 'public contract', it does not distinguish between public contracts whose value is above the threshold defined in Article 4 of the Directive and those whose value is below that threshold.
26. In order to ensure equal treatment, it is necessary to interpret the concept of 'public contract' derived from EU law in a uniform manner in situations falling within the scope of Directive 2014/24 (procurement procedures with a value above the threshold) and in situations outside the scope of that Directive (procurement procedures with a value below the threshold). This means that, in a situation such as that of the main proceedings, in which the value of the public contract is below the threshold defined in Article 4 of Directive 2014/24, it is also necessary to interpret the concept of 'public contract' taking into account the case law of the Court.

#### ***Grounds for the request for a preliminary ruling***

27. The Državna revizijska komisija has doubts about the interpretation and application of Article 2(1)(5) of Directive 2014/24, which defines the concept of public contract.
28. The pecuniary nature of the contract concluded between the contracting authority and the economic operator is one of the essential elements that defines a public contract. The contract is indisputably of pecuniary interest when the two parties are, respectively, creditors and debtors to each other. The operator provides goods or services to the contracting authority and receives consideration from the contracting authority for the goods or services provided.
29. However, the Državna revizijska komisija asks whether there is a 'contract for pecuniary interest' within the meaning of Article 2(1)(5) of Directive 2014/24 where the contracting authority is not required to provide any consideration but, if the contract is concluded, the economic operator obtains access to a new market or new users for the purpose of the public contract. The fact that the contracting authority will obtain the supply of services for a price of EUR 0.00 or that it is not required to provide consideration for such supply could lead to the conclusion that, where the price offered is EUR 0.00, there is no contract for pecuniary interest within the meaning of Article 2(1)(5) of Directive 2014/24. However, even if the contracting authority does not have to pay for the provision of services, it is possible that the award of a public contract already has in itself an (economic) value for the economic operator that cannot be expressed in terms of monetary value at the time of awarding the contract or concluding the contract. Thus,

through the performance of the contract, the economic operator acquires a new market and, consequently, gains references, which may represent some economic benefit in the future.

30. However, if it is not possible to share the view that access to the market or acquisition of a new market and references may constitute a ‘contract for pecuniary interest’ within the meaning of Article 2(1)(5) of Directive 2014/24, the Državna rematzijska komisija has doubts regarding the application of that provision of the Directive. In this respect, the Državna rezijska komisija asks whether the provision in question constitutes an autonomous legal basis for rejecting the bid.
31. The Državna rezijska komisija asks whether the contracting authority may, after initiating the public procurement procedure, reject the tenderer’s bid if it becomes clear during the procedure that no consideration would be required in order to provide the service, since the tenderer offered a price of EUR 0.00 in order to be awarded the contract.
32. On the one hand, in the event of acceptance of the bid priced at EUR 0.00 between the contracting authority and the tenderer, there would not be a contract for pecuniary interest, but rather a gratuitous contract, since, in such a case, the contracting authority would not be required to provide consideration for the service received. In view of its gratuitous nature, the contract concluded could not be considered as a contract for the performance of a public contract. This would mean that the contracting authority had initiated a public procurement procedure whose final result would be not the award of a public service contract or the conclusion of a contract for the performance of a public contract but rather, for example, a gift.
33. On the other hand, however, Article 2(1)(5) of Directive 2014/24, which defines the concept of public contract, does not regulate the mode of action in the context of public procurement procedures, but lays down in which cases the directive applies. The definition of the concept of public contract may be relevant before or after the conclusion of the contract. Before the conclusion of the contract, the concept of public contract constitutes a guideline whereby, if the contracting authority provides for the supply of good or services on the basis of a contractual relationship for pecuniary interest, the provisions of Directive 2014/24 are to be taken into account. Conversely, if the contracting authority provides for the supply of goods or services on the basis of a gratuitous contract, it is not required to act in accordance with the provisions of Directive 2014/24. After the conclusion of the contract, on the other hand, the concept of public contract is relevant for assessing whether the contract in question has been concluded in accordance with the rules governing the award of public contracts.
34. The initiation of the public procurement award procedure reflects the contracting authority’s assessment that in order to obtain the subject matter of the public contract it will be necessary for it to provide consideration. Whether or not this

assessment of the contracting authority is correct can only be demonstrated by the bids submitted by tenderers, taking into account the situation of the relevant market. The subsequent conduct of the tenderers and the content of their bids cannot affect this (preliminary) assessment by the contracting authority. After initiating the procurement procedure and after receipt of the bids, the contracting authority is obliged to take those bids into consideration and to examine them and assess them solely in the light of the requirements defined in advance. In addition, the contracting authorities organise the procedures for awarding public contracts not with the aim of concluding a contract for pecuniary interest, but with the aim of obtaining (necessary) goods or services. Likewise, in the present case, if the contracting authority accepted the bid at a price of EUR 0.00, it would obtain the subject-matter of the procurement in accordance with its requirements.

***Decision and content of the request for a preliminary ruling***

35. The Državna rezijska komisija, considering that the doubts that have arisen concern the interpretation and application of EU law, submits to the Court of Justice, in accordance with the third paragraph of Article 267 TFEU, the following questions for a preliminary ruling, specifying that the answer to the second question is only required if the answer to the first is negative:

**1. Is there a ‘contract for pecuniary interest’ as part of a public contract within the meaning of Article 2(1)(5) of Directive 2014/24, where the contracting authority is not required to provide any consideration but, by performing the public contract, the economic operator obtains access to a new market and references?**

**2. Is it possible or necessary to interpret Article 2(1)(5) of Directive 2014/24 in such a way that it constitutes a basis for rejecting a bid with a price of EUR 0.00?**

[...]