

Case C-23/20**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:**

17 January 2020

Referring court:

Klagenævnet for Udbud (Denmark)

Date of the decision to refer:

16 January 2020

Applicant:

Simonsen & Weel A/S

Defendants:

Region Nordjylland and Region Syddanmark

Subject of the action in the main proceedings

The Klagenævnet for Udbud (Public Procurement Complaints Board, Denmark) is considering a complaint lodged by Simonsen & Weel A/S against Region Nordjylland (Region of North Jutland) and Region Syddanmark (Region of Southern Denmark) concerning the requirement to indicate in a contract notice the estimated quantity and/or the estimated value, or, alternatively, the maximum quantity and/or a maximum value, of, the supplies under a framework contract to which the tender relates.

Subject matter and legal basis of the reference

Interpretation of Directive 2014/24 (the Procurement Directive) and Directive 92/13 (the General Remedies Directive) in the light of the judgment of the Court of Justice in Case C-216/17, *Autorità Garante della Concorrenza e del Mercato — Antitrust and Coopservice*.

Legal basis: Article 267 TFEU.

The questions referred

1. Are the principles of equal treatment and transparency laid down in Article 18(1) of [Directive 2014/24] and Article 49 of [Directive 2014/24], in conjunction with points 7 and 10(a) of Part C of Annex V to Directive 2014/24, to be interpreted as meaning that the contract notice in a case such as the present must contain information on the estimated quantity and/or the estimated value of the supplies under the framework contract to which the tender relates?

If the answer to this question is in the affirmative, the Court is also asked whether the above provisions are to be interpreted as meaning that the information must be stated in respect of the framework contract (a) as a whole and/or (b) in respect of the original contracting authority which stated its intention to conclude an agreement on the basis of the invitation to tender (in the present case: Region Nordjylland) and/or (c) in respect of the original contracting authority which merely stated that it is participating in one option (in the present case: Region Syddanmark).

2. Are the principles of equal treatment and transparency laid down in Article 18(1) of [Directive 2014/24] and Articles 33 and 49 of [Directive 2014/24], in conjunction with points 7 and 10(a) of Part C of Annex V to Directive 2014/24, to be interpreted as meaning that either the contract notice or the tender specifications must set a maximum quantity and/or a maximum value of the supplies under the framework contract to which the tender relates, such that the framework contract in question will no longer have any effect when that limit is reached?

If the answer to this question is in the affirmative, the Court is also asked whether the above provisions are to be interpreted as meaning that the above maximum limit must be indicated in respect of the framework contract (a) as a whole and/or (b) in respect of the original contracting authority which stated its intention to conclude an agreement on the basis of the invitation to tender (in the present case: Region Nordjylland) and/or (c) in respect of the original contracting authority which merely stated that it is participating in one option (in the present case: Region Syddanmark).

If the answer to Question 1 and/or Question 2 is in the affirmative, the Court is further asked — in so far as it is relevant to the content of those answers — to answer the following question:

3. Is Article 2d(1)(a) of [Directive 92/13], read in conjunction with Articles 33 and 49 of [Directive 2014/24], in conjunction with points 7 and 10(a) of Part C of Annex V to Directive 2014/24, to be interpreted as meaning that the condition that ‘the contracting entity has awarded a contract without prior publication of a notice in the *Official Journal of the European Union*’ covers a case such as the present where the contracting authority has published a

contract notice in the *Official Journal of the European Union* concerning the envisaged framework contract, but

- (a) where the contract notice does not meet the requirement to indicate the estimated quantity and/or the estimated value of the supplies under the framework contract to which the tender relates since an estimate thereof is set out in the tender specifications, and
- (b) where the contracting authority has breached the requirement to set in the contract notice or the tender specifications a maximum quantity and/or a maximum value of the supplies under the framework contract to which the call for tenders relates?

Provisions of EU law relied on

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) ('the 2004 Procurement Directive').

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) ('the Procurement Directive'); recitals 59 to 61; Articles 2(1)(5), 4(5), 18(1), 33(1) and (3), and 49; points 2, 5, 7 and 8 and point 10(a) of Part C of Annex V.

Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14) ('the General Remedies Directive'), as amended; Article 2d(1).

Case-law of the Court of Justice of the European Union: judgment of 19 December 2018, Case C-216/17, *Autorità Garante della Concorrenza e del Mercato — Antitrust and Coopservice* (EU:C:2018:1034); paragraphs 57 to 69 and operative part.

Provisions of national law relied on

Contract notice No 2019/S 086-205406 of 30 April 2019 relating to a four-year framework contract for Region Nordjylland with a single operator for the purchase of probe kits for patients receiving home care and institutions ('the contract notice').

Law on public procurement (Law No 1564 of 15 December 2015, as subsequently amended), which implements the procurement directive in Danish law; Paragraphs 2, 56 and 128(2).

Law on the Public Procurement Complaints Board (Law No 492 of 12 May 2010); Paragraph 17(1)(1), which implements, inter alia, the General Remedies Directive in Danish law.

As regards the content of the above Danish legislation, the Klagenævnet for Udbud stated that, in its view, those provisions must, and may, be interpreted in accordance with the underlying provisions of the Procurement Directive and the General Remedies Directive, which they are intended to implement.

Succinct presentation of the facts and the main proceedings before the Klagenævnet for Udbud

- 1 The complaint concerns a public procurement procedure under the Procurement Directive which the regions initiated by the contract notice relating to a four-year framework contract for Region Nordjylland with a single operator for the purchase of probe kits for patients receiving home care and institutions. As for Region Syddanmark, it was stated that this region merely participated ‘by option’.
- 2 Point II.1.4 of the contract notice, headed ‘Short description’, stated that it was not possible ‘to tender for parts of the contract’ and that a tender had to be made for ‘all the headings in the contract’. In addition, a main CPV code and two supplementary CPV codes were specified (see Points II.1.2 and II.2.2. of the contract notice). Point II.1.5 of the contract notice concerning the ‘Estimated total value’ was not completed. This was also the case in respect of Point II.2.6 concerning the ‘Estimated value’ and the contract notice does not otherwise contain information on the estimated value of the procurement, or the estimated value of the framework contract in respect of Region Nordjylland or the option in the framework contract in respect of Region Syddanmark. Furthermore, the contract notice contains no information on the maximum value of the framework, either individually or cumulatively, or any information on the estimated or maximum quantity of goods likely to be purchased under the framework contract. Paragraph I.3 concerning ‘Communication’ states, inter alia, that the tender documentation was ‘accessible free of charge, without restriction and in full’ at a specified internet address.
- 3 An annex (Annex 2 to the contract — requirements specification) to that tender documentation, which was drafted in Danish, includes a detailed description of the goods to which the tender relates. Furthermore, it was stated at the beginning of the tender specifications that the expected quantities to be consumed were set out in an annex (Annex 3 to the contract — tender list). In that regard, it was stated that the *‘indicated estimates and expected quantities to be consumed merely reflect the contracting authorities’ expectations regarding the consumption of the services covered by the contract to which the tender relates. The contracting*

authorities do not therefore undertake to buy a specific quantity of services or make purchases in a particular amount under the framework agreement. In other words, the actual consumption may prove to be higher or lower than the estimates indicate.'

- 4 Contract Annex 3 in question (the tender list) consisted of a spreadsheet with 51 different lines of goods. Each line provided a description of the goods and the annual consumption expected for Region Nordjylland and Region Syddanmark respectively, and the total annual consumption for both regions. The columns were then to be completed by the individual tenderers with the price offered per basic unit, whereby the annual expected consumption in DKK per basic unit was then calculated and entered in a subsequent column. On that basis, the annual expected consumption in DKK was also calculated as a total sum at the bottom of the spreadsheet.
- 5 The tender documentation also contained a draft contract stating, inter alia, that the framework agreement was not to entail a specific, final obligation on customers to buy specific quantities at particular times, but rather to give them the right, from time to time as a specific need arises, to purchase goods under the framework agreement, and that that meant that the amounts relating to consumption under the framework agreement indicated in the tender documentation (contract annexes 2 and 3 referred to above) should be regarded as indicative, since the actual operating situation may give rise to changes. In addition, it stated that there could be no question of an exclusive framework agreement and that customers are thus entitled to buy similar goods from other suppliers under the rules on procurement, including by placing such goods in a separate tender.
- 6 Under the tender procedure, the regions received three admissible tenders, including those from Simonsen & Weel A/S and Nutricia A/S. On 9 August 2019, the regions announced, providing a precise statement of reasons, that the tender from Nutricia A/S was regarded, in accordance with the specified award criterion (best price-quality ratio) and the associated sub-criteria, as the most advantageous tender and that Nutricia A/S was thus awarded the contract.
- 7 On 19 August 2019, Simonsen & Weel A/S lodged a complaint with the Klagenævnet for Udbud, which does not have suspensive effect. Region Nordjylland subsequently concluded a framework agreement with the successful tenderer, Nutricia A/S, which intervened in support of the regions during the complaint procedure. Region Syddanmark has not yet availed itself of the option to which the tender relates.
- 8 Since the regions had acted in breach of the Danish Law on public procurement by failing to indicate in the contract notice the estimated quantity or the estimated value of the goods under the framework agreement to which the tender relates, Simonsen & Weel A/S claimed that the Klagenævnet for Udbud should annul the

regions' decision to award the contract to Nutricia A/S and declare ineffective the contracts which had been concluded.

Principal arguments of the parties in the main proceedings

The requirement to indicate the estimated value and/or quantity

- 9 **Simonsen & Weel A/S** claimed in particular that the regions infringed Paragraphs 56 and 128(2) of the udbudslov (Law on public procurement) (see Article 49 of the Procurement Directive) and the principles of equal treatment and transparency contained in Paragraph 2 of the udbudslov (see Article 18 of the Procurement Directive) by failing to indicate in the contract notice the estimated quantity or estimated value of the supplies under the framework agreement to which the tender relates. In that regard, the company pointed out in particular that point 7 of Part C of Annex V to the Procurement Directive stipulates that the contract notice is to include a description of the 'nature and extent of works, nature and quantity or value of supplies, nature and extent of services'. Point 10(a) of the annex does not depart from that provision. Annex VII A to the 2004 Procurement Directive contains, in the wording thereof, both a reference to the overall estimated value of the framework agreement and a reference to the value of the underlying contracts concluded under the framework agreement. Although that is not the case in point 10(a) of the 2014 Procurement Directive, that does not constitute a modification, but is merely because the requirement to indicate the overall value follows from point 7. The reference in point II.1.4 of the contract notice to the tender list of the tender specifications (Annex 3 to the contract — the tender list), and thus to estimates entered therein, was not sufficient, since the information required under Part C of Annex V is to be set out in the contract notice itself. The fact that there is a framework agreement and not a public contract cannot lead to a different outcome (see paragraph 62 of the judgment of the Court of Justice in Case C-216/17).
- 10 **The regions** argued in particular, first, that there is no absolute requirement to indicate, in the contract notice, a specific scope or value of a framework agreement. The wording of Article 33 of Procurement Directive ('where appropriate') must therefore be understood as meaning that the quantity envisaged must be indicated only if it is relevant and/or possible. Furthermore, in Part C of Annex V to the 2014 Procurement Directive, the reference to the estimated total value of the services for the entire duration is omitted (see point 10(a)), which must be assumed to be due to the desire to increase flexibility and take account of the fact that framework agreements cannot be defined precisely in terms of, for example, quantity, value and characteristics. Probe kits have not been subject to a public tender procedure before and it could have been harmful to competition if the regions had indicated in the contract notice a misleading or incorrect estimated value. The scope of the framework agreement (quantity, value and characteristics) depends on treatment needs. An indication of maximum value or scope will

therefore be subject to a great deal of uncertainty and should, where appropriate, be stated with a significant margin in relation to the expected value.

The regions argued, second, that the tender specifications (Annex 3 to the contract — tender list) stated the expected consumption of the expected purchase under the agreement for each of the two regions and the requirement laid down in point 10(a) of Part C of Annex V to the Procurement Directive was therefore satisfied. According to the wording of point 7 of Part C of Annex V, the contracting entity has, in principle, when purchasing goods, a choice between describing either the nature and quantity of the supplies or the nature and value of the supplies in the contract notice, since there is no cumulative requirement. Point 7 of Part C of Annex V to the directive concerns public contracts in general and takes no account of the specific features of framework agreements, including their specific character, objectives and background. Point 10(a) of Part C of Annex V, by contrast, describes, as a *lex specialis*, the specific information that the contract notice is to contain, as regards framework agreements, and therefore must take precedence over paragraph 7. That is supported by the established standard form for contract notices in which the fields ‘Estimated overall value’ in point II.1.5 of the contract notice and ‘Estimated value’ in point II.2.6 therefore are not mandatory and merely allow indication of an economic value and not ‘scope’ or ‘quantity’ in other units of measurement.

The requirement to set maximum quantity and/or value

- 11 **Simonsen & Weel** argued in particular that, in its judgment in Case C-216/17, the Court of Justice ruled that a contracting authority which invites tenders for a framework contract must set a maximum value or maximum quantity of goods which may be the subject of subsequent contracts and that the requirement has not been satisfied. The estimates for individual probe kits indicated in the tender documentation do not satisfy that requirement as they were expressly not binding. The Court of Justice’s reasoning is general (see, inter alia, paragraph 61 of the judgment in Case C-216/17) and thus also relevant to the case before the *Klagenævnet for Udbud*, regardless of the fact that it is to be decided under the current Procurement Directive and the facts in the cases are not comparable. By not indicating the maximum quantity of the supplies which may be acquired under the framework agreement or the overall maximum value of the framework agreement, the regions can make use of the framework agreement without restriction during the period in which it runs.
- 12 **The regions** stated, in particular, that the judgment in Case C-216/17 concerned the interpretation of Articles 1(5) and 32(2) of the 2004 Procurement Directive and that the outcome should be viewed in the light of the forms of order sought and the specific circumstances of the case. The scope of the judgment is thus limited to situations where a contracting authority acts on behalf of other authorities which are not directly parties to the framework agreement in question, which is not so in the present case. Furthermore, the scope of the judgment must be regarded as limited to the wording of the 2004 Procurement Directive,

Article 9(9) of which, concerning the calculation of the value of a framework agreement, used the following phrase: ‘the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement’, whilst Article 5(5) of the 2014 Procurement Directive uses the phrase: ‘the maximum estimated value [net of VAT] of all the contracts envisaged for the total term of the framework agreement’. In accordance with the judgment, it is sufficient for the total quantity of services to be referred to in the framework agreement itself or in another published document, such as the tender specifications, since, by doing so, full observance of the principles of transparency and equal treatment is ensured (paragraph 68 of the judgment). It is decisive to an invitation to tender for a framework contract whether it is also made on behalf of other contracting authorities (see, in this regard, the judgment and recitals 59 to 62 of the Procurement Directive). The requirement to indicate a maximum quantity (or maximum value) described in paragraph 61 of the judgment in Case C-216/17 cannot be applied to cases which are not comparable. The regions invited tenders for a non-exclusive and non-mutually binding framework agreement and at the time of the invitation to tender had no knowledge of the extent of the specific purchasing requirement or the price level for the ‘individual contracts’. The regions were thus unable to make an estimate of the framework agreement’s estimated value that was sufficiently sound to comply with point II.1.5 or point II.2.6 of the contract notice. Thus, the regions’ statements in the tender documentation regarding the fixed amounts of services are consistent with the guidance set out in paragraphs 31, 61 and 64 of the judgment. The regions’ indication of the envisaged quantities does not mean that they may make use, without restriction, of the framework agreement during the term thereof, since the quantities which they indicated in the tender specifications (Annex 3 to the contract — tender list), together with the successful tenderer’s completion and pricing thereof, provides the estimated value over the term of the contract and thus also the value of the original contract, which is a natural limitation on subsequent modifications under Article 72 of the Procurement Directive.

Ineffective sanction

- 13 **Simonsen & Weel** claimed that the regions’ failure to indicate the value, quantity or scope of the framework agreement in the contract notice and their simultaneous failure to indicate the maximum quantities or the maximum value in the contract notice or the other tender documentation means that the framework agreement concluded by Region Nordjylland does not correspond to the published contract notice and the tender requirement is thus not met. The framework agreement concluded must therefore be declared ineffective.
- 14 **The regions** contended, in particular, that their conclusion of an agreement with Nutricia A/S is not a situation which can give rise to ‘ineffectiveness’, since the failure to complete the non-mandatory fields ‘Estimated total value’ in point II.1.5 of the contract notice and ‘Estimated value’ in point II.2.6 thereof cannot be equated with a situation where a contract is concluded without prior publication of a contract notice. In addition, the regions referred in the contract notice to the

tender list, which indicated the regions' expected annual consumption. The tender requirement was therefore met.

Brief statement of reasons for the reference

- 15 The Klagenævnet for Udbud notes that the above provisions of Danish legislation should, in its view, be interpreted in accordance with the underlying provisions of the Procurement Directive and the General Remedies Directive, which they are intended to implement. The complaint which the Klagenævnet for Udbud is considering is clearly inspired by the judgment of the Court of Justice in Case C-216/17. However, that judgment concerned a very special situation and also referred to the provisions of the previous Procurement Directive. It can therefore be held that the Court of Justice's answer may be construed with certainty only as applying to the exceptional circumstances set out in its final conclusion. However, a number of paragraphs appear to reflect a general interpretation of the rules in force at that time. Those rules also appear, to a great extent, to be reproduced unchanged in the new Procurement Directive. However, in that respect, even minor amendments may give rise to some doubt as to whether the stated interpretations may be applied to the rules currently in force.
- 16 The Klagenævnet for Udbud also has doubts as to whether, and to what extent, it also applies, as follows from paragraphs 57 to 69 of the judgment in Case C-216/17, to a situation such as the present, where the contracting authorities are both original parties to the framework agreement and one of the two parties participates only in one option. The doubts of the Klagenævnet for Udbud relate in particular to the scope of the statement in paragraph 60, namely that a maximum limit must be stated and that the agreement in question will no longer have any effect (paragraph 61) when that limit is reached. That gives rise, inter alia, to doubt as to whether such a limit must indicate both the maximum quantity and maximum value of the goods which may be purchased under the framework agreement and whether such a limit must, where appropriate, be laid down at 'the outset' and thus already be indicated in the contract notice (and is therefore identical to the estimated value) and/or in the tender documents (see to that effect paragraph 66 of the judgment, whereas in paragraphs 68 and 69 the assumption appears to be that it is sufficient for a maximum first to be set in the framework agreement itself and thus at the conclusion of the tender procedure (see Question 2)).
- 17 In the assessment of the questions referred, doubt may also arise as to whether a breach of the requirements for a contract notice, as they must subsequently be laid down, is covered by Article 2d of the General Remedies Directive, since the conclusion of an agreement on the basis thereof must be equated with the situation where no contract notice concerning the purchase is published at all and there are therefore grounds for regarding the contract as ineffective (see Question 3).

- 18 In the light of the foregoing and having regard to the parties' submissions, the Klagenævnet for Udbud finds that the questions give rise to such doubts that it has decided to stay proceedings and refer the questions to the Court of Justice of the European Union for a preliminary ruling.

WORKING DOCUMENT