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Judgment of the Court in Case C-54/21 | ANTEA POLSKA and Others

The protection of confidentiality in the field of public procurement must be weighed against the requirements of transparency and effective judicial protection

EU law precludes national legislation which requires publicising of any information communicated by tenderers with the sole exception of trade secrets, since such legislation is likely to prevent the contracting authority from deciding not to disclose certain information which, while it does not constitute a trade secret, should remain inaccessible

The Państwowe Gospodarstwo Wodne Wody Polskie (National Water Management Authority of Poland; 'the contracting authority') launched a tender procedure for the purpose of developing projects relating to the environmental management of certain river basin districts in Poland.

At the end of that procedure, one of the tenderers, to whom the contract was not awarded, brought an action before the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland), the referring court, seeking annulment of the decision awarding the contract to another tenderer, a fresh examination of the tenders, and disclosure of certain information. The referring court asks the Court about the limits of the confidentiality of information included by tenderers in their tenders in procedures for the award of public contracts.

By its judgment, the Court clarifies the scope and applicability of the prohibition on the disclosure by contracting authorities of information which candidates and tenderers provide to them in the context of procedures for the award of such contracts.

Findings of the Court

In the first place, the Court considers the delimitation of the scope of the obligation to treat information as confidential. In that regard, it finds that Directive 2014/24 on public procurement [1] 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 Directive 2016/943. [2] By contrast, that directive precludes such a regime where it does not include a set of rules allowing contracting authorities exceptionally to refuse to disclose information which, while not covered by the concept of trade secrets, should remain inaccessible.

[1] Article 21(1) of Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

[2] 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).

In order to reach that conclusion, the Court finds that **the scope of the protection of confidentiality set out in Directive 2014/24 is broader than that of protection covering trade secrets alone**. It recalls, however, that, under that directive, the prohibition on disclosure of information communicated in confidence applies unless otherwise provided in the national law to which the contracting authority is subject. Consequently, each Member State may strike a balance between the confidentiality referred to in that provision of that directive and the rules of national law pursuing other legitimate interests, such as access to information, in order to ensure the greatest possible transparency in public procurement procedures. That being so, it must refrain from introducing regimes which do not guarantee undistorted competition, which undermine the balancing of the prohibition on disclosure of confidential information against the general principle of good administration, from which the obligation to state reasons arises, in order to ensure observance of the right to an effective remedy of unsuccessful tenderers, or which alter the regime relating to the publicising of awarded contracts and the rules relating to information to candidates and tenderers. [3]

National legislation which requires that any information communicated by all tenderers to the contracting authority, with the sole exception of information covered by the concept of 'trade secrets', be publicised is liable to prevent that authority from deciding, pursuant to one of the interests and objectives recognised by Directive 2014/24, relating to the application of laws, the public interest, the legitimate commercial interests of an economic operator and fair competition, [4] **not to disclose certain information which does not fall within that concept.**

In the second place, the Court states 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 subcontractors 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 contract in question, where its disclosure might undermine legitimate commercial or fair competition. [5] Furthermore, the contracting authority may refuse to grant access to that information where its release would impede law enforcement or otherwise be contrary to the public interest. However, **where full access to information is refused, the contracting authority must grant access to the essential content of that information, so that observance of the right to an effective remedy is ensured**.

In particular, as regards, first of all, the relevant experience of the tenderers and the references demonstrating that experience and their capacities, the Court considers that such information cannot be classified as confidential in its entirety. Experience is not, as a general rule, secret, so that competitors cannot, in principle, be deprived of information relating to it. 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 and the references demonstrating 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 in order to ensure compliance with a prohibition or requirement laid down by law or the protection of the public interest.

As regards, next, information on natural and legal persons, including subcontractors, on which a tenderer indicates reliance in order to perform the contract, a distinction must be made between information enabling those persons to be identified and that which relates only to their qualifications or professional capacities.

[3] Articles 50 and 55 of Directive 2014/24.

[4] Article 50(4), and Article 55(3) of Directive 2014/24.

[5] Article 18(1), Article 21(1), and Article 55 of Directive 2014/24.

As regard name-specific data, the Court does not rule out that, in so far as it is plausible that the tenderer and its experts or subcontractors have created a synergy with commercial value, access to that data should be refused. Thus, the contracting authority must determine whether the disclosure of that identifying information is likely to undermine the protection of confidentiality [6] in respect of that tenderer. To that end, it should take into account all relevant circumstances, including the subject matter of the 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 other procurement procedures. However, the disclosure of information sent to the contracting authority cannot be refused if that information, which is relevant to the procurement procedure in question, has no commercial value in the wider context of the activities of those economic operators.

As regards non-name-specific data, the Court considers that, given their importance for the award of the contract, the principle of transparency and the right to an effective remedy require that the essential content of information such as the qualifications or professional capacities of the 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 be accessible to all tenderers.

As regards, finally, the design of the projects planned to be carried out under the contract and the description of the manner of performance of the contract, the Court finds that it is for the contracting authority to examine whether they 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 relating to law enforcement. [7] It recalls however that, even in the event that that design and that description are regarded as constituting works protected by copyright, that protection is solely reserved for elements which are the expression of an intellectual creation specific to its author, reflecting the author's personality.

In addition, and independently of that examination, the publication of that design and of that description, which have commercial value, may 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. While it is therefore possible that full access to information relating to the design of the projects and the description of the manner of performance should be refused, the essential content of that part of the tenders must nevertheless be accessible. [8]

In the third place, the Court holds that, in the event of a finding, when dealing with an action brought against a decision awarding a public contract, [9] of an obligation on the part of the contracting authority to disclose to the applicant information 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 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.

[6] Article 21(1) of Directive 2014/24.

[7] Article 55(3) of Directive 2014/24.

[8] Pursuant to Article 21(1), or Article 55(3) of Directive 2014/24.

[9] Article 1(1) and (3) of Council Directive 89/665 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).

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

The full text of the judgment is published on the CURIA website on the day of delivery.

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