

Case C-282/24

Request for a preliminary ruling

Date lodged:

23 April 2024

Referring court:

Högsta förvaltningsdomstolen (Sweden)

Date of the decision to refer:

18 April 2024

Appellant:

Polismyndigheten

Respondent:

Konkurrensverket

[...]

DECISION UNDER APPEAL

Judgment of the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm) of 13 April 2023 in Case No 7456-22

SUBJECT MATTER

Procurement fine; reference for a preliminary ruling from the Court of Justice of the European Union

[...]

The Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden) issues the following

ORDER

A reference for a preliminary ruling pursuant to Article 267 TFEU shall be made to the Court of Justice of the European Union in accordance with the attached request for such a ruling [...]

[...]

Request for a preliminary ruling pursuant to Article 267 TFEU seeking interpretation of Article 72(2) of Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC (Public Procurement Directive)

Introduction

- 1 By its reference for a preliminary ruling, the Supreme Administrative Court seeks clarity on the detailed conditions in which an amendment of a framework agreement concluded previously which, in terms of its value, could be covered by Article 72(2) of the Public Procurement Directive, may nevertheless be deemed to give rise to an obligation to conduct a new procurement procedure on the ground that the overall nature of the framework agreement is altered. The question has arisen in a case concerning a procurement fine.

Applicable provisions of EU law

- 2 Article 72(1) of the Public Procurement Directive allows contracts and framework agreements to be modified without a new procurement procedure in a number of situations. One of them is where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4 of that article. That paragraph states that a modification of a contract or a framework agreement during its term is to be considered to be substantial where it renders the contract or the framework agreement materially different in character from the one initially concluded. Paragraph 4(a) further states that a modification is in any event to be considered to be substantial where it introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure.
- 3 Under Article 72(2), furthermore, and without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4 are met, contracts may equally be modified without a new procurement procedure where the value of the modification is below both the thresholds set out in Article 4, and, for service and supply contracts, 10% of the initial contract value. However, the modification may not alter the overall nature of the contract or framework agreement.
- 4 Article 72(5) states that a new procurement procedure in accordance with that directive is to be required for other modifications of the provisions of a public contract or a framework agreement during its term than those provided for under paragraphs 1 and 2.

- 5 Recital 107 of the directive states that a new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties. It states that such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that contract and that this is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.
- 6 Recital 107 further states that modifications to the contract resulting in a minor change of the contract value up to a certain value should always be possible without the need to carry out a new procurement procedure.
- 7 Recital 109 deals with the exclusion from the obligation to conduct a new procedure which applies where a contracting authority needs to modify an existing contract due to unforeseeable circumstances. It states that that exclusion cannot apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed.

Applicable provisions of national law

- 8 Under Paragraph 8 of Chapter 17 of Lagen (2016:1145) om offentlig upphandling (Law No 1145 of 2016 on public procurement; 'the Law on public procurement'), a contract or framework agreement may be modified without a new procurement procedure if the modification is made on the basis of one of the provisions in Paragraphs 9 to 14.
- 9 According to the first subparagraph of Paragraph 9, a contract or framework agreement may be modified without a new procurement procedure if the overall nature of the contract or framework agreement is not altered and the increase or decrease in the value of the contract or framework agreement is less than the prescribed threshold and 10% of the value of the contract or framework agreement, where there is procurement of goods or services.
- 10 The first subparagraph of Paragraph 14 states that a contract or a framework agreement may be modified without a new procurement procedure even though the modification is not covered by Paragraphs 9 to 13, if the modification is not substantial. According to point (1) of the second subparagraph, a modification is to be considered to be substantial if, inter alia, it introduces new conditions which, had they been included in the original procurement procedure, would have resulted in other candidates being invited to submit tenders, other tenders being included in the evaluation or additional suppliers participating in the procurement procedure.

Facts in the proceedings

Background

- 11 In 2020, the Polismyndigheten (Swedish Police Authority) carried out a procurement procedure in respect of towing services under the Law on public procurement. The total contract value was estimated at SEK 15 million and the tender was evaluated on the basis of the award criterion of lowest price offered. The tenderers were required to quote a fixed price for assignments where the pick-up point of the vehicle to be towed was within a 10-km radius of the place where the vehicle was to be returned. For transportation outside the 10-km radius, tenderers were required to quote a specific additional price per kilometre for the remainder of the distance covered. According to the tender documents, the prices were to remain unchanged for the duration of the contract.
- 12 The procurement procedure was concluded by the Swedish Police Authority entering into two framework agreements in early 2021, one with Lidköpings Biltjänst Hyr AB and one with another supplier.
- 13 In the middle of 2021, the Swedish Police Authority agreed with the two suppliers to amend the terms of remuneration in the framework agreements. The amendment agreements stipulated that the radius within which the kilometre price would not be paid was extended from 10 to 50 km. At the same time – as far as Lidköpings Biltjänst Hyr AB is concerned – the fixed price per assignment was changed from SEK 0 to SEK 4 500, while the kilometre prices outside the radius for certain transportation were changed from SEK 185 to SEK 28 and for others from SEK 275 to SEK 55.
- 14 The Swedish Police Authority has stated that the reason for the amendments was a need to even out the distribution of costs internally within the authority between different police areas with varying geographical size and urbanisation levels. The starting point was that the amendments should not result in any change in the total value of the framework agreements. The authority has subsequently concluded, based on the invoices, that the amendment agreement with Lidköpings Biltjänst Hyr AB has led to a marginal reduction in the total remuneration in comparison with what would have been paid under the original terms.

Application for procurement fine

- 15 The Konkurrensverket (Swedish Competition Authority) applied to the Förvaltningsrätten i Stockholm (Stockholm Administrative Court) for an order requiring Swedish Police Authority to pay a procurement fine on the grounds that the amendment agreements should have been preceded by a new procurement procedure.
- 16 The Swedish Police Authority contested the application. The authority argued that it had not been obliged to carry out a new procurement procedure because the

amendments were not substantial within the meaning of Paragraph 14 of Chapter 17 of the Law on public procurement. In addition, with regard to the amendments to the agreement with Lidköpings Biltjänst Hyr AB, the authority argued that they were permissible under Paragraph 9 of Chapter 17 of the Law on public procurement because they were changes of lesser value.

- 17 The Administrative Court granted the Swedish Competition Authority's application and ordered the Swedish Police Authority to pay SEK 1 200 000 by way of a procurement fine. The Administrative Court found that the amendments, which meant that the tenderers would have had to strike a different balance between the prices for fixed and variable remuneration, were not foreseeable based on the information in the original procurement documents, which meant that the other tenderers were not given the same opportunities as the successful suppliers to make correct calculations of the profitability of the potential orders under the new conditions. In the Administrative Court's view, it appeared likely that the amendments to the conditions, had they been included in the original tender, could have resulted in additional suppliers participating or the outcome of the evaluation being different. Against that background, the Administrative Court found that the amendments were to be considered to be substantial and thus not permitted under Paragraph 14 of Chapter 17 of the Law on public procurement. For the same reason, the Administrative Court found that the amendments to the agreement with Lidköpings Biltjänst Hyr AB altered the overall nature of the framework agreement and were thus not permitted under the provisions on changes of lesser value set out in Paragraph 9 of Chapter 17 of the Law on public procurement.
- 18 The Swedish Police Authority brought an appeal against the judgment of the Administrative Court before the Administrative Court of Appeal. With regard to the amendments to the agreement with Lidköpings Biltjänst Hyr AB, the Swedish Police Authority claimed that a change of lesser value can be permitted even if the change in itself were considered to be substantial. Furthermore, the authority referred to recital 109 of the Public Procurement Directive and argued that there must be changes of a greater kind than an adjustment of the terms of remuneration for the overall nature of the contract to be considered to have been altered.
- 19 The Administrative Court of Appeal dismissed the appeal. The Administrative Court of Appeal also considered that the amendments were to be considered to be substantial and thus not permitted under Paragraph 14 of Chapter 17 of the Law on public procurement. Furthermore, the Administrative Court of Appeal held that the concept of 'the overall nature of the agreement' and the examples given in the preamble to the Public Procurement Directive cannot be interpreted as meaning that amendments to the terms of remuneration cannot be considered to be alterations of the overall nature. Instead, in the view of the Administrative Court of Appeal, it is necessary to assess on a case-by-case basis whether an amendment to the terms of remuneration is too dramatic a change in the obligations of the parties and means that it can be concluded that the outcome of the previous procurement procedure had been affected in some relevant way. In the present

case, the Administrative Court of Appeal considers that it could be held that the outcome of the original procurement procedure would have been affected had the amended terms of remuneration been included from the outset. The amendments to the agreement with Lidköpings Biltjänst Hyr AB were therefore considered to constitute such an alteration of the overall nature of the framework agreement, as referred to in Paragraph 9 of Chapter 17 of the Law on public procurement.

- 20 The Swedish Police Authority has brought an appeal against the judgment of the Administrative Court of Appeal and claims that the Supreme Administrative Court should dismiss the Swedish Competition Authority's application for a procurement fine or, in any event, set the fine at a lower amount. The Swedish Competition Authority contends that the appeal should be dismissed.
- 21 The Swedish Police Authority further argues before the Supreme Administrative Court that the amendment agreements were permitted under Paragraph 14 of Chapter 17 of the Law on public procurement. The authority also maintains that the amendments to the agreement with Lidköpings Biltjänst Hyr AB were in any event permitted under Paragraph 9 of Chapter 17 of the Law on public procurement.
- 22 This reference for a preliminary ruling concerns the latter provision and the corresponding provision of the Public Procurement Directive, Article 72(2), and, more specifically, what is meant by the overall nature of a framework agreement being altered.

Positions of the parties

The Swedish Police Authority

- 23 The Swedish Police Authority makes the following submissions. The amendments are not such as to have resulted in the overall nature of the framework agreement being altered. Article 72(2) of the Public Procurement Directive states that a contract which fulfils the requirements of that provision may be modified without any verification of whether the conditions set out under points (a) to (d) of paragraph 4 are met. This means that the fact that another supplier could have been awarded the contract had the new conditions applied from the outset cannot be regarded as supporting the position that the overall nature of the contract has been altered. The case-law of the Court of Justice of the European Union (*Finn Frogne*, C-549/14, EU:C:2016:634) also shows that even substantial changes to the contract may be permitted if the possibility of making them has been indicated in advance. Amending clauses are now governed by Article 72(1)(a) of the Public Procurement Directive and are reserved for modifications which do not affect the overall nature, which means that that concept cannot be synonymous with substantial modifications but must relate to modifications of a greater kind. Recital 109 of the Public Procurement Directive states, as an example of an

alteration of the overall nature, the replacement of the subject matter of the contract by something else or a fundamental change in the type of procurement.

The Swedish Competition Authority

- 24 The Swedish Competition Authority makes the following submissions. Changes of lesser value in a contract which has already been concluded can be made since such changes cannot generally be expected to distort competition or infringe the principles of equal treatment and transparency to any great extent. However, the scheme of the procurement rules would be undermined if amendments, which in themselves entail only a marginal change in value in absolute terms, but which are contrary to the principles for reasons other than a change in value, were to be permitted. Thus, the assessment of whether such an amendment alters the overall nature of the framework agreement should focus on whether the outcome of the original procurement procedure could hypothetically have been different, irrespective of the impact of the marginal change in value. In this case, the value is irrelevant to the issue of whether the amendments are contrary to the principles. The amendments have concerned the basic economic conditions of the original tender and affected the attractiveness of the procurement procedure from a risk perspective that could not have been foreseen when the tenders were submitted. It may be assumed that the outcome of the procurement procedure would have been affected had the amendments been known from the outset as another supplier could have submitted the most economically advantageous tender under different conditions. For those reasons, the amendment agreement is contrary to the principles of equal treatment and transparency and means that the overall nature of the framework agreement has been altered. The fact that the assessment of whether the overall nature of the framework agreement has been altered is similar to the assessment to be made, according to the case-law of the Court of Justice of the European Union, as to whether an amendment is substantial, is in the nature of the matter since both concepts are corollaries of the abovementioned principles.

The need for a preliminary ruling

- 25 The Swedish Police Authority has calculated the value of the amendments made to the framework agreement concluded with Lidköpings Biltjänst Hyr AB at an amount lower than the value stated in Paragraph 9 of Chapter 17 of the Law on public procurement and Article 72(2) of the Procurement Directive. In order to determine whether, on that basis, it was permissible for the Swedish Police Authority to enter into the amendment agreement, the Supreme Administrative Court must rule on whether the modification of the remuneration model that was made can be considered to have altered the overall nature of the framework agreement.
- 26 In its previous case-law – which predates the introduction of the current Public Procurement Directive – the Court of Justice has held that the principles of equal treatment and transparency preclude the provisions of an existing contract from

being amended, without a new procurement procedure, in such a way that they are materially different in character from the original contract (*presstext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraph 34). An amendment is to be considered to be substantial, inter alia, when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the acceptance of a tender other than the one initially accepted (paragraph 35 of that judgment). In principle, an amendment which is substantial may not be made after the contract has been awarded unless the possibility of making the amendment has been provided for in the terms of the contract initially concluded (*Finn Frogne*, paragraphs 30 and 36). Amendments made on the basis of existing provisions of a contract may also, in exceptional cases, require a new procurement procedure where, in view of the particular characteristics of the services concerned, the conditions being amended were a decisive factor in concluding the contract (*Wall*, C-91/08, EU:C:2010:182, paragraph 39).

- 27 Article 72 of the Public Procurement Directive is in part intended to codify that case-law. Article 72(4) expresses the principle that only substantial modifications call for a new procurement procedure. Article 72(1) and (2) sets out a number of situations in which modifications may be made, irrespective of whether or not they are substantial, in several cases, provided that they do not alter the overall nature of the contract or framework agreement. In addition to the exception for changes of lesser value, that requirement also applies to modifications under clear, precise and unequivocal review clauses and to modifications resulting from unforeseeable circumstances.
- 28 The exception for changes of lesser value, as expressed in Article 72(2), has no direct basis in the case-law of the Court of Justice of the European Union. In *Commission v Germany* (C-160/08, EU:C:2010:230, paragraphs 99 to 101), a change was deemed to be substantial on the basis that its value was higher than the threshold laid down in the applicable directives, and in *Presstext Nachrichtenagentur* (paragraphs 61 to 63) a minor adjustment of the price to the detriment of the supplier was held not to be a substantial change of the terms of the contract. However, the fact that a change which is deemed to be substantial in itself may nevertheless be permitted on account of its low value appears to be new in the context of the current Public Procurement Directive.
- 29 The Court of Justice has not ruled on the conditions under which an amendment to a framework contract may require a new procurement procedure on the ground that it alters the overall nature of the framework contract, either in the case of amendments of lesser value (Article 72(2)) or in the case of amendments pursuant to review or option clauses or as a result of unforeseeable circumstances (Article 72(1)). Nor has the Court of Justice ruled on the corresponding provisions of Directive 2014/23/EU on the award of concession contracts or Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

- 30 The preamble to the Public Procurement Directive (recital 109, which deals with modifications due to unforeseeable circumstances) gives examples of modifications that may alter the overall nature of a contract or framework agreement. Those examples refer to changes in the subject matter of the contract and the type of procurement. Otherwise, there is no clear guidance in the preamble as to what is meant by the overall nature being altered.
- 31 In the light of the foregoing, the Supreme Administrative Court finds that it is necessary to request a preliminary ruling from the Court of Justice of the European Union.

Question

- 32 Can a modification of the remuneration model in a framework agreement originally awarded on the basis of the award criterion of the lowest price offered, whereby the balance between fixed and variable prices is altered and the price levels are adjusted to such an extent that the total contract value does not change to more than a marginal degree, mean that the overall nature of the framework agreement is to be considered to have been altered within the meaning of Article 72(2) of the Public Procurement Directive?

WORKING DOCUMENT