Case C-54/21

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:

29 January 2021

Referring court or tribunal:

Krajowa Izba Odwoławcza (Poland)

Date of the decision to refer:

22 December 2020

Applicants:

ANTEA POLSKA S.A.

'Pectore-Eco' sp. z o.o.

Instytut Ochrony Środowiska – Państwowy lnstytut Badawczy

Defendant:

Państwowe Gospodarstwo Wodne Wody Polskie

Other parties to the proceedings:

ARUP Polska sp. z o.o.

CDM Smith sp. z o.o.

Multiconsult Polska sp. z o.o.

ARCADIS sp. z o.o.

HYDROCONSULT sp. z o.o. Biuro Studiów i Badań Hydrogeologicznych i Geofizycznych

Subject matter of the main proceedings

Appeal in a public procurement procedure for the 'preparation of draft second updates of river basin management plans (II aPGW) together with methodologies' concerning the acts or omissions of the contracting authority – Państwowe Gospodarstwo Wodne Wody Polskie (National Water Management Authority, Poland) – during the procedure in question.

Subject matter and legal basis of the request

The present request covers two groups of issues: the first relates to economic operators reserving information as trade secrets, and the second relates to the contracting authority's determination of non-price criteria for evaluating tenders, and the manner of their evaluation.

The request is based on Article 267 TFEU.

Questions referred

Question 1: Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of 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 ('Directive 2014/24/EU') permit Article 21(1) of Directive 2014/24/EU and 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 ('Directive 2016/943'), including in particular the terms 'is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible' and 'has commercial value because it is secret' and the indication that 'the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential', to be interpreted in such a manner that an economic operator can reserve, as a trade secret, any information on the ground that it does not wish to disclose that information to competing economic operators?

Question 2: Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24/EU permit Article 21(1) of Directive 2014/24/EU and Article 2(1) of Directive 2016/943 to be interpreted in such a manner that economic operators competing for a public contract may reserve the documents referred to in Articles 59 and 60 of Directive 2014/24/EU and in Annex XII to Directive 2014/24/EU in whole or in part as trade secrets, including in particular the description of their experience, the list of references, the list of persons proposed to perform the contract and their professional qualifications, the names and capacities of the entities whose capacities they rely on or of their

subcontractors, where those documents are required in order to prove fulfilment of the conditions for participation in the procedure or for the purpose of conducting an evaluation in accordance with the criteria for the evaluation of tenders or for ascertaining the compliance of the tender with the other requirements of the contracting authority contained in the procedure documentation (contract notice, tender specifications)?

Question 3: Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24/EU, read in conjunction with Articles 58(1), 63(1) and 67(2)(b) thereof, permit the contracting authority to accept the economic operator's declaration that it has at its disposal the personal resources required by the contracting authority or declared by the economic operator, the entities on whose resources it wishes to rely or their subcontractors, which it must demonstrate to the contracting authority in accordance with applicable laws, and at the same time the economic operator's declaration that the mere disclosure to competing economic operators of the details of those persons or entities (their names, experience and qualifications) may result in their being 'poached' by those economic operators, with the result that it is necessary to treat that information as a trade secret? In the light of the foregoing, may such an impermanent link between the economic operator and those persons and entities be regarded as evidence of the availability of the resource in question and, in particular, may the economic operator be awarded additional points under the tender evaluation criteria?

Question 4: Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24/EU permit Article 21(1) of Directive 2014/24/EU and Article 2(1) of Directive 2016/943 to be interpreted in such a manner that economic operators competing for a public contract may reserve as trade secrets documents required for the purpose of examining the compliance of their tender with the requirements of the contracting authority contained in the tender specifications (including the description of the subject matter of the contract) or for the purpose of evaluating the tender under the tender evaluation criteria, particularly where those documents relate to the fulfilment of the requirements of the contracting authority laid down in the tender specifications, in applicable laws or in other documents which are generally available or accessible to interested parties, and in particular where that evaluation does not take place according to objectively comparable schemes and mathematically or physically measurable and comparable indicators, but rather according to an individual assessment by the contracting authority? Consequently, are Article 21(1) of Directive 2014/24/EU and Article 2(1) of Directive 2016/943 to be interpreted as meaning that a declaration made by an economic operator in the context of its tender that it will perform the subject matter of the contract in accordance with the contracting authority's requirements included in the tender specifications, compliance with which is monitored and assessed by the contracting authority, can be regarded as a trade secret of the economic operator in question, even though it is for the

economic operator to choose the methods intended to achieve the result required by the contracting authority (the subject matter of the contract)?

Question 5: Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24/EU, read in conjunction with Article 67(4) thereof, which provides that award criteria must not have the effect of conferring an unrestricted freedom of choice on the contracting authority, must ensure the possibility of effective competition and must allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria, permit the contracting authority to establish a tender evaluation criterion, including in particular a criterion evaluated according to the contracting authority's own judgment, even though it is known at the time at which the criterion is established that economic operators will designate the part of their tender relating to that criterion as a trade secret, to which the contracting authority does not object, with the result that competing economic operators, being unable to verify their competitors' tenders and compare them with their own tenders, may have the impression that the contracting authority examines and evaluates tenders in an entirely discretionary manner?

Question 6: Are the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24/EU, read in conjunction with Article 67(4) thereof, which provides that award criteria must not have the effect of conferring an unrestricted freedom of choice on the contracting authority, must ensure the possibility of effective competition and must allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria, to be interpreted as permitting the contracting authority to establish a tender evaluation criterion such as, in the present case, the criterion concerning the 'concept of the study' and the criterion concerning the 'description of the manner of performance of the contract'?

Question 7: Is Article 1(1) and (3) of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts ('the Review Procedures Directive'), requiring the Member States to ensure that economic operators have effective remedies against decisions taken by contracting authorities and that review procedures are available to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement, to be interpreted as meaning that a finding by the adjudicating authority that documents reserved by the economic operators in a particular procedure are not trade secrets, which results in the contracting authority being obliged to disclose them and to make them available to competing economic operators – if such an effect is not directly provided for in applicable laws – imposes an obligation on the adjudicating authority to make a ruling enabling the economic operator in question to lodge an appeal again – within the

scope arising from the content of those documents which the economic operator did not know beforehand, as a result of which it was not in a position to make effective use of a legal remedy – against an action with respect to which it would not be entitled to lodge an appeal on account of the expiry of the period for doing so, for instance by declaring invalid the examination and evaluation of tenders to which the documents in question reserved as trade secrets pertained?

Provisions of EU law invoked

Directive 2014/24/EU: Articles 18(1), 21(1), 55(2) and (3), 56(1) and (2), 58(4), 59, 60(1), 63(1), 67 and 71(2).

Directive 2016/943: Article 2(1).

Directive 2007/66: Article 1(1) and (3).

Provisions of national law invoked

Ustawa z dnia 29 stycznia 2004 r. – Prawo zamówień publicznych (Public Procurement Law of 29 January 2004) (Dziennik Ustaw (*Journal of Laws*) (Dz. U.) of 2004, No 19, item 177)

Article 7

The contracting authority shall prepare and conduct the procurement procedure in a manner ensuring fair competition and equal treatment of economic operators and in accordance with the principles of proportionality and transparency.

Article 8

1. The procurement procedure shall be open and transparent.

2. The contracting authority may restrict access to information related to the procurement procedure only in the cases determined by legislation.

2a. The contracting authority may set out in the tender specifications requirements concerning the confidentiality of information provided to the economic operator in the course of the procedure.

3. Information constituting a trade secret within the meaning of the provisions on unfair competition shall not be disclosed if the economic operator, not later than the deadline for submission of tenders or requests to participate, has stated that the information concerned may not be disclosed and has demonstrated that the reserved information constitutes a trade secret. An economic operator cannot claim confidentiality for the information referred to in Article 86(4). This provision shall apply *mutatis mutandis* to competitions.

Article 36b(1)

The contracting authority shall require the economic operator to indicate the part of the contract which it intends to subcontract and to provide the names of its subcontractors

Article 91

1. The contracting authority shall select the most advantageous tender on the basis of the tender evaluation criteria set out in the tender specifications.

2. The tender evaluation criteria shall be the price or cost, or the price or cost and other criteria relating to the subject matter of the contract, including, in particular:

(1) quality, including technical parameters, aesthetic and functional properties;

(2) social aspects, including the professional and social integration of the persons referred to in Article 22(2), accessibility for persons with disabilities and consideration of the needs of users;

(3) environmental aspects, including the energy efficiency of the subject matter of the contract;

(4) innovative aspects;

(5) the organisation, professional qualifications and experience of the persons assigned to perform the contract, if these may have a significant impact on the quality of performance of the contract;

(6) after-sales service and technical assistance, delivery conditions such as the delivery date, manner of delivery and delivery period or period of completion.

…

2d. The contracting authority shall define the criteria for evaluating tenders in an unambiguous and comprehensible manner which makes it possible to verify the information provided by economic operators.

…

Article 96

1. In the course of conducting a procurement procedure, the contracting authority shall draw up a record containing, as a minimum: …

(5) the name and surname or company name of the economic operator whose tender has been selected as the most advantageous and the reasons why that tender was selected as well as, if known, an indication of the proportion of the contract or

framework agreement which the economic operator intends to subcontract to third parties and, if known at the time, the full names or company names of any subcontractors; …

(7) where applicable, the results of the examination of the grounds for exclusion, the assessment of compliance with the conditions for participation in the procedure or the selection criteria, including:

(a) the names and surnames or company names of the economic operators which are not subject to exclusion and which have demonstrated their compliance with the conditions for participation in the procedure or with the selection criteria, as well as the reasons for selecting those economic operators;

(b) the names and surnames or company names of the economic operators which are subject to exclusion and which have failed to demonstrate that they comply with the conditions for participation in the procedure or with the selection criteria, as well as the reasons for not inviting them to participate in the procedure;

(8) the reasons for the rejection of tenders; …

2. Tenders, expert opinions, statements, information from the meeting referred to in Article 38(3), notices, requests, other documents and information submitted by the contracting authority and economic operators, and the public procurement contract shall constitute appendices to the record.

3. The record and the appendices shall be public. Appendices to the record shall be made available after the selection of the most advantageous tender or the cancellation of the procedure, with the proviso that tenders shall be made available from the time of their opening, initial tenders shall be made available from the date of the invitation to tender, and requests to participate shall be made available from the date of notification of the results of the assessment of compliance with the conditions for participation in the procedure.

Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji (Law on Unfair Competition of 16 April 1993) (Dz. U. 2020, item 1913)

Article 11(2)

A ‘trade secret’ shall be construed as technical, technological and organisational information of an undertaking or other information of economic value that is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons normally dealing with that type of information, provided that the entity authorised to use or dispose of such information has taken measures, with due diligence, to keep it confidential.

Rozporządzenie Ministra Rozwoju z dnia 26 lipca 2016 r. w sprawie rodzajów dokumentów, jakich może żądać zamawiający od wykonawcy w postępowaniu o udzielenie zamówienia (Regulation of the Minister for Development of 26 July

2016 on the types of documents that the contracting authority may request from the economic operator in the procurement procedure) (Dz. U. 2020, item 1282)

§ 2(4)

In order to confirm that an economic operator meets the conditions for participation in the procedure or the selection criteria regarding its technical or professional capacity, the contracting authority may request the following documents:

(1) …

(2) a list of supplies made or services provided and, in the case of periodic or continuous supplies or services, also made or provided over the course of the last three years prior to the deadline for submission of tenders or requests to participate, and if the period of business activity is shorter – in that period, together with their value, subject matter, dates of completion and the entities to which the supplies were made or services provided, together with evidence stating whether those supplies were made or services were provided properly; the evidence in question shall be references or other documents issued by the entity to which the supplies were made or the services provided or, in the case of periodic or continuous supplies or services, are made or provided, and if the economic operator is unable to obtain such documents for objective reasons – a statement by the economic operator; in the case of periodic or continuous supplies or services which continue to be made or provided, the references or other documents confirming their proper performance should be issued not later than three months prior to the deadline for submission of tenders or requests to participate;

(3) a list of tools, plant equipment or technical facilities available to the economic operator in order to perform the public contract, together with information on the basis for using those resources;

(4) a description of the technical facilities used and of the organisational and technical measures applied by the economic operator to ensure quality and a description of the research and development facilities which the economic operator has or will have at its disposal;

(5) a list of supply chain management and tracking systems that the economic operator will be able to use in order to perform the public contract; …

10) a list of persons to which the economic operator is to have recourse in order to perform the public contract, including in particular those responsible for providing services, quality control or managing construction works, together with information on their professional qualifications, licences, experience and education necessary to perform the public contract as well as the scope of activities to be performed by them and the basis for using those persons to perform the public contract.

Succinct presentation of the facts and procedure in the main proceedings

1 The dispute in the present case concerns the public procurement procedure announced by the Państwowe Gospodarstwo Wodne Wody Polskie (National Water Management Authority, Poland) for the 'preparation of draft second updates of river basin management plans (II aPGW) together with methodologies', conducted by way of an open procedure. The tender was announced in *the Official Journal of the European Union* under Ref. No 2019/S 245-603343.

2 River basin management plans are among the basic planning documents whose preparation and update is required by the provisions of the Water Framework Directive (Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ 2000 L 327, p. 1) and in the Ustawa z dnia 20 lipca 2017 r. Prawo wodne (Water Law of 20 July 2017) (Dz. U. 2018, item 2268, as amended). These documents form the basis for decision-making that shapes the status of water resources and the principles of their future management. They serve to coordinate activities concerning the status of waters and ecosystems, water resources, water use, and substances discharged into waters or into soil which may have a negative impact on waters, flood protection and drought prevention. The contract concerned the cyclical updating of those plans and was to be executed in four stages: Stage I: Preparation of II aPGW drafts together with methodologies; Stage II: Public consultations of II aPGW drafts and a strategic environmental impact assessment; Stage III: Development of draft regulations on II aPGW; Stage IV: Preparation of a report for the European Commission and compilation of II aPGW databases.

3 In the tender specifications, the contracting authority indicated the minimum experience to be demonstrated by an economic operator applying for the contract and specified the team required to perform the contract, indicating the minimum experience, education and qualifications of team members. The contracting authority also stated that an economic operator having recourse to the resources of other entities must demonstrate that, when performing the contract, it would have at its disposal the necessary resources of those entities, in particular by submitting an undertaking from those entities to put at its disposal the persons necessary to perform the contract. Economic operators were required to submit documents which are standard in public procurement procedures: the European Single Procurement Document, lists of completed contracts with references, persons assigned to perform the contract, and entities providing the economic operator with resources. Pursuant to Article 36b(1) of the Public Procurement Law, the contracting authority requested the economic operators to indicate whether they would perform the contract with the participation of subcontractors and to indicate the name of the subcontractor and the part of the contract to be subcontracted. The tender form was to indicate the documents that could be obtained through free and publicly accessible databases (document name and website address).

4 The following economic operators submitted tenders in the procedure: 1. economic operators jointly tendering for the contract: ANTEA POLSKA Spółka akcyjna (ANTEA POLSKA public limited company) with its registered office in Katowice, 'Pectore-Eco' Spółka z ograniczoną odpowiedzialnością ('Pectore-Eco' limited liability company) with its registered office in Gliwice, and the Instytut Ochrony Środowiska – Państwowy lnstytut Badawczy (Institute of Environmental Protection – National Research Institute, Poland) with its registered office in Warsaw (together, 'the applicants'); 2. ARUP Polska Spółka z ograniczoną odpowiedzialnością (ARUP limited liability company) with its registered office in Warsaw ('Arup'); 3. CDM Smith Spółka z ograniczoną odpowiedzialnością (CDM Smith limited liability company) with its registered office in Warsaw ('CDM'); 4. economic operators jointly tendering for the contract: Multiconsult Polska Spółka z ograniczoną odpowiedzialnością (Multiconsult Polska limited liability company) with its registered office in Warsaw, ARCADIS Spółka z ograniczoną odpowiedzialnością (ARCADIS limited liability company) with its registered office in Warsaw, HYDROCONSULT Spółka z ograniczoną odpowiedzialnością Biuro Studiów i Badań Hydrogeologicznych i Geofizycznych (HYDROCONSULT limited liability company, Office for Hydrogeological and Geophysical Studies and Surveys) with its registered office in Warsaw ('Multiconsult').

5 The tenders were evaluated in accordance with the contract award criteria (two quality criteria – the 'concept of the study', weighting: 42, and the 'description of the manner of performance of the contract', weighting: 18; price criterion, weighting: 40).

6 According to the 'concept of the study' criterion, the tender was to describe the approaches to the performance of the contract:

1. a methodological approach to the development of a set of measures (with respect to individual measures, the methods for: conducting effectiveness and feasibility assessments related to achieving environmental objectives with respect to individual water bodies, performing a cost-effectiveness analysis, determining how the implementation of measures will affect downstream/upstream water bodies, determining the costs of implementation and sources of financing, taking into account domestic and European funds, performing a climate check of the programmes, determining the socio-economic effects of implementing the measures, prioritising measures, determining the potential synergies resulting from the existence of other planning documents, assessing whether the proposed set of measures for a given water body will enable environmental objectives to be achieved, and taking into account the implementation of measures planned for neighbouring water bodies);

2. a methodological approach to identifying measures for the preservation of morphological continuity in the context of the planned environmental objectives for the water body, including the manner of carrying out the analysis/assessment of the functioning of existing fish migration facilities (including a methodological

approach to identifying structures that constitute obstacles to migration, to determining whether the identified structures are equipped with facilities allowing for fish migration, to assessing the functioning of existing facilities in the context of achieving environmental objectives, and to identifying measures in this regard);

3. a reasoned concept for identifying deviations from the achievement of environmental objectives;

4. an approach to depicting the map location of surface water bodies and groundwater bodies in a manner that enables the water use points relating to at least the localities referred to in point 28(r) of Stage IV of the description of the subject matter of the contract to be located.

7 Additionally, in accordance with the 'description of the manner of performance of the contract' criterion, the tender was to include:

1. a description of potential risks to the proper performance of individual tasks at each stage of the contract and the ways of preventing and counteracting those risks in the form of a risk register with an estimate of the potential probability of their occurrence and threat level;

2. the organisational structure of the team: roles and responsibilities in relation to declared competences; information flow;

3. added value proposals not included in the detailed description of the subject matter of the contract, which have an impact on the quality and performance of the subject matter of the contract.

8 The sub-criteria within individual criteria were evaluated according to tables with descriptive ratings corresponding to certain scores. The descriptive ratings assessed whether the requirements set out in the tender documentation were met, whether substantive errors were made, whether all parts of the sub-criterion in question were described, how many of them were described in a clear and comprehensive manner, how many of the solutions proposed for a given sub-criterion were optimal and guaranteed work results of a high level of quality and reliability, and how many added value proposals were included in the description which were not included in the detailed description of the subject matter of the contract and which had an impact on the quality and performance of the subject matter of the contract.

9 The tenders received the following scores:

1. CDM – price (PLN 21 517 620): 33.61 points, concept of the study: 29 points, description of the manner of performance of the contract: 12 points, total: 74.61 points (the most advantageous tender);

2. the applicants – price (PLN 18 081 000): 40 points, concept of the study: 7 points, description of the manner of performance of the contract: 15 points, total: 62 points;

3. Multiconsult – price (PLN 20 662 770): 35 points, concept of the study: 14 points, description of the manner of performance of the contract: 9 points, total: 58 points;

4. Arup – price (PLN 18 240 900): 39.65 points, concept of the study: 9 points, description of the manner of performance of the contract: 6 points, total: 54.65 points.

10 The applicants lodged an administrative appeal with the Prezes Krajowej Izby Odwoławczej (President of the National Appeals Chamber), requesting that the selection of CDM's tender be declared invalid, that the tenders be re-examined and re-evaluated, that the documents and information reserved as trade secrets be disclosed and made available by CDM, Multiconsult and Arup in respect of the 'concept of the study' and 'description of the manner of performance of the contract' criteria, that the documents and information reserved by CDM (list of services, list of persons, references, points 5 and 13 of the tender form) be disclosed and made available, that the scores be adjusted in favour of the applicants and to the detriment of CDM, that the factual grounds for the scores awarded to CDM, Multiconsult and Arup be made available and that the tender submitted by the applicants be selected as the most advantageous.

11 Arup, CDM and Multiconsult joined the appeal proceedings on the side of the contracting authority.

12 The applicants raised the following pleas:

– failure to disclose information on the basis of which scores were awarded for the quality criteria as well as other information which was not effectively reserved as a trade secret by CDM, in breach of Article 7(1) and (3), read in conjunction with Article 8(1), (2) and (3), of the Public Procurement Law, read in conjunction with Article 11(2) of the Law of 16 April 1993 on Unfair Competition;

– failure to provide adequate justification for the evaluation of quality criteria, in breach of Article 92(1), read in conjunction with Article 7(1), of the Public Procurement Law;

– failure to evaluate the tenders submitted by the applicants and by CDM in accordance with the tender evaluation criteria and selection of the tender submitted by CDM as the most advantageous notwithstanding the fact that, in accordance with the tender evaluation criteria, the tender submitted by the applicants should have been selected as the most advantageous, contrary to Article 92(1), read in conjunction with Article 7(1), of the Public Procurement Law.

Essential arguments of the parties in the main proceedings

13 In their reasoning, the applicants submitted – with respect to the plea concerning the failure to disclose information improperly reserved as a trade secret by CDM, Multiconsult and Arup – that the principle of openness of public information is one of the basic principles of the legal system of the Republic of Poland arising from Articles 54 and 61 of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland) and from the provisions of the Ustawa z dnia 6 września 2001 r. o dostępie do informacji publicznej (Law of 6 September 2001 on Access to Public Information) (Dz. U., No 112, item 1198). The option to restrict the openness of a public procurement procedure cannot be abused or interpreted in an overly broad manner, since the principle of openness of such procedures is an overriding one and exceptions to it cannot be interpreted in such a way as to result in its scope being limited. That option cannot be used merely as a competitive measure between economic operators; it may only be applied strictly within the limits of the definition provided in Article 11(2) of the Law on Unfair Competition. Pursuant to Article 96(3) of the Public Procurement Law, the record and the appendices are public and should be made available for inspection by all interested persons, regardless of their legal or factual interest. Economic operators competing for public contracts should take account of the fact that their tenders will, as a rule, be public and should be aware of the consequences of being subject to the procedures laid down in public procurement law.

14 The justifications submitted by CDM, Multiconsult and Arup for reserving certain information as a trade secret are extremely brief and essentially limited to quoting case-law. It follows clearly from the provision of Article 8(3) of the Public Procurement Law that it is only possible to reserve specific information as a trade secret, but not a document in which such information may be partially included. CDM, Multiconsult and Arup, however, have reserved entire sets of documents as trade secrets without duly demonstrating the legality of doing so. The contracting authority ought to have verified in detail whether and to what extent the reservation of such documents as trade secrets was effective, all the more so as those documents had a direct bearing on the evaluation of the tenders, together accounting for as much as 60% of the tender evaluation criteria. Instead, the contracting authority uncritically accepted the economic operators' explanations, making it difficult for the applicants to challenge the scores given to those economic operators. Such action directly contradicts the principle of openness of public procurement procedures.

15 In relation to the individual documents and information reserved by the competitors, the applicants submitted that the competitor in question had previously disclosed this type of information in procedures related to contracts it had sought; that documents were reserved which were published on websites; that the contracts in the reserved list concerned services rendered to contracting authorities obliged to comply with the Public Procurement Law and therefore constituted public information; that the economic operator in question had not

taken the appropriate measures to maintain confidentiality despite making a declaration to that effect in the statement submitted to the contracting authority.

16 As regards the alleged lack of full justification for the scores awarded to CDM, Multiconsult and Arup, the applicants stated that, due to the lack of factual grounds for the decision regarding the scores awarded to the economic operators, they were not in a position to comment precisely on the evaluation conducted by the contracting authority. The extremely brief justification for the contracting authority's decision that was provided to the economic operators makes it difficult to determine whether the contracting authority's actions were correct and to use legal remedies.

17 The contracting authority stressed that the economic operators' right to keep parts of their tenders secret should be treated on a par with the principle of open public procurement procedures. The economic operator reserving certain information must endeavour to explain in a credible manner why the reserved information deserves the protection accorded to trade secrets, the claims in this respect must be substantiated, and the argument must be convincing, coherent and logical, taking into account the characteristics of the procedure and the information reserved. Those requirements, the contracting authority submits, were met by all of the economic operators.

18 One economic operator participating in the procedure submitted that Directive 2016/943 was adopted in order to protect information, which is the currency of the knowledge economy and provides a competitive advantage. Businesses view such information as being on a par with patents and other types of intellectual property. It is clear from recital 18 of that directive that it does not exempt public authorities from the obligation to preserve the confidentiality of trade secrets communicated to them, also in the context of public procurement procedures. The obligation to preserve the confidentiality of selected information designated by economic operators as trade secrets derives from Article 21(1) of Directive 2014/24/EU. An exception to the general principle of openness of public procurement procedures (Article 8(1) of the Public Procurement Law) is the principle of protecting information that constitutes a trade secret within the meaning of the Law on Unfair Competition (Article 8(3) of the Public Procurement Law). The definition of a trade secret is set out in Article 11(2) of the Law on Unfair Competition. The principle of openness of public procurement procedures is not absolute. The contracting authority makes an assessment as to what does and does not constitute legally protected information and, depending on that decision, takes further protective measures. The contracting authority's actions should not expose economic operators to the risk of damage resulting from the disclosure of information.

19 As regards the requirement that information must have economic value in order to be a trade secret, under Article 39 of TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights of 15 April 1994, annexed to the Agreement establishing the World Trade Organization) information that has

commercial value because it is secret is protected. This means that the information in question must be of some economic value to the economic operator precisely because it will remain confidential.

20 As regards reservation of the documents to be evaluated under the quality criteria, it follows from the arguments put forward by the contracting authority and the participating economic operators that they are original works and constitute the intellectual property of the individual operators – their know-how. Those documents constitute works within the meaning of the Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych (Law of 4 February 1994 on Copyright and Related Rights) (Dz. U. 1994, No 24, item 83), and the author (economic operator) has the exclusive right to use those works and dispose of them in all fields of use, including the right to supervise the manner in which the work is used and the right to decide on the first release of the work. Disclosure of the documents in question could seriously harm the interests of the economic operators, since they have economic value and the economic operators have taken the necessary precautions not to disclose them to the public, such as, inter alia, appropriate internal procedures; confidentiality clauses; work regulations; building access control; electronic document security (logins and passwords) and physical document security (lockers).

21 The contracting authority explained that each of the concepts submitted by the economic operators was drafted for the purposes of the procedure in question and contained unique solutions. By contrast, the ideas contained therein are not innovative, since the contracting authority does not expect innovation but rather compliance with the requirements of the tender specifications such that the presented solutions seek to achieve the best possible results and be correct. The disclosure of one of the concepts could harm the interests of its author, because another economic operator could propose a shorter completion date or a lower price; the concept could be used because it does not concern a one-off activity since the contract in question overlaps with other contracts and the same specialists or companies could appear in different contracts; based on the concept, a competitor could assess who is to be involved in the performance of the contract and that person could be poached.

22 As regards the reservation of the list of services and corresponding references, the information indicated in the list of services constitutes knowledge that would allow competitors to learn many aspects of the economic operator's activity (monitoring the profile of its activity at a given time, the types of contracts performed and the customers of its services). The list of services also shows the amount of revenue generated by the services, which also constitutes a trade secret.

23 As regards the reservation of the list of persons, this includes details that make it possible to identify the persons concerned, which may expose the economic operator to losses in the event of an attempt by competitors to entice those persons away. Similarly, the data included in the tender form contain details of third parties providing resources that have commercial value. The economic operators'

business is primarily the provision of consultancy services and they have no assets other than the intellectual-property assets created by their employees. The specification of the services in question requires the availability of highly qualified personnel and the protection of information concerning the persons who are to perform the contracts. Data on human resources are of economic importance to economic operators and concern the functioning of the economic operator's undertaking, its internal structure and its organisation.

24 It also emerged from the contracting authority's position presented during the hearing that it is standard practice in procedures for such studies to be kept secret. Economic operators use standardised justifications for reserving information as confidential. The documents requested by the contracting authority are interrelated and cannot be separated.

25 As regards the alleged lack of full justification for the scores awarded, the contracting authority submits that it assessed each of the items, sub-criteria and criteria in accordance with the procedure and principles described in the tender specifications. Each of the tenders was analysed in detail and the evaluation was accompanied by a detailed justification, which was sent to the economic operators on 12 March 2020. The level of detail in the scoring justifications provided to all economic operators makes it easy to check whether the awarded score was correct and to calculate in how many cases the item in question was assessed as being clearly and comprehensively described and the extent to which the declared added value was recognised as such by the contracting authority. The ability to conduct that check depended on reading in detail and understanding the principles for evaluating tenders, something which the applicants failed to do, as evidenced by the allegations and misinterpretation of individual passages in the justification for the tender evaluation. It is apparent from the applicants' arguments that they did not understand the manner in which the individual criteria and sub-criteria were evaluated and, as a result, formulated erroneous assumptions in their administrative appeal and drew conclusions pointing to alleged irregularities or bias on the part of the contracting authority. The score for each individual sub-criterion depended on the number of items which met the specified requirements: optimal solutions guaranteeing work results of a high level of quality and reliability as well as the number of elements going beyond the description of the subject matter of the contract which were deemed to have a positive impact on the quality of contract performance. In addition, below the table in which the scoring rules were presented, the contracting authority specified that the phrase 'optimal solutions guaranteeing work results of a high level of quality and reliability' meant 'an appropriate level of detail in the economic operator's analyses and/or appropriate tools and/or conducting an effective substantive verification of the source data and/or taking effective measures to ensure the completeness of the data and analyses'. The above principles were consistently applied by the tender committee when evaluating each tender and did not raise any doubts from either the applicants or other economic operators during the tendering procedure. No concerns were expressed as to the method adopted by the contracting authority for evaluating the tenders, as not a single question was asked with respect to the

tender specifications and there were no requests for changes in that regard. The contracting authority therefore considers the specifications to have been properly formulated.

Succinct presentation of the reasons for the request

26 The first group of issues covered by the request for a preliminary ruling concerns the reservation by economic operators of information as trade secrets.

27 In accordance with the judgment of the Court of Justice of 29 March 2012 in *SAG ELV Slovensko a.s.*, C-599/10, EU:C:2012:191, the contracting authority must treat the various tenderers equally and fairly, in such a way that it cannot appear unduly to have favoured or disadvantaged the tenderer or tenderers, once the procedure for selection of tenders has been completed and in the light of its outcome. Achieving such an effect is directly linked to the transparency of the award of a contract, which is in turn linked to the openness of the procedure to its participants. The openness of the procedure may be restricted, but domestic law does not impose such limitations with respect to the principles enshrined in Article 7(1) of the Public Procurement Law, that is to say, fair competition, equal treatment and transparency of the procedure. Similarly, the application of the provisions of Article 21(1) of Directive 2014/24/EU and of Article 2(1) of Directive 2016/943 cannot result in non-compliance with the principles set out in Article 18(1) of Directive 2014/24/EU.

28 In the Polish legal system, economic operators, as a rule, have full access to the documentation pertaining to a public procurement procedure (Article 96 of the Public Procurement Law). The lack or restriction of such access undermines economic operators' confidence in the decisions made by contracting authorities, and thus in the entire public procurement system, due to the lack of openness and the inability to verify the actions taken by the contracting authority and by competitors. This also makes it difficult, if not impossible, for economic operators effectively to exercise legal remedies.

29 Economic operators commonly monitor the course of procedures, examine competitors' tenders and verify those tenders and the information provided to the contracting authority in national procurement procedures. This is evident from the appeals lodged with the National Appeals Chamber, which primarily involve allegations of failure to reject invalid tenders and failure to exclude economic operators which have not demonstrated that they meet the conditions for participation in the procedure or which have provided the contracting authority with inaccurate information. Economic operators often have much greater professional knowledge of the subject matter of the contract and of the situation in the relevant industry than the contracting authority, and they are willing to use their access to public information in order to verify the information provided by competitors, which often allows them to change the outcome of the procedure.

30 An increasingly common practice aimed at counteracting this is to reserve documents submitted in a procedure, or parts thereof, as containing trade secrets. This applies with regard to documents required by the contracting authority which are related to the grounds for excluding economic operators from the procedure, the fulfilment of conditions for participation in the procedure, the compliance of the tender with the requirements set out in the tender specifications, and the tender evaluation criteria. Reserving such documents is perceived as a desire to conceal their content from competitors so that they are unaware of the grounds for excluding the economic operator from the procedure or rejecting the tender which the contracting authority would itself be unaware of, or to prevent competitors from challenging the evaluation of the tender according to the evaluation criteria.

31 In accordance with a 2005 determination of the Sąd Najwyższy (Supreme Court, Poland), reserving information as a trade secret when it has no such character does not cause a tender to be rejected as non-compliant with statutory provisions, but merely obliges the contracting authority to verify such reservations and to disclose the information concerned. Economic operators have therefore gradually begun to reserve more and more information because this does not entail any negative consequences for them. Information is reserved for opportunistic reasons, that is to say, economic operators reserve certain information when it is beneficial to them and also disclose the same information when it is beneficial to them. Economic operators often reserve entire documents, and when asked at a hearing to indicate which specific fragments contain secrets and why, they are unable to answer or merely indicate individual items of data or short passages.

32 On the one hand, contracting authorities are afraid to disclose reserved documents, even if they believe that they do not contain trade secrets, for fear of possible repercussions and compensation claims. On the other hand, this practice is convenient for them because it prevents other economic operators from having access to the documents, which also prevents them from effectively challenging the decisions of contracting authorities and restricts any appeals against those decisions.

33 The 2014 amendment to Article 8(3) of the Public Procurement Law, which introduced the obligation for economic operators to demonstrate that the reserved information constitutes a trade secret, was an attempt to counteract the problem described here.

34 In recent years, rules have emerged – both in Directive 2014/24/EU and in Directive 2016/943 – which may give rise to increased uncertainty on the part of contracting authorities and adjudicating bodies as to the actual ability of economic operators to reserve information in public procurement procedures. Those doubts relate mainly to the terms used in the directives concerned.

35 Article 21(1) of Directive 2014/24/EU provides that the contracting authority must not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets

and the confidential aspects of tenders. Article 2(1) of Directive 2016/943, for its part, defines a 'trade secret' as information which 'is not, as a body or in the precise configuration and assembly of its components, generally known … or readily accessible' and which 'has commercial value because it is secret'. Those provisions therefore emphasise the mere fact that some information is designated as secret by an entrepreneur but do not address the nature of that information. The provisions of those directives likewise do not emphasise the obligation of the economic operator to demonstrate that a given piece of information or document constitutes a trade secret, or the obligation of the contracting authority to examine whether the reservation in question is justified.

36 Economic operators are attempting to take advantage of the very general wording of the directives' provisions and to interpret them – in particular Article 2(1) of Directive 2016/943 – as allowing them to reserve any and all information or documents that they do not wish to disclose to the other economic operators involved in the procedure. Such reserved items may include any document prepared individually for the purposes of the tender procedure and any relevant element of the tender. For economic operators, the commercial value of that information stems precisely from the fact that it is covered by secrecy, because, if it were not, competitors might find flaws in their tenders. However, this does not appear to be the purpose of the option to protect economic operators' information introduced by Article 21(1) of Directive 2014/24/EU as well as by Directive 2016/943. Nor does it accord with the common understanding of operating under conditions of fair competition.

37 In the current proceedings, reservations concerning two types of documents are being challenged: on the one hand, documents describing the situation of the selected economic operator in terms of its experience and the entities and staff proposed to perform the contract, and, on the other hand, documents describing the manner in which the contract will be performed.

38 With respect to documents describing the situation of the selected economic operator in terms of its experience and the entities and staff proposed to perform the contract, the contracting authority requires official and standard documents and information as defined in the applicable laws – Articles 59 and 60 of, and Part II of Annex XII to, Directive 2014/24/EU, the Public Procurement Law and the Regulation on the types of documents that the contracting authority may request from the economic operator in the procurement procedure.

39 In view of the fact that the EU legislature indicated specific information to be provided to contracting authorities, it may be inferred that it took the view that such information does not constitute trade secrets. The scope of that information is determined by the contracting authority's requirements, and no contract details are required, especially those concerning financial and other sensitive data.

40 As regards information on successfully completed projects with references from customers, as well as information on the specific qualifications of staff or

researchers, such information is sometimes advertised by economic operators and placed on their websites in order to attract future customers and gain prestige. Such information does therefore not, by its nature, constitute trade secrets.

41 If economic operators state that the reason for reserving the information in question is to prevent the persons proposed to perform the contract or the entities that are to make their resources/subcontractors available from being 'poached', doubts arise as to the actual relationship between the economic operator and the person or entity indicated by it, and the economic operator's actual ability to have at its disposal that person or entity and their resources. An economic operator should decide whether it can actually claim that it really has at its disposal the resources indicated, which, in the case of the procedure in question, has a bearing not just on compliance with the contracting authority's minimum requirements, but also on the tender evaluation criteria. What is meant here are the persons indicated under the evaluated criterion and by reason of whose participation in the procedure the tender is awarded additional points.

42 In practice, the National Appeals Chamber did not determine that the 'poaching' of staff or third parties/subcontractors is a genuine problem in the public procurement market, nor did it find evidence of other practices that go beyond the bounds of the natural turnover of staff or freedom of contract between entrepreneurs. Valued industry experts, especially those who are narrowly specialised, are usually well-known and the entity interested in hiring them is able to contact them; specialist HR companies operate in the market as well. The authors of studies do not conceal their professional accomplishments and often publicise them, especially if they engage in academic work. Besides, if the project in question is interesting and prestigious from a professional point of view, or if it is profitable, those experts will wish to be involved regardless of the entity for which they will be working. The same applies with regard to subcontractors. There is no prohibition on the same person, the same subcontractor or the same entity being indicated by more than one economic operator – in the end, only one economic operator will be awarded the contract. Therefore, the decisive factor is rather which of the economic operators will be awarded the contract in question and the terms of cooperation it will offer. As follows from Directive 2016/943, it should not be understood as restricting the freedom of establishment, the free movement of workers or the mobility of workers (Article 1(3) and recital 13).

43 In addition, such data contained in a tender may indeed constitute a trade secret, but only prior to the submission of the tender, when the economic operator is seeking staff, subcontractors, entities that provide resources, and so on. Once the tender has been submitted, however, and given that its content can no longer be amended (Article 87(1) of the Public Procurement Law), knowledge of the staff or entities with which the competitor intends to cooperate is no longer useful. The future suitability of such staff or entities depends, in turn, on whether they meet the specific requirements of other contracts.

44 The second type of documents reserved by economic operators consists of studies required by the contracting authority, the purpose of which is to aid the evaluation of tenders according to quality criteria, namely, the 'concept of the study' and the 'description of the manner of performance of the contract'. In their reasons for reserving the documents in question, the participating economic operators and the contracting authority invoked primarily the fact that the documents in question constituted the economic operators' original works which are intellectual property.

45 The National Appeals Chamber has doubts as to whether the mere fact that a given part of the tender may be regarded as intellectual property justifies designating that part as a trade secret. It could indeed be a trade secret were it to be developed for the economic operator's own use. However, the studies in question are prepared on the basis of the requirements included in tender specifications in order to form the basis for examining whether the tender complies with those requirements (the description of the subject matter of the contract) and the basis for evaluating the tender according to the tender evaluation criteria. In the absence of that goal, it is difficult to see any value in those studies. Also, the mere fact that the study can be considered an intellectual work of the economic operator in question does not mean that it is a secret, since it is a characteristic feature of such works that they are made public, with their authorship indicated. The contracting authority's statement that the studies did not contain solutions which would constitute industry innovations – and therefore contained knowledge which is available to professionals – was likewise not challenged. Thus, it is questionable whether the mere ability neatly to describe a certain item can be regarded as a trade secret.

46 The economic operators' argument concerning competitive advantage could be applied to any tender procedure. To accept the assumption that the mere drafting of a tender that simultaneously meets the requirements of the contracting authority and receives a high score under the tender evaluation criteria is the economic operator's know-how constituting a trade secret would result in economic operators reserving every detail of their tenders.

47 According to recital 14 of Directive 2016/943, information may be considered a trade secret where there is both a legitimate interest in keeping it confidential and a legitimate expectation that such confidentiality will be preserved. Furthermore, such know-how or information should have a commercial value, whether actual or potential. However, the positions of the contracting authority and the participating economic operators include too many hypothetical assumptions and statements which contradict the arguments put forward, and this raises doubts as to whether the stated reasons for reserving information are genuine and whether the reserved documents have a real commercial value as contemplated by recital 14. On the other hand, the economic operators express a concerted and strong opposition to disclosure. The wording of the provisions of Directive 2016/943 raises doubts as to what is allowed in this respect, and there is no uniform and settled case-law on the possibility of reserving such information as a trade secret. Thus, in the opinion of the National Appeals Chamber, it is important that the Court of Justice should

answer the question whether the economic operators' expectation that the above documents will not be disclosed by the contracting authority is justified.

48 Reserving certain information as a trade secret also has the effect of limiting other economic operators' ability to use legal remedies and often prevents them from doing so entirely, as can be seen from the pleas raised in the appeal and the arguments put forward, in which the applicants indicate that they are not able to present a more extensive justification due to lack of access to information.

49 A further issue related to the use of legal remedies is that, pursuant to the Review Procedures Directive and the Public Procurement Law, they are limited both in terms of time and subject matter.

50 As regards the time aspect, Article 182 of the Public Procurement Law provides for time limits within which an appeal may be lodged against a contracting authority's actions. In the present case, an appeal can be lodged only within 10 days from the date of announcement by the contracting authority of information about the selection of the most advantageous tender and about the result of the examination and evaluation of tenders by the contracting authority; afterwards, the economic operator no longer has a right to lodge an appeal, and that deadline is final (with no provision providing for its extension).

51 The applicants lodged an appeal concerning the reservation of information in all other tenders even if they were ranked lower than their own tender, since at a later point in time they would not be able to challenge that reservation even if the ranking of the tenders were to change, and they also challenged the evaluation of CDM's tender even though they did not know the basis for that evaluation.

52 The restriction of the subject matter of appeal lies in the fact that, pursuant to Article 189(2)(4) and (5) of the Public Procurement Law, the National Appeals Chamber must reject an appeal if it finds that an applicant refers exclusively to the same circumstances as those which were the subject of the National Appeals Chamber's decision in another appeal concerning the same procedure and brought by the same applicant, or the appeal concerns an action which the contracting authority performed in accordance with a ruling of the National Appeals Chamber or of a court or, if the pleas included in an appeal were upheld, which the contracting authority performed in accordance with a demand contained in the appeal. Thus, if an economic operator raises several pleas in its appeal, as is the case in the present procedure, and the National Appeals Chamber upholds only some of these, for instance the failure to disclose documents, and dismisses those concerning the tender evaluation, the contracting authority is obliged only to disclose the documents, while the successful tender remains unchanged, with the economic operator no longer being able to challenge the successful economic operator's tender after reviewing its entire content.

53 The National Appeals Chamber is unsure whether, if it finds that the reserved documents are not trade secrets, resulting in the contracting authority being

ordered to disclose them, that finding will result in the economic operator being able to lodge another appeal with respect to their content, of which it was unaware beforehand and was thus effectively unable to exercise a legal remedy. Therefore, if such a possibility for the economic operator does not arise directly from applicable laws (their content or their interpretation), should the National Appeals Chamber, in its ruling, open up such a possibility for the economic operator, for instance by ordering not only that the documents in question be disclosed, but also that the selection of the most advantageous tender be invalidated, which would allow an appeal against the new tender selection? Alternatively, does such a possibility arise directly from the provisions of the Review Procedures Directive or their correct interpretation?

54 The second group of issues covered by the request for a preliminary ruling concerns the determination by the contracting authority of non-price criteria for evaluating tenders, and the manner of their evaluation. The manner in which tenders are evaluated according to those criteria may perhaps not raise doubts at the stage when economic operators become acquainted with them in the tender specifications, but defects may emerge later, when the contracting authority actually attempts to evaluate tenders on the basis of those criteria.

55 It follows from Article 67(4) of Directive 2014/24/EU that the criteria for the evaluation of tenders established by the contracting authority must not have the effect of conferring an unrestricted freedom of choice on the contracting authority; moreover, they must ensure the possibility of effective competition and must allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. This therefore means that they should also provide for the possibility of verifying the evaluation made by the contracting authority. The non-price criteria formulated by the contracting authority with respect to the evaluation of the ‘concept of the study’ and the ‘description of the manner of performance of the contract’ raise doubts in this regard for several reasons.

56 Firstly, the criteria in question are not based on easily comparable and objective data that are measurable through the use of mathematical or physical methods, such as individual parameters, performance, strength, functionality and so forth, but rather on an individual assessment which the contracting authority expresses using insufficiently defined terms such as ‘vaguely described’, ‘clearly and comprehensively described’, ‘some elements were not described’, ‘the solutions proposed are optimal and guarantee results of a high level of quality and reliability’ or ‘… do not guarantee results of a high level of quality and reliability’, ‘has added value that impacts the quality and performance of the subject matter of the contract’.

57 Secondly, the assessment of the criteria in question depends on the contracting authority’s individual view of the above characteristics. It is not possible to appoint an expert to assess the content of the studies drawn up by the economic operators as they do not contain verifiable parameters.

58 Thirdly, the question whether the economic operators actually had the opportunity properly to prepare their tenders in line with the predetermined evaluation method should also be considered.

59 Fourthly, the economic operators had no opportunity to familiarise themselves with the materials evaluated by the contracting authority and to assess them in full, including verification as to whether the economic operators were evaluated in a comparable manner with respect to the advantages and disadvantages of their studies.

60 Fifthly, the applicants, through no fault of their own, were unable to raise in their appeal specific pleas concerning many elements of the evaluation, as a result of which the principles laid down in the Review Procedures Directive were disregarded. Pursuant to Article 192(7) of the Public Procurement Law, the National Appeals Chamber is bound by the scope of the pleas raised and cannot act as a replacement for the applicant concerned in this regard. The applicants did not know what specific pleas to raise against the evaluation of their own tender, much less CDM's tender. While it is true that the contracting authority made an effort and prepared justifications for its evaluations which ran to several pages, it is none the less clear that the contracting authority cannot make the full justification for its evaluation available if the studies themselves are secret. Key information was redacted and replaced with [TRADE SECRET].

61 Sixthly, the performance of the contract in question will be evaluated on the basis of its result rather than the economic operator's best effort. However, the contracting authority did not require studies in the form of, for instance, sample drafts, but rather descriptions of how the economic operators would perform their work. Thus, it is difficult to ascertain how those evaluated studies will translate into final drafts, and there is a concern that what is in fact being evaluated is the ability to prepare studies (the 'concept of the study' and the 'description of the manner of performance of the contract') that are well received by the contracting authority rather than the quality of the services ordered.

62 In the tender procedure in question, the contracting authority provided for the following tender evaluation criteria: price with a weighting of 40% and non-price criteria (the 'concept of the study' and the 'description of the manner of performance of the contract') with a total weighting of 60%. Those criteria are based on an open-ended evaluation conducted by the contracting authority that is not based on factors that could be verified through the use of mathematical or physical methods, such as figures, parameters, functionality and so forth, which makes it very difficult from the outset to verify the evaluation of the tenders made by the contracting authority. In addition, all of the economic operators designated their studies as trade secrets, which the contracting authority expected or could have expected when developing the criteria, given the fact that similar documents were previously reserved as such, which makes it impossible not only to verify the evaluation of the tenders made by the contracting authority, but also the tenders themselves. Consequently, the contracting authority selected the tender with the

highest price among those submitted, with price being the only available and verifiable criterion, while the other criteria that determined the ranking of the tenders are difficult to verify.