

Case C-424/23**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:**

11 July 2023

Referring court:

Ondernemingsrechtbank Gent, afdeling Gent (Belgium)

Date of the decision to refer:

28 June 2023

Applicant:

DYKA Plastics NV

Defendant:

Fluvius System Operator CV

Subject matter of the main proceedings

The main proceedings concern the claim brought by the applicant before the Ondernemingsrechtbank (Business Court), which essentially seeks to establish that the defendant's procurement policy on sewage works, which stipulates in the contract documents that, as a rule, the sewage pipes be made of vitrified clay and concrete, infringes public procurement legislation, to require the defendant, in light of this, to amend its contract documents, in particular the technical specifications, and also to order it to pay damages.

Subject matter and legal basis of the request for a preliminary ruling

The request for a preliminary ruling pursuant to Article 267 TFEU concerns the question of how Article 42 of Directive 2014/24 is to be interpreted. In particular, the referring court questions whether the enumeration of the ways in which technical specifications must be drawn up, as set out in paragraph 3 of that provision, is exhaustive, whether it is permissible under paragraph 4 of that provision to refer in technical specifications to sewage pipes made of vitrified clay

and concrete, and whether such a reference to a single product by definition favours or eliminates certain undertakings or products, despite the fact that several undertakings are able to offer the aforementioned product in competition with one another, or whether this requires that only one undertaking be able to offer the product in question on the market and, finally, whether an infringement of Article 42(3) and/or (4) also constitutes an infringement of Article 42(2) and Article 18(1) of Directive 2014/24.

Questions referred for a preliminary ruling

1. Must Article 42(3) of Directive 2014/24/EU be interpreted as meaning that the list of ways in which the technical specifications must be formulated is of an exhaustive nature and that, a contracting authority consequently is obliged to formulate the technical specifications of its public contracts in one of the ways listed in that provision?

2. Must Article 42(4) of Directive 2014/24/EU be interpreted as meaning that references to sewage pipes made of vitrified clay and concrete (depending on the specific type of sewage system) in the technical specifications of calls for tender are to be regarded as falling within one or more of the references listed in that provision, for example, as references to specific types, or to specific productions of pipes?

3. Must Article 42(4) of Directive 2014/24/EU be interpreted as meaning that references in the technical specifications of calls for tender to a single product, for example, to sewage pipes made of vitrified clay and concrete (depending on the specific type of sewage system) as constituting specific technical solutions, already produce the effect required by that provision (namely ‘favouring or eliminating certain undertakings or certain products’) since they have the effect of excluding a priori and thus disadvantaging, undertakings which offer alternative solutions to the specified product, despite the fact that different undertakings in competition with each other are able to offer the prescribed specified product, or is it necessary that there be no competition whatsoever with regard to the product in question, for example, sewage pipes made of vitrified clay and concrete (depending on the specific type of sewage system) and that the effect referred to can therefore be said to exist only if the product in question is characteristic of one particular undertaking which alone offers it on the market?

4. Must Article 42(2) of Directive 2014/24/EU be interpreted as meaning that an established infringement of Article 42(3) of Directive 2014/24/EU and/or of Article 42(4) of Directive 2014/24/EU, by virtue of the unlawful use of references in the technical specifications of calls for tender, for example, to sewage pipes made of vitrified clay and concrete (depending on the specific type of sewage system), also at the outset implies an infringement of Article 42(2) of Directive 2014/24/EU, as well as of the related Article 18(1) of Directive 2014/24/EU?

Provisions of EU law and national law relied on

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, Articles 18 and 42, recital 74.

Wet van 17 juni 2016 inzake overheidsopdrachten (Law of 17 June 2016 on Public Procurement), Articles 4, 5 and 53.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The dispute concerns the award of public contracts for sewage works. The defendant is a contracting authority which stipulates in the contract documents relating to those contracts that the pipes in question must, as a rule, be made of vitrified clay and concrete (only). The applicant is a manufacturer and supplier of plastic sewage pipes, which prevents it from offering its products in the context of the aforementioned contracts.
- 2 The applicant therefore considers that the defendant's procurement policy is unlawful. In recent years, it has unsuccessfully requested the defendant to change its approach. Thus, it has already put the defendant on notice and invited it to clarify its policy in this regard. Against that background, the applicant brought the present proceedings before the referring court.

The essential arguments of the parties in the main proceedings

- 3 The applicant submits that, as a supplier of plastic pipes, it is systematically discriminated against and does not have a fair opportunity to participate in the public contracts put out to tender by the defendant. The references in the contract documents to vitrified clay and concrete pipes, which constitute technical specifications within the meaning of public procurement legislation, exclude plastic pipes without any justification, which impedes competition and infringes public procurement legislation.

In particular, the applicant claims that the defendant infringes Article 53(3) of the Overheidsopdrachtenwet (Law on Public Procurement), since the technical specifications in question were not formulated in accordance with one of the ways exhaustively defined in that provision. The defendant also infringes Article 53(4) of that law, since those specifications refer only to a single technical solution, thereby favouring or eliminating certain undertakings or products. The prohibition laid down in that provision is not limited to the situation where a contracting authority specifies one unique product that can only be offered by one company. Furthermore, an infringement of Article 53(3) and (4) of the Overheidsopdrachtenwet also implies an infringement of Article 4, Article 5 and Article 53(2) of that law. In essence, Article 53(2) of the Overheidsopdrachtenwet constitutes a special application of the fundamental obligations laid down in

Articles 4 (principle of equality) and 5 (principle of competition) incumbent on a contracting authority such as the defendant. These require that a diversity of solutions be allowed, whereas undertakings which, like the applicant, offer an alternative solution, are excluded in the present case. Finally, the defendant also infringed the principle of the duty of care, the principle of proportionality and the principle of fair play.

In view of the foregoing, the defendant should adjust its approach in future. Since the applicant has in the past already lost several opportunities to participate in and be awarded the contracts in question, it has suffered damage which must be compensated by the defendant.

- 4 The defendant argues that it has discretionary powers of judgment and thus may choose, without further justification, which material, namely vitrified clay and concrete, its sewage pipes should normally be made of.

This approach does not violate Article 53(4) of the Wet overheidsopdrachten. Indeed, that provision does not apply in the present case, as its specifications do not prescribe a ‘unique product’. After all, there are several producers and suppliers of vitrified clay and concrete pipes. Furthermore, there are sound reasons for choosing vitrified clay pipes when laying a DWA sewage line and concrete pipes when laying a RWA sewage line. So, for example, vitrified clay pipes last at least 100 years, while plastic pipes have a lifespan of 50 years. Plastic pipes also have more defects and failures than vitrified clay pipes, which increases the maintenance costs of plastic pipes. From both a financial and customer perspective, the choice of vitrified clay pipes is reasonably justified. Moreover, from an environmental point of view, there are also good reasons not to choose plastic sewage pipes. Plastic pipes are therefore only acceptable when justified in the light of the specific circumstances of the project.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 5 According to the referring court, the question is whether the description of the required pipes set out in the contract documents meets the requirements of Article 53 of the Overheidsopdrachtenwet, read in the light of Article 42 of Directive 2014/24.

This description does not specify any standards with which such pipes must comply. This denies companies the opportunity to offer alternative technical options that comply with those standards. Nor does it lay down any performance or functional requirements that allow for other technical solutions. In light of this, the defendant’s contention that there are several manufacturers of vitrified clay and concrete pipes, so that it is not prescribing a unique product, is irrelevant.

- 6 The referring court also questions whether the enumeration of the ways in which technical specifications must be drawn up, as set out in Article 42(3) of Directive 2014/24, is exhaustive or merely illustrative.

The referring court finds that sewage pipes are the ‘product’ and that the ‘requirement’ is that they must be made of vitrified clay or concrete. It is therefore necessary to examine whether the way in which the defendant described the technical specification in question is compatible with the way in which it should be done under Article 53 of the Overheidsopdrachtenwet, read in the light of Directive 2014/24.

- 7 Furthermore, the referring court questions whether the reference to sewage pipes made of vitrified clay and concrete in the defendant’s technical specifications should be considered as one or more of the references listed in Article 42(4) of Directive 2014/24, for example, as references to certain types or to certain productions of pipes.

WORKING DOCUMENT