

**Case C-210/24**

**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:**

14 March 2024

**Referring court:**

Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi (Spain)

**Date of the decision to refer:**

14 March 2024

**Applicant:**

Asociación de Empresas de Servicios para la Dependencia (AESTE)

**Defendant:**

Ayuntamiento de Ortuella

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**Subject matter of the main proceedings**

Public contracts – Directive 2014/24/EU – Article 67 – Contract award criteria – Criterion of the most economically advantageous tender – Criterion linked to the subject matter of the public contract – Right of collective bargaining and action – Freedom to provide services – Home care service

**Subject matter and legal basis of the request**

Reference for a preliminary ruling – Public contracts – Directive 2014/24/EU – Article 67 – Contract award criteria – Criterion of the most economically advantageous tender – Criterion linked to the subject matter of the public contract – Charter of Fundamental Rights of the European Union – Article 28 – Right of collective bargaining and action – Treaty on the Functioning of the European Union – Article 56 – Freedom to provide services

### **Questions referred for a preliminary ruling**

‘Is a criterion for awarding a contract for services, such as that described, which:

- assesses the increase in the total payroll cost above that determined by the collective agreement applicable to the sector, which the tenderer proposes to apply to the individuals performing the contract, and
- obliges the successful tenderer, following collective bargaining with the workers’ representatives, to specify the precise form that the pay increase is to take, and to seek to formalise a collective agreement applicable to the staff assigned to the contract,

suitable for identifying the most economically advantageous tender, as required by Article 67(1) of Directive 2014/24/EU?

Does such an award criterion conflict with the freedom to provide services or restrict free competition, contrary to Article 56 of the Treaty on the Functioning of the European Union and Directives 2014/24/EU and 96/71/EC?

Does such an award criterion infringe the right of collective bargaining recognised in Article 28 of the Charter of Fundamental Rights of the European Union?’

### **Provisions of European Union law and case-law relied on**

Article 56 of the Treaty on the Functioning of the European Union:

‘Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

[...].’

Article 28 of the Charter of Fundamental Rights of the European Union:

‘Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.’

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,

recitals 98 and 99, Article 2(1)(3) and (4), Article 18(1), Articles 67 and 76 and Annex XIV

#### Recital 98

‘It is essential that award criteria or contract performance conditions concerning social aspects of the production process relate to the works, supplies or services to be provided under the contract. In addition, they should be applied in accordance with Directive 96/71/EC, as interpreted by the Court of Justice of the European Union and should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States or from third countries parties to the GPA or to Free Trade Agreements to which the Union is party. Thus, requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive.’

#### Recital 99

‘Measures aiming at the protection of health of the staff involved in the production process, the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract or training in the skills needed for the contract in question can also be the subject of award criteria or contract performance conditions provided that they relate to the works, supplies or services to be provided under the contract. For instance, such criteria or conditions might refer, amongst other things, to the employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the contract to be awarded. In technical specifications contracting authorities can provide such social requirements which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users.’

#### Article 18(1) – Principles of procurement

‘1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.’

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

#### Article 67 – Contract award criteria

‘1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services,

contracting authorities shall base the award of public contracts on the most economically advantageous tender.

2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject matter of the public contract in question. Such criteria may comprise, for instance:

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.

[...]

4. Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.

[...].’

#### Article 76 – Principles of awarding contracts

‘1. Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules

allow contracting authorities to take into account the specificities of the services in question.

2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.’

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts

Judgment in Case C-346/06, *Rüffert*; judgment in Case C-583/10, *Nolan*; judgment in Case C-313/12, *Romeo*; judgment in Case C-115/14, *RegioPost*; judgment in Case C-234/14, *Ostas celtnieks*; judgment in Case C-546/16, *Montte*; judgment in Case C-462/19, *Anesco and Others*; judgment in Case C-376/21, *Obshtina Razlog*.

#### **Provisions of national law relied on**

Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público (Law 9/2017 of 8 November 2017 on Public Sector Contracts, ‘the LCSP’), Articles 1, 48 and 145 and Annex IV.

‘Article 1. Object and purpose.

[...]

3. Social and environmental criteria shall, on a universal and mandatory basis, be included in all public procurement, provided that it is relevant to the subject matter of the contract, in the belief that the inclusion thereof improves the price-quality ratio of the contractual performance, as well as providing greater and improved efficiency in the use of public funds. Small and medium-sized enterprises and social enterprises shall also be given access to public procurement.’

‘Article 145. Requirements and classes of contract award criteria.

1. Contracts shall be awarded using a number of award criteria on the basis of the best price-quality ratio.

Where justified in the procurement documents, contracts may be awarded according to criteria based on a cost-effectiveness approach, on the basis of the price or cost, such as life cycle costing in accordance with Article 148.

2. The best price-quality ratio shall be evaluated on the basis of financial and qualitative criteria.

The qualitative criteria established by the contracting authority in order to evaluate the best price-quality ratio may include environmental or social aspects, linked to the subject matter of the contract as laid down in paragraph 6 of this article, which may include the following:

(1) Quality, including technical merit, aesthetic and functional characteristics, accessibility, universal design or design for all users, social, environmental and innovative characteristics and trading and its conditions;

[...]

The social characteristics of the contract shall relate, inter alia, to the following aims: promoting the social integration of persons with disabilities, disadvantaged persons or members of vulnerable groups among the persons assigned to the performance of the contract and, in general, the social integration and employment of persons with disabilities or who are at risk of social exclusion; subcontracting with special employment centres or companies providing employment; the application of gender equality plans in the performance of the contract and, in general, equality between women and men; promoting the employment of women; the reconciliation of work, personal and family life; improving working and pay conditions; stable employment; the employment of a greater number of people to perform the contract; training and the protection of health and safety at work; the application of ethical and social responsibility criteria to the contractual performance; and criteria relating to the supply or use of fair trade products in the course of the performance of the contract.

(2) The organisation, qualification and experience of the staff assigned to the performance of the contract, provided that the quality of that staff may have a significant impact on the level of performance of the contract.

[...].

‘Forty-seventh additional provision. Principles applicable to the concession contracts included in Annex IV and to the contracts for social, healthcare or educational services included in Annex IV.

Without prejudice to the application of the provisions of this law and, inter alia, those relating to the establishment of the technical prescriptions, the minimum requirements with regard to standing, the award criteria and the special conditions relating to the performance of the contract, in procurement procedures for concession contracts appearing in Annex IV and social, healthcare or educational

contracts also appearing in Annex IV, the contracting authorities shall, at every stage of those procedures, safeguard the need to ensure the quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement of users of the services and innovation in the provision of the service.

Moreover, when establishing the criteria for awarding the contracts referred to in this additional provision, the contracting authority may relate them to aspects such as: experience of the staff assigned to the contract to provide services aimed at especially disadvantaged groups or to provide services of a similar nature as laid down in Article 145; the reinvestment of the profits obtained in improving the services provided; the establishment of mechanisms for user participation and for the information and guidance of users.'

Annex IV of the LCSP corresponds to Annex XIV of Directive 2014/24. The contract to which the contested award criterion relates is included in Annex IV of LCSP.

Article 119(3) of Ley 39/2015, del Procedimiento Administrativo Común de las Administraciones Públicas (Law 39/2015 on the Common Administrative Procedure for Public Sector Bodies).

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The Ayuntamiento de Ortuella (Municipality of Ortuella; 'the Council') has announced a public procurement procedure for the 'Municipality of Ortuella home help service', in its capacity as a 'sub-central contracting authority', being a local authority (Article 2(1)(1) and (3) of Directive 2014/24). The service in question forms part of 'Social work services without accommodation' (CPV – 85312000-9) and has been defined by that municipality as 'a community social service which, using qualified, trained and supervised staff, carries out preventative, educational and care work [for the benefit of] families and/or individuals who have difficulties in maintaining or preserving their physical, social and/or emotional well-being, and aims to allow users to continue living in their home and/or environment for as long as is possible and advisable.'
- 2 The award criterion set out in paragraph 19 B of Annex I (Table of characteristics) to the Schedule of Specific Administrative Specifications proposed by the municipality in the context of this procurement procedure ('the contested award criterion') states:

'Increase in the total payroll cost: 40 points

Taking as a reference the rates of pay established in the collective agreement for the sector, higher rates of pay (increases on the total payroll cost) which the

tenderer proposes to apply to the individuals performing the contract shall be taken into account.

The percentage increase in the rate of pay, taking into account the basic rate of pay and the standard agreed bonus for all of the workers to be subrogated, shall be considered, applying the following formula:  $\text{Points} = P \times A / B$ .

‘Points’ is the total number of points awarded to the proposal.

P = the maximum number of points to be awarded, that is, 40 points.

A = the highest percentage of all the tenders submitted.

B = the percentage of the tender being assessed.

Tenders proposing a percentage increase to be applied to the individuals performing the contract shall be considered. Tenders which do not propose any increase shall receive a score of 0 points.

No later than one month after the contract has been formalised, following negotiations with the workers’ representatives, the precise form which that pay increase is to take shall be specified. The successful tenderer shall also seek to formalise an agreement (collective agreement of the Ortuella home help service) regulating the working conditions of the staff assigned to the contract.’

- 3 On 13 June 2023, the Asociación de Empresas de Servicios para la Dependencia (Association of Care Service Providers; ‘AESTE’) brought a special challenge against the procurement documents for the contract proposed by the municipality before the Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi (Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country, Spain; ‘the OARC’). In particular, it sought the annulment of the contested award criterion.

#### **The essential arguments of the parties in the main proceedings**

- 4 AESTE maintains, first of all, that the contested award criterion infringes the right to access the procurement procedure on equal terms, since it hinders free competition between economic operators and participation in the procurement procedure. Second, it argues that the criterion in question is not linked to the subject matter of the contract, in so far as it is neither viable to correlate a higher rate of pay with a better service provided, nor reasonable to create pay inequalities between employees of the successful tenderer on the basis of the client which they have to attend to (that is, according to whether or not they are assigned to the ‘Municipality of Ortuella home help service’). Third, the award criterion does not establish a maximum amount which the tenderer must propose in order to obtain the maximum score, which means, in AESTE’s view, that quantities could ultimately be proposed which are disproportionate and in no way linked to the

correct performance of the contract. Fourth and finally, the obligation to formalise the pay increase in a collective bargaining agreement relating to the staff assigned to the contract implies ceasing to apply the current collective agreement to those workers, which is beyond the powers of the municipality as a contracting authority.

- 5 The Municipality of Ortuella opposes the annulment sought by AESTE on the grounds that the inclusion of the contested award criterion is justified given the social and labour market context and its link to the subject matter of the contract, and also with a view to the correct performance of the contract. With regard to the context, it contends that it is necessary to resolve industrial disputes in the sector, motivated in part the loss of purchasing power on the part of workers, which affects the provision of a sensitive service. Regarding the subject matter of the contract, it maintains that the award criterion is linked to the guarantee in respect of the quality and continuity of the service and that it is valid, provided that it is formulated in an objective and proportionate manner.

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

- 6 The OARC was created, as a permanent body, by means of the Eighth Additional Provision of Ley 5/2010, de 23 de diciembre, por la que se aprueban los Presupuestos Generales de la Comunidad Autónoma de Euskadi para el ejercicio 2011 (Law 5/2010 of 23 December 2010 approving the Budget of the Autonomous Community of the Basque Country for the 2011 financial year). Its function is to rule on the claims and special actions brought before it in relation to contracts, in accordance with Article 44 et seq of the LCSP.
- 7 The OARC satisfies the requirements to be regarded as a ‘court or tribunal’ for the purposes of Article 267 TFEU, as the Court of Justice has established, in particular in its judgment of 20 September 2018 (C-546/16, *Montte*, EU:C:2018:752, paragraphs 20 to 25).
- 8 The OARC considers that the decision on the matter before it depends on the interpretation of various provisions of EU law. Even if, in view of its subject matter and its value, the contract to which the contested award criterion relates does not fall within the scope of Directive 2014/24, the OARC considers applicable the settled case-law of the Court of Justice which establishes that where, in regulating situations outside the scope of an EU measure, national legislation seeks to adopt the same solutions as those adopted in that measure, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions taken from that measure should be interpreted uniformly. Thus, an interpretation of provisions of an EU measure in situations outside its scope is justified where those provisions have been made applicable to such situations by national law in a direct and unconditional way, in order to ensure that those situations and situations within the scope of that measure are treated in the same way (see, to that effect, the judgments of the

Court of Justice of 18 October 2012, *Nolan*, C-583/10, EU:C:2012:638, paragraphs 46 and 47; of 7 November 2013, *Romeo*, C-313/12, EU:C:2013:718, paragraphs 22 and 23; of 14 January 2016, *Ostas celtnieks*, C-234/14, EU:C:2016:6, paragraphs 17 to 20; and of 16 June 2022, *Obshtina Razlog*, C-376/21, EU:C:2022:472, paragraphs 52 to 55).

- 9 As the referring body states, except in a few cases, the LCSP, which is the legislation transposing Directive 2014/24 into Spanish law, opts to impose the same legal rules on contracts which are not subject to that directive by reason of their value as it establishes for contracts which are subject to it. That is the case here, since Article 145 of the LCSP is applicable to the contracts for services specified in Annex IV to that law.
- 10 Article 145(2)(1) of the LCSP provides that award criteria relating to the social characteristics of the contract are, amongst other objectives, to relate to improving the pay conditions of the staff who perform the contract. However, the scope and application of that criterion, its relationship with competition and the freedom to provide services and its compatibility with Directive 2014/24 are, in Spain, the subject of debate among legal scholars and of conflicting decisions by the bodies responsible for ruling on special actions relating to public procurement.
- 11 In the opinion of the OARC, it is doubtful whether the contested criterion serves to identify the most economically advantageous tender (Article 67(1) of Directive 2014/24/EU), since the relationship between the pay increase and the improvement in the provision of the service seems too hypothetical as to identify an advantageous aspect which could decide how the contract is awarded. Furthermore, the loss of purchasing power referred to by the municipality in support of the contested award criterion is not specific to that social group, but rather is typical of broad swathes of the population working as employees, and the group concerned does not appear to be particularly disadvantaged or at risk of exclusion.
- 12 At the same time, an award criterion such as that at issue in the main proceedings could require a company to pay the workers who are going to provide the service higher rates of pay than those which they had been receiving (even if the latter were entirely legal and in compliance with the rules on collective agreements and the statutory minimum wage), in order to increase their chances of being awarded the contract. In the opinion of the OARC, that implies an additional financial burden which could prevent or hinder the submission of a tender in the public procurement procedure, or make doing so less attractive.
- 13 Moreover, the contested award criterion could disproportionately and unfairly harm operators with less financial capacity to pay high rates of pay (for example, SMEs), while, on the other hand, those same operators may submit competitive tenders in part because they have lower wage costs.

- 14 According to the specifications proposed by the municipality, the company awarded the contract for the service must, following collective bargaining, specify the precise form which that pay increase is to take and also seek to formalise a collective agreement applicable to the staff assigned to the contract. According to the OARC, that could constitute interference with the right of collective bargaining conferred by Article 28 of the Charter of Fundamental Rights of the European Union.
- 15 Moreover, removing the staff who perform the contract in question from the scope of a current collective agreement could create pay inequalities between workers of the same company who perform the same tasks, solely on the basis of the client for which they carry them out.
- 16 Recital 98 of Directive 2014/24 states, in short, that social criteria should be applied in accordance with Directive 96/71/EC, as interpreted by the Court of Justice of the European Union, and should not be chosen or applied in a way that discriminates. In particular, the minimum rate of pay must remain at the level established by the national legislation and the collective agreements applied in accordance with EU law, according to Directive 96/71. Irrespective of the legal value which that recital has in itself, the fact is that it refers to a legally binding rule of EU law and to the case-law interpreting it (see, for example, the judgments of the Court of Justice of 3 April 2008, *Rüffert*, C-346/06, EU:C:2008:189, and of 17 November 2015, *RegioPost*, C-115/14, EU:C:2015:760).
- 17 With regard to the stated aim, in the opinion of the OARC, the contested award criterion could be a disproportionate measure, since the collective agreement resulting from its application could imply the consolidation of the pay improvement beyond the performance of the contract itself, leading to the loss of the link with its subject matter required by Article 67(3) of Directive 2014/24,. In that regard, however, the referring body observes that, under national case-law, improvements in working conditions imposed by a public contract are not, in principle, a 'more beneficial condition' that is consolidated as a workers' right beyond the scope of that contract.