

**Request for a preliminary ruling from the Krajowa Izba Odwoławcza (Poland) lodged on 29 January 2021 — Konsorcjum: ANTEA POLSKA S.A., ‘Pectore-Eco’ sp. z o.o., Instytut Ochrony Środowiska — Państwowy Instytut Badawczy v Państwowe Gospodarstwo Wodne Wody Polskie**

**(Case C-54/21)**

(2021/C 228/19)

*Language of the case: Polish*

**Referring court**

Krajowa Izba Odwoławcza

**Parties to the main proceedings**

*Applicant:* Konsorcjum: ANTEA POLSKA S.A., ‘Pectore-Eco’ sp. z o.o., Instytut Ochrony Środowiska — Państwowy Instytut Badawczy

*Defendant:* Państwowe Gospodarstwo Wodne Wody Polskie

**Questions referred**

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 <sup>(1)</sup> (‘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 <sup>(2)</sup> (‘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?
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)?
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?

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)?
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?
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'?
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<sup>(1)</sup> ('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?

---

<sup>(1)</sup> OJ 2014 L 94, p. 65.

<sup>(2)</sup> OJ 2016 L 157, p. 1.

<sup>(3)</sup> OJ 2007 L 335, p. 31.