



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 26 June 2018¹

Case C-546/16

Montte SL
v
Musikene

(Request for a preliminary ruling
from 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))

(Reference for a preliminary ruling — Public procurement — Open procedure — Award criteria —
Staged evaluation of tenders — Minimum score threshold)

I. Introduction

1. The present case concerns, in particular, the degree of freedom enjoyed by the Member States when implementing the provisions of Directive 2014/24/EU² into national law with regard to public procurement contracts awarded under an open procedure.
2. More precisely, the first question concerns whether national legislation may entitle contracting authorities to carry out a two-stage evaluation of tenders in an open procedure in such a way that in the second stage (economic stage) only those tenders that have obtained the required number of points in the first stage (technical stage) are evaluated. The second question concerns whether such national legislation relating to the open procedure must impose on the contracting authority an obligation to ensure that a certain number of tenders will be evaluated in the final stage of the procedure. Lastly, the third question concerns the compatibility with Directive 2014/24 of an approach which assumes that in the first stage (technical stage) of such a procedure a tender must obtain a certain number of points in order to be evaluated during the second stage (economic stage).

¹ Original language: Polish.

² Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

II. Legal framework

A. EU law

3. Pursuant to Article 26(1) and (2) of Directive 2014/24:

‘1. When awarding public contracts, contracting authorities shall apply the national procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 32, a call for competition has been published in accordance with this Directive.

2. Member States shall provide that contracting authorities may apply open or restricted procedures as regulated in this Directive.’

4. Article 27 of that directive, entitled ‘Open procedure’, sets out the time limits within which interested economic operators may submit a tender in public procurement procedures where the contracting authority has used the open procedure.

5. Article 66 of Directive 2014/24 states:

‘Where contracting authorities exercise the option of reducing the number of tenders to be negotiated as provided for in Article 29(6) or of solutions to be discussed as provided for in Article 30(4), they shall do so by applying the award criteria stated in the procurement documents. In the final stage, the number arrived at shall make for genuine competition in so far as there are enough tenders, solutions or qualified candidates.’

6. Pursuant to Article 67(1), (2) and (4) of that directive:

‘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. ...

...

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 ...’

B. Spanish law

7. Article 150(4) of the Texto Refundido de la Ley de Contratos del Sector Público (consolidated text of the Spanish Law on Public Sector Contracts) ('the TRLCSP') states:

'Where more than one criterion needs to be taken into consideration, it will be necessary to specify the relative weighting attributed to each criterion, which may be expressed by establishing a sufficiently broad band of values. If the award procedure is divided into several stages, it will also be necessary to indicate in which stages the various criteria will be applied, and the minimum number of points that must be obtained by the tenderer in order that he may continue to participate in the selection process.'

8. Article 22(1)(d) of Real Decreto 817/2009, de 8 de mayo, por el que se desarrolla parcialmente la Ley 30/2007, de 30 de octubre, de Contratos del Sector Público (Royal Decree No 817/2009 of 8 May 2009 partially implementing Law No 30/2007 of 30 October 2007 on Public Sector Contracts), which governs the functions of the Mesas de Contratación (Procurement Boards), these being collegiate bodies that advise the contracting authorities, states in particular that:

'Without prejudice to the remaining functions entrusted to it by the Law on Public Sector Contracts and its additional provisions, the Procurement Board shall fulfil the following functions in open tendering procedures:

...

(d) Where the evaluation procedure [for submitted tenders] is divided into several stages, it will decide which tenderers are to be excluded for not obtaining the minimum number of points that a tenderer must obtain in order to continue to participate in the selection process.

...'

III. Facts of the dispute which is the subject of the main proceedings

9. Musikene ('the contracting authority') is a public-sector foundation in the Autonomous Community of the Basque Country, which organised an open procedure for the award of a supply contract described as 'furniture and signage, specific musical equipment, musical instruments, electro-acoustic, recording and audiovisual equipment, computer equipment and reprographics'. The value of the contract was estimated to exceed the threshold that obliged the contracting authority to apply the provisions implementing Directive 2014/24 into Spanish law.

10. The call for tenders under the open procedure within the meaning of Article 27 of Directive 2014/24 was published in the *Official Journal of the European Union* on 26 July 2016.

11. The procurement documents specified the procurement procedure as well as the tender evaluation criteria. In simple terms, the documents distinguished two stages, referred to as the technical stage and the economic stage. In each of those stages, a tender could receive a maximum score of 50 points.

12. In the technical stage, a weighted criterion — 'Presentation and description of the project', broken down into various sub-criteria for each of the lots comprising the contract — was applied. In the economic stage, the price criterion was evaluated. This consisted in the award of points for a reduction in the tender price relative to the value of the contract.

13. In addition, the procurement documents required a minimum number of points to be obtained in the technical stage in order to be able to participate in the economic stage. Only those tenderers which had obtained at least 35 points in the technical stage could proceed to the economic stage.

14. 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') is a permanent body which deals with appeals in the field of public procurement.

15. On 11 August 2016 the OARC received an appeal from Montte, SL ('the appellant') regarding the procurement documents. In its appeal, the appellant challenged those documents in so far as they require a minimum number of points to be obtained during the technical stage. According to the appellant, such a requirement should be deemed inadmissible, since it renders meaningless the weighting of technical and economic criteria as provided for in the procurement documents. That requirement leads to a situation in which the contracting authority is unable to evaluate the tenders on the basis of the price offered, and is unable to select the most advantageous offer.

16. By contrast, the contracting authority is of the view that it was necessary to establish that requirement due to the subject matter of the contract, which concerned the supply of equipment that forms an integral part of a building. For that reason, a tender could proceed to the economic stage if it met certain minimum requirements, thereby ensuring that the contract would be performed within the established time limits and to the appropriate technical standards.

IV. The questions referred and the proceedings before the Court

17. In those circumstances, the OARC decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- '(1) Does Directive [2014/24] preclude national legislation, such as Article 150(4) of the TRLCSP, or a practice for interpreting and implementing that legislation, which authorises contracting authorities to establish in the documents governing an open tendering procedure award criteria which apply in successive elimination stages for tenders which do not exceed a predetermined minimum score threshold?
- (2) If the answer to Question 1 is in the negative, does the aforementioned Directive 2014/24 preclude national legislation, or a practice for interpreting and implementing that legislation, which uses the aforementioned system of award criteria which apply in successive elimination stages in such a way that in the last stage there are not sufficient tenders to ensure "genuine competition"?
- (3) If the answer to Question 2 is in the affirmative, does the aforementioned Directive 2014/24 preclude, because it does not ensure genuine competition or circumvents the mandate to award the contract to the tender with the best price-quality ratio, a clause such as that at issue, in which the price factor is evaluated only for tenders which have obtained 35 out of 50 points in the technical criteria?'

18. The request for a preliminary ruling was lodged at the Court Registry on 28 October 2016.

19. Written observations have been submitted by the Spanish and Greek Governments and by the European Commission. Those governments and the Commission also took part in the hearing held on 16 April 2018.

V. Analysis

A. Admissibility

20. In its request for a preliminary ruling, the OARC begins by considering whether it can be regarded as a ‘court or tribunal’ for the purposes of Article 267 TFEU. I will therefore begin by addressing this issue.

21. According to settled case-law, in order to determine whether a given national body is a ‘court or tribunal’ for the purposes of Article 267 TFEU, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.³ Moreover, a national body may refer a question to the Court only if it is called upon to give a ruling in proceedings intended to lead to a decision of a judicial nature.⁴ Those factors are indicative in the sense that they are neither decisive nor exhaustive. They provide a point of reference for determining the judicial nature of the referring body.⁵

22. Importantly, even if a body is regarded under the law of a given Member State as an administrative body, that fact is not, in itself, conclusive for the purpose of determining whether the body concerned is a ‘court or tribunal’ for the purposes of Article 267 TFEU.⁶

23. It follows from the information referred to in the request for a preliminary ruling that the OARC is a permanent appeal body that was established on the basis of laws of general application. The OARC’s jurisdiction to hear appeals in cases concerning public procurement does not depend on the parties’ agreement.⁷ The decisions of that body are binding on the parties. Furthermore, the OARC decides cases brought before it on the basis of rules of law, following *inter partes* proceedings. Lastly, the OARC is an independent body that is not subject to any external instructions.

24. In the light of those observations, I believe that the OARC fulfils the criteria allowing it to be regarded as a ‘court or tribunal’ for the purposes of Article 267 TFEU.

B. The first question referred

25. By its first question, the referring court seeks to determine whether Directive 2014/24 precludes legislation which implements that directive into national law from authorising a contracting authority to establish a staged evaluation of tenders in documents governing the award of a contract under an open procedure, provided that in successive stages only those tenders that have reached the specified score threshold in previous stages are evaluated.

3 See judgments of 31 May 2005, *Syfait and Others* (C-53/03, EU:C:2005:333, paragraph 29), and of 31 January 2013, *Belov* (C-394/11, EU:C:2013:48, paragraph 38).

4 Judgments of 31 May 2005, *Syfait and Others* (C-53/03, EU:C:2005:333, paragraph 29), and of 31 January 2013, *Belov* (C-394/11, EU:C:2013:48, paragraphs 39 and 40).

5 See my Opinion in *Ascendi* (C-377/13, EU:C:2014:246, point 33).

6 See judgment of 6 October 2015, *Consorti Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraph 17).

7 I note in passing that in its judgment of 6 October 2015, *Consorti Sanitari del Maresme* (C-203/14, EU:C:2015:664), the Court interpreted the provisions of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), which preceded Directive 2014/24, in the context of questions referred by a Catalan appeal body. It is true that reference was made in that context to a provision of Spanish law which provides that a special appeal in public procurement proceedings is optional prior to an administrative-law action. I cannot rule out the possibility that that provision of Spanish law may apply to the main proceedings, which also concern an appeal body of another Autonomous Community. However, in its judgment of 6 October 2015, *Consorti Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraphs 22 to 25), the Court held that the Catalan appeal body also satisfied the criterion of compulsory jurisdiction, despite the fact that a person bringing proceedings in a public procurement case may choose between a special appeal to the referring body and an administrative-law action. The decisive factor is that the jurisdiction of the referring body does not depend on the parties’ agreement and its decisions are binding on the parties.

26. The referring court states that doubts as to the possibility of carrying out a staged evaluation of tenders in the context of an open procedure arise for several reasons.

27. First, the referring court states that Article 66 of Directive 2014/24 provides for the possibility of reducing the number of tenders and solutions by allowing competitive procedures with negotiation (Article 29(6) of Directive 2014/24) and competitive dialogues (Article 30(4) of that directive) to take place in successive stages as part of the public procurement procedure. Directive 2014/24 does not, however, contain an analogous provision for the open procedure referred to in Article 27 of that directive.

28. In that context, the referring court points out that the possibility of establishing stages in a public procurement procedure applies only to those procedures where it is possible to negotiate the tenders originally submitted. Consequently, the referring court is of the view that it is possible to defend the view that a contracting authority is not permitted to establish stages in public procurement procedures where it is not possible to negotiate tenders. Such procedures include the open procedure.

29. Secondly, the referring court points out that the content of recitals 90, 92 and 104 of Directive 2014/24 could also be an argument against the introduction of stages in the open procedure. According to the referring court, those recitals concern the function performed by the award criteria. Those criteria make it possible to compare tenders such that they can be assessed objectively. However, the purpose of the award criteria is not to eliminate tenders. This is done instead by the criteria that verify a tenderer's ability to perform a contract or by the criteria that relate to the minimum technical requirements as set out in the procurement documents.

30. Third and lastly, the referring court points out that a staged evaluation of tenders, carried out in a manner corresponding to that used in the national procedure, could lead to a situation in which the most economically advantageous tender would not be considered by the contracting authority. As a consequence, the contract would be awarded without taking into account the price criterion, which could prove contrary to Article 67(2) of Directive 2014/24 in particular.

1. Positions of the parties

31. Regarding the doubts of the referring court, the Spanish Government points out, first, that the EU legislature has not fully harmonised the rules governing the open procedure. A Member State may therefore freely regulate in national law issues related to the conduct of an open procedure, provided that the adopted national rules do not undermine the effectiveness of the provisions of Directive 2014/24.

32. Secondly, the Spanish Government disagrees with the interpretation of the referring court, which considers that the staged evaluation of tenders under the open procedure is intended to reduce the number of candidates or tenders. According to the Spanish Government, the purpose of establishing a two-stage evaluation of tenders in the national procedure was to ensure that only tenders which met the needs of the contracting authority would be taken into consideration.

33. Third and lastly, according to the Spanish Government, it is true that the contracting authority cannot determine the award criteria in such a way as to give itself unrestricted freedom. Nevertheless, it follows from Article 67(2) of Directive 2014/24 that the most economically advantageous tender may be selected on the basis of a criterion relating to the best price-quality ratio.

34. As regards the first question, the Greek Government and the Commission, in essence, take the same position as the Spanish Government.

2. Analysis

35. In my view, the doubts of the referring court, to which the parties refer in their observations, give rise to three issues. The first issue concerns the extent to which Member States are free to regulate the open procedure in national law. Secondly, the doubts of the referring court also concern whether a two-stage evaluation of tenders, carried out in a similar manner to the evaluation to which the main proceedings relate, leads to a situation in which the purpose of the tender evaluation criteria is, in essence, to eliminate tenders, whereas their purpose should be to evaluate them. Thirdly, the referring court asks whether the staged evaluation of tenders leads to circumventing the price criterion when awarding a contract. In the next section of this Opinion, I shall address each of these issues in turn.

(a) *The extent to which Member States are free to regulate the open procedure*

(1) *Introductory remarks*

36. Pursuant to Article 26(1) of Directive 2014/24, when awarding public contracts, contracting authorities are to apply the national procedures *adjusted* to be in conformity with that directive. Furthermore, pursuant to Article 26(2) of Directive 2014/24, Member States have an obligation to provide that contracting authorities may apply the open procedure *as regulated* in that directive.⁸

37. In that context, it should be noted that Directive 2014/24 does not regulate exhaustively the manner in which the open procedure is to be conducted. The Spanish and Greek Governments and the Commission also point to this. While it is true that Article 27 of Directive 2014/24 specifies the time limits within which tenders must be submitted in an open procedure, that directive does not contain any provisions concerning the procurement procedure that is to be carried out under that open procedure.

38. Given that, on the one hand, Member States are required to ensure that contracting authorities are able to use the open procedure and, on the other, that that procedure is *adjusted* to be in conformity with Directive 2014/24 and may be applied *as regulated* in that directive, it is for national legislators to lay down appropriate rules for the conduct of such a procedure, since that procedure is regulated only to a very limited extent by EU law.

39. Of course, the freedom of national legislators is not unrestricted in this regard. National legislation must not give rise to procedures under which contracting authorities would regularly infringe the principles of procurement laid down in Article 18 of Directive 2014/24 and the general principles of EU law. Nor must national legislation undermine the effectiveness of the provisions of that directive (*effet utile*).⁹ In my view, this is how the requirement that procedures should be *adjusted* to be in conformity with Directive 2014/24, and may be applied *as regulated* in that directive, should be understood.

40. In the light of the foregoing considerations, it is necessary to consider whether, given the silence of Directive 2014/24 on the admissibility of a staged evaluation of tenders in the context of an open procedure, it is appropriate to conclude that authorising contracting authorities to provide for such a solution in public procurement documents is contrary to the provisions of that directive. In that context, as regards the doubts of the referring court, reference must be made to a systematic interpretation of Directive 2014/24, in the light of Article 66 thereof.

⁸ Emphasis added.

⁹ In this spirit, with reference to Directive 2004/18, see judgment of 28 February 2018, *MA.T.I. SUD* and *Duemme SGR* (C-523/16 and C-536/16, EU:C:2018:122, paragraph 48). With reference to the national procedural rules governing legal actions in the field of public procurement, see judgment of 5 April 2017, *Marina del Mediterráneo and Others* (C-391/15, EU:C:2017:268, paragraph 33).

(2) *The role of Article 66 of Directive 2014/24 in the light of other provisions of that directive*

41. The referring court states that its doubts concerning the possibility of establishing a two-stage tender evaluation in the documents governing an open tendering procedure derive from the inclusion in Directive 2014/24 of a provision that expressly permits solutions or tenders under certain procedures to be evaluated in stages (Article 66), whereas there is no analogous provision in that directive in relation to the open procedure.

42. I do not share the doubts of the referring court in this regard.

43. The establishment of an explicit rule that permits solutions or tenders to be evaluated in stages using award criteria in competitive procedures with negotiation and competitive dialogues is, in my view, dictated by the fact that it is possible in those procedures to negotiate the tenders originally submitted (Article 29(5) of Directive 2014/24) and to clarify, specify and optimise such tenders (Article 30(6) of that directive).

44. On the one hand, negotiating a large number of tenders or solutions could in some cases be problematic for contracting authorities. The Commission drew attention to this in its written observations. By reducing the number of tenders or solutions in successive stages of the procedure, only those that meet the needs of the contracting authorities can be negotiated.

45. On the other hand, as a result of dividing the procedure into successive stages in order to reduce the number of tenders or discussed solutions, it could transpire that only those tenderers whose tenders or solutions had not been eliminated in previous stages of the procedure would actually be able to negotiate the tender and conclude a contract with the contracting authority on the basis of that negotiation. This could give rise to doubts as to whether the principles of procurement laid down in Article 18 of Directive 2014/24 were being observed. The main principles at issue here are equal and non-discriminatory treatment, the obligation of transparency, and the prohibition on the artificial narrowing of competition.

46. For this reason, the EU legislature made it clear that the staged evaluation of tenders is admissible in procedures which provide for the possibility of negotiating tenders. In this way, doubts were removed as to the admissibility of establishing stages in such procedures.¹⁰

47. Such doubts do not arise, however, with regard to the open procedure, which does not provide for the possibility of negotiating the tenders originally submitted.¹¹ Therefore, in the absence of a provision analogous to Article 66 of Directive 2014/24 concerning the open procedure, it cannot be inferred that, in the context of such a procedure, it is inadmissible to introduce stages that relate to particular award criteria.

¹⁰ Moreover, unlike the open procedure, the competitive procedure with negotiation and competitive dialogue can be applied so long as certain conditions are met. In addition, the EU legislature has regulated those procedures more restrictively than in the case of the open procedure. In legal academic writings, this is explained by the fact that the risk of restricting competition is generally higher when a contracting authority uses such special procedures as opposed to the open procedure. For the legal status quo prior to the adoption of Directive 2014/24, see Bovis, C., *Public Procurement in the European Union*, Palgrave, New York, 2005, pp. 132 and 133.

¹¹ See González García, J., in Caranta, R., Edelstam, G., and Trybus, M. (editors), *EU Public Contract Law: Public Procurement and Beyond*, Bruylant, Brussels, 2013, Chapter 3, point 4. Indeed, authorising a contracting authority to conduct negotiations could lead to an infringement of the principles of equal treatment and non-discrimination and the obligation of transparency. See judgment of 7 April 2016, *Partner Apelski Dariusz* (C-324/14, EU:C:2016:214, paragraph 62 and the case-law cited).

48. To conclude: it cannot be inferred from the inclusion in Directive 2014/24 of a provision such as Article 66 of that directive concerning competitive procedures with negotiation and competitive dialogues that the staged evaluation of tenders in an open procedure is inadmissible, provided that it does not infringe the principles of procurement laid down in Article 18 of that directive and the general principles of EU law, and that it does not undermine the effectiveness of the provisions of that directive.

(b) *The nature and role of the award criteria*

49. In its request for a preliminary ruling, the referring court expresses doubts as to whether the establishment of a staged open procedure, such as the one referred to in the procurement documents contested in the main proceedings, means that in practice the purpose of the award criteria is to verify a tenderer's ability to perform the contract and to eliminate tenders.

50. In order to address the doubts raised by the referring court, it seems necessary to explain the essence of the criteria used in the award of contracts under procedures falling within the scope of Directive 2014/24.

51. In Article 56 of Directive 2014/24, the EU legislature clearly distinguished two types of criteria, namely: the criteria for qualitative selection, which principally include the grounds for exclusion and the selection criteria that verify the economic operators' ability to perform the contract to be awarded (see Articles 57 and 58 of that directive), and the award criteria, which relate to the tenders themselves. Unlike the criteria for qualitative selection, the award criteria are objective in the sense that they are criteria linked to the subject matter of the contract in question (first sentence, *in fine*, of Article 67(2) thereof).¹²

52. An analysis of the reference for a preliminary ruling leads to the conclusion that the criteria applied in both stages of the open procedure concerned the tenders (award criteria) and not the economic operators' ability to perform the contract to be awarded (criteria for qualitative selection). Indeed, according to the information provided by the referring court, criteria referring to the presentation and description of the project were applicable at the technical stage.

53. While it is true that the application of award criteria in the way in which this was done in the national procedure means that in practice certain tenders are not considered by the contracting authority in subsequent stages of the procedure, in my view this is not about preselecting tenderers, but about improving the way in which the weighting of each of the award criteria is determined.

54. It is conceivable that the contracting authority could assess the technical and economic criteria under the open procedure without dividing it into stages. This would require the weighting of the various criteria in the procurement documents to be determined in such a way that a tender which did not meet certain technical requirements could not in practice obtain enough points to be selected by the contracting authority.

¹² Importantly, in the context of the statement concerning the objective character of the award criteria, those criteria may also apply to 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. See Article 67(2)(b) of Directive 2014/24. See also judgment of 26 March 2015, *Ambisig* (C-601/13, EU:C:2015:204, paragraphs 33 and 34). It is worth noting, also against the background of Article 66 of Directive 2014/24, which is referred to several times in the request for a preliminary ruling, that a reduction in the number of tenders or solutions is achieved by dividing the competitive procedure with negotiation or competitive dialogue through the use of award criteria, and not criteria for qualitative selection. See Pawelec, J. (editor), *Dyrektywa Parlamentu Europejskiego i Rady 2014/24/UE w sprawie zamówień publicznych, uchylająca dyrektywę 2004/18/WE. Komentarz*, C.H. Beck, Warsaw, 2017, p. 315; Sánchez Graells, A., *Public Procurement and the EU Competition Rules*, Hart Publishing, Oxford — Portland, 2015, p. 312.

55. In my view, the solution described in the previous point, and the two-stage evaluation of tenders which is contested by the appellant in the main proceedings, are not in themselves contrary to Directive 2014/24. With respect to both of those solutions, the award criteria should of course, pursuant to Article 67(4) of that directive, be defined in such a way as to ensure the possibility of effective competition. Importantly, in this context, the appellant does not appear to contest in the main proceedings the proportionality of the contracting authority's expectations which led to the establishment of a 35-point threshold at the technical stage for the evaluation of tenders in qualitative terms.

56. I therefore consider that Directive 2014/24 does not preclude the specification of award criteria in the procurement documents, in accordance with Article 67(2) and (4) of that directive, in such a way that only those tenders which have obtained a certain number of points in the previous stages will be evaluated in the subsequent stages of the open procedure.

(c) The role of price as an award criterion

57. The referring court also points out that a staged evaluation of tenders, such as that provided for in the documents contested by the appellant, may lead to the contract being awarded with the omission of the price element. According to the referring court, this could be contrary to Directive 2014/24.

58. Indeed, the second sentence of recital 90 of Directive 2014/24 states that an assessment based on the best price-quality ratio should always include a price or cost element.

59. However, Article 67(1) of Directive 2014/24 provides that contracting authorities are to base the award of public contracts on the most economically advantageous tender. This means, pursuant to Article 67(2) of that directive, the most economically advantageous tender *from the point of view of the contracting authority*, and the most economically advantageous tender *may* include the best price-quality ratio.¹³

60. Furthermore, according to the second paragraph of recital 90 of Directive 2014/24, a greater quality orientation of public procurement is to be encouraged. For this reason, Member States should be permitted to prohibit or *restrict* use of price only or cost only to assess the most economically advantageous tender where they deem this appropriate. In addition, according to the fourth sentence of the first paragraph of recital 92 of that directive, contracting authorities should be encouraged to choose award criteria *that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs*.

61. This does not mean that contracting authorities have unrestricted freedom to determine the award criteria. In this regard, the aforementioned Article 67(4) of Directive 2014/24 applies. It imposes an obligation on contracting authorities to define the award criteria in such a way as to ensure the possibility of effective competition.

62. The obligation arising from Article 67(4) of Directive 2014/24 must, however, be respected by contracting authorities regardless of whether they establish a staged evaluation of tenders in the procurement documents. That obligation would therefore also apply if, in the procurement documents contested by the appellant, there had been a decision to assess the qualitative and economic criteria without distinguishing individual stages. The staged evaluation of tenders does not have the effect of adding to the obligations of the contracting authority under Article 67(4) of Directive 2014/24 in such a way that the contracting authority is compelled to assign a special role to the price criterion.

¹³ Emphasis added.

63. To conclude: first, it cannot be inferred from the inclusion of Article 66 in Directive 2014/24 that it is not possible to establish a staged evaluation of tenders in documents governing the award of a contract under an open procedure, provided that it does not infringe the principles of procurement laid down in Article 18 of that directive and the general principles of EU law, and that it does not undermine the effectiveness of the provisions of the directive. Secondly, the criteria used in such a staged evaluation of tenders remain award criteria provided that they comply with Article 67(2) and (4) of Directive 2014/24. Thirdly, this kind of staged evaluation of tenders does not mean that the contracting authority does not base the award of the contract on the most economically advantageous tender.

64. In the light of those considerations, I propose that the Court should answer the first question as follows: Directive 2014/24 must be interpreted as not precluding a contracting authority from being entitled, by using award criteria in accordance with Article 67(2) and (4) of that directive, to establish a staged evaluation of tenders in the documents governing the award of a contract under an open procedure.

C. The second question referred

65. The second question was formulated in the event that the Court's answer to the first question should mean that the national legislature could authorise contracting authorities to establish a staged evaluation of tenders in documents governing the award of a contract under the open procedure. By its second question, the referring court, in essence, seeks clarification as to whether Directive 2014/24 precludes a situation where a contracting authority is not obliged, in the final stage of the procedure, to arrive at a sufficient number of tenders to ensure 'genuine competition' within the meaning of Article 66 of that directive.

66. The Spanish Government considers that the second question is hypothetical. In that government's view, there is nothing to suggest that the staged evaluation of tenders in the national procedure could have led to the contract being awarded in the absence of competition. In addition, the Spanish Government points out that the issue in the main proceedings is the assessment of the procurement documents contested by the appellant. The Greek Government and the Commission, by contrast, take the view that the requirement to ensure 'genuine competition' does not apply in relation to the open procedure.

1. Admissibility

67. It is necessary to begin by addressing the doubts of the Spanish Government regarding the admissibility of the second question.

68. The provisions of Spanish law that refer to the open procedure do not lay down a requirement of 'genuine competition'. There is no indication that such a requirement was laid down in the procurement documents contested by the appellant.

69. In my view, the referring court is asking whether there is a need to comply with the requirement of 'genuine competition' in the context of a staged evaluation of tenders under the open procedure in view of the wording of Article 66 of Directive 2014/24, which is referred to several times in the reference for a preliminary ruling. If it transpired that the requirement laid down in Article 66 of Directive 2014/24 was also applicable directly or by analogy to open procedures in which tenders are evaluated in stages, the referring court would have to examine whether the procurement documents enabled the contracting authority to ensure 'genuine competition' in the final stage of the procedure.

70. In the light of the foregoing considerations, the second question is admissible.

2. Substance

71. In order to answer this question it is necessary to determine whether Article 66 of Directive 2014/24 applies either directly or by analogy to open procedures in which tenders are evaluated in stages.

72. In my view, Article 66 of Directive 2014/24 cannot be applied to open procedures.

73. First, Article 66 of Directive 2014/24 refers exclusively to competitive procedures with negotiation and competitive dialogues. It is not, however, applicable in the case of open procedures.¹⁴ Moreover, a contracting authority may continue an open procedure even if the award criteria mean that only a small number of economic operators may tender for the contract.¹⁵

74. Secondly, the second sentence of Article 66 of Directive 2014/24 provides that the number of tenders or solutions arrived at in the final stage must ensure genuine competition *in so far as there are enough tenders, solutions or qualified candidates*.

75. It follows from the wording of that provision that the requirement to ensure a certain number of tenders and solutions in the final stage of the procedure is not an absolute requirement. It is applicable where it is possible to arrive at an appropriate number of tenders, solutions or qualified candidates.¹⁶ I consider, therefore, that the aim of arriving at a number that ensures *genuine competition* in the final stage of a competitive procedure with negotiation and competitive dialogue is to avoid a situation where the tenderer or candidate concerned would not be interested in negotiating the tender because it would be the only economic operator taken into consideration by the contracting authority, even though other economic operators could offer the contracting authority a tender that would meet its expectations and needs.

76. Therefore, in my view, there is no need to apply Article 66 of Directive 2014/24 by analogy in the case of an open procedure in which tenders are evaluated in stages. At subsequent stages of such a procedure situations arise in which only those tenders that meet the needs and expectations of the contracting authority are taken into account. However, there is no possibility to negotiate them.

77. In the light of the foregoing considerations, the requirement to arrive at a certain number of tenders in the final stage of an open procedure such that that number ensures ‘genuine competition’ within the meaning of Article 66 of Directive 2014/24 is not applicable either directly or by analogy in an open procedure such as that referred to in the procurement documents contested by the appellant.

78. Therefore, I propose that the Court should answer the second question as follows: Directive 2014/24 must be interpreted as not precluding a situation where a contracting authority which establishes a staged evaluation of tenders in the documents governing a contract awarded under an open procedure is not obliged, in the final stage of such a procedure, to arrive at a number of tenders sufficient to ensure ‘genuine competition’ within the meaning of Article 66 of that directive.

¹⁴ See point 47 of this Opinion.

¹⁵ In that spirit, see judgment of 17 September 2002, *Concordia Bus Finland* (C-513/99, EU:C:2002:495, paragraph 85). Moreover, in the judgment of 16 September 1999, *Fracasso and Leitschutz* (C-27/98, EU:C:1999:420, paragraphs 32 to 34), regarding the legal status quo prior to the entry into force of Directive 2014/24, the Court pointed out that if, on conclusion of a public procurement procedure, there is only one tender remaining, the contracting authority is not required to award the contract to the tenderer which submitted that tender. It does not follow, however, that the contracting authority has to annul such a procedure.

¹⁶ In accordance with the explanatory note on competitive dialogue drafted by the Commission (European Commission Directorate-General Internal Market and Services Public Procurement Policy, *Explanatory Note — Competitive Dialogue — Classic Directive*, accessible via the webpage ec.europa.eu, pp. 8 and 9), reducing the number of solutions may lead to only one solution being considered in the final stage of the procedure. However, this does not prevent the contracting authority from continuing the procedure. In this spirit, see also the second sentence of recital 41 of Directive 2004/18, which clarifies that a reduction in the number of tenders to be discussed or negotiated in the case of competitive dialogues and negotiated procedures with publication of a contract notice should, *in so far as the number of appropriate solutions or candidates allows*, ensure that there is genuine competition.

D. The third question referred

79. By its third question, the referring court, in essence, seeks clarification as to whether a requirement such as that contested by the appellant is contrary to Directive 2014/24 because it is not possible to ensure genuine competition or to award a contract to the economic operator that has submitted the tender with the best price-quality ratio.

80. The third question was formulated in the event that the answer to the second question was in the affirmative. Such an answer would mean that the requirement to arrive at a sufficient number of tenders in the final evaluation stage to ensure genuine competition within the meaning of Article 66 of Directive 2014/24 is also applicable in an open procedure.

81. In the light of my proposed answer to the second question, there is no need to answer the third question. However, in the event that the Court does not share my position in regard to the second question, I shall also briefly refer to the third question.

82. In the context of the requirement to arrive at a sufficient number of tenders in the final stage of the procedure to ensure genuine competition, it should be borne in mind that even if such a requirement were to be deduced from Article 66 of Directive 2014/24 applied directly or by analogy, it is not an absolute requirement. It would apply only in so far as the number of appropriate tenders would allow it.¹⁷ In any event, the final assessment in this regard would have to be left to the referring court.

83. As regards the award of a contract to the economic operator that has submitted the tender with the best price-quality ratio, Directive 2014/24 requires contracting authorities to award contracts on the basis of the most economically advantageous tender. However, that criterion cannot be interpreted to mean that the contracting authority is obliged to select the most advantageous tender in terms of price, even if that tender does not meet that authority's quality requirements as specified in the procurement documents. The freedom of contracting authorities to set award criteria is, however, restricted by Article 67(4) of Directive 2014/24.¹⁸ It is for the referring court to decide whether the contracting authority has complied with the requirements laid down in that provision.

VI. Conclusions

84. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by 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) as follows:

- (1) 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 must be interpreted as not precluding a contracting authority from being entitled, by using award criteria in accordance with Article 67(2) and (4) of that directive, to establish a staged evaluation of tenders in the documents governing the award of a contract under an open procedure.
- (2) Directive 2014/24 must be interpreted as not precluding a situation where a contracting authority which establishes a staged evaluation of tenders in the documents governing a contract awarded under an open procedure is not obliged, in the final stage of such a procedure, to arrive at a number of tenders sufficient to ensure 'genuine competition' within the meaning of Article 66 of that directive.

¹⁷ See point 75 of this Opinion.

¹⁸ See points 61 and 62 of this Opinion.