Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

5 April 2017*

(Reference for a preliminary ruling — Public procurement — Directive 2004/17/EC — Contract not reaching the threshold laid down by that directive — Articles 49 and 56 TFEU — Limit on reliance on subcontracting — Submission of a common tender — Professional capacities of the tenderers — Changes to the tender specifications)

In Case C-298/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania), made by decision of 12 June 2015, received at the Court on 18 June 2015, in the proceedings

'Borta' UAB

v

Klaipėdos valstybinio jūrų uosto direkcija VĮ,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President de la Cour, A. Borg Barthet, E. Levits and F. Biltgen, Judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Administrator,having regard to the written procedure and further to the hearing on 1 June 2016, after considering the observations submitted on behalf of:

— 'Borta' UAB, by V. Kilišauskaitė, advokatė,

— Klaipėdos valstybinio jūrų uosto direkcija VĮ, by N. Šilaika, advokatas, and by A. Vaitkus, A. Kamarauskas, I. Vaičiulis and L. Rudys,

— the Lithuanian Government, by D. Kriaučiūnas and by A. Svinkūnaitė and R. Butvydytė, acting as Agents,

— the European Commission, by J. Jokubauskaitė and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 December 2016,

gives the following

* Language of the case: Lithuanian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), as amended by Commission Regulation (EU) No 1336/2013 of 13 December 2013 (OJ 2013 L 335, p. 17) ('Directive 2004/17').

2 The reference has been made in proceedings between 'Borta' UAB ('Borta') and Klaipėdos valstybinio jūrų uosto direkcija VĮ (Klaipėda State Seaport Authority, Lithuania) ('the port authority') concerning the legality of the tender specifications for a public works contract concerning the reconstruction of the quays of that port.

Legal context

EU law

3 Recital 9 of Directive 2004/17 states:

'(9) In order to guarantee the opening up to competition of public procurement contracts awarded by entities operating in the water, energy, transport and postal services sectors, it is advisable to draw up provisions for Community coordination of contracts above a certain value. …

For public contracts the value of which is lower than that triggering the application of provisions of Community coordination, it is advisable to recall the case-law developed by the Court of Justice according to which the rules and principles of the Treaties … apply.'

4 Article 16 of that directive provides:

'… [T]his Directive shall apply to contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds:

…

(b) EUR 5 186 000 in the case of works contracts.'

5 Article 37 of that directive is worded as follows:

'In the contract documents, the contracting entity may ask, or may be required by a Member State to ask, the tenderer to indicate in his tender any share of the contract he intends to subcontract to third parties and any proposed subcontractors. This indication shall be without prejudice to the question of the principal economic operator's liability.'

6 Article 38 of Directive 2004/17 provides that:

'Contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the notice used as a means of calling for competition or in the specifications. …'

7 Article 54 of that directive states:

‘1. Contracting entities which establish selection criteria in an open procedure shall do so in accordance with objective rules and criteria which are available to interested economic operators.

…

6. Where the criteria referred to in [paragraph 1] include requirements relating to the technical and/or professional abilities of the economic operator, the latter may where necessary and for a particular contract rely on the abilities of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator must prove to the contracting entity that for the performance of the contract those resources will be available to it, for example by delivering an undertaking by those entities to make the necessary resources available to the economic operator.

Under the same conditions, a group of economic operators as referred to in Article 11 may rely on the abilities of participants in the group or of other entities.’

8 Annex XVI of that directive, entitled ‘Information to be included in the contract award notice’, provides, in Part I thereof:

‘I. Information for publication in the *Official Journal of the European Union*:

…

10. State, where appropriate, whether the contract has been, or may be, subcontracted.

…

13. Optional information:

— value and share of the contract which has been or may be subcontracted to third parties,

…’

Lithuanian law

Lithuanian Law on public procurement

9 Article 24(5) of Lietuvos Respublikos viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on Public Procurement) (‘the Law on public procurement’) provides:

‘The procurement documents may require that the candidate or tenderer specify in its tender any proposed subcontractors … and may require the candidate or tenderer to specify the share of the contract that it is intended to subcontract to those subcontractors … However, where subcontractors are invited to carry out a works contract, the main works, as specified by the contracting authority, must be performed by the tenderer. …’

10 Under Article 27(4) of the Law on public procurement:

‘The contracting authority may, of its own motion, at any time prior to the deadline for the submission of tenders, clarify the procurement documents.’

11 Article 32(3) of the Law on public procurement provides that, where necessary in a specific tendering context, a tenderer may rely on the capacities of other economic operators, irrespective of the nature of its legal relationship with them. In this case, the tenderer must prove to the contracting authority that those resources will be available to it to carry out the contract. A group of economic operators may, under the same conditions, rely on the capacities of members of the group or on those of other economic operators.

The tender specifications at issue in the main proceedings

12 Under Clause 3.2.1 of the tender specifications at issue in the main proceedings, concerning the requirements relating to the professional capacities of tenderers:

'Tenderer's average annual volume of work relating to the main construction and installation work (seaport quay construction or reconstruction) over the last five years or over the period since the date of registration of the tenderer (in the case where the tenderer has operated for less than five years) shall correspond to a value of at least LTL 5 000 000 (EUR 1448100.09), excluding VAT.'

13 Clause 4.2.3 of the tender specifications regulating the presentation of several subcontractors of a common tender under a joint-activity agreement, provides:

'… the commitments of the partners operating under a joint-activity agreement in relation to the implementation of the contract [must be specified], and [must] state that this division of the volume of services applies only to the partners and creates no obligations for the client (the port authority)'.

14 Clause 4.3 of the tender specifications in the version resulting from its successive amendments, provides:

'Where the bid is submitted by tenderers operating under a joint-activity agreement, the requirements of [paragraph 3.2.1] must be satisfied by at least one partner engaged in the joint-activities or by all of the partners operating under the joint-activity agreement taken together. … A partner's contribution (volume of work completed) under the joint-activity agreement must be proportionate to its contribution to satisfying the requirement under paragraph 3.2.1 … and to the volume of work that will actually be carried out by it in the event of a successful bid (contract implementation). … Pursuant to Article 24(5) of [the Law on public procurement], the Seaport Authority indicates that the main works consist of Item 1.2.8 in the Construction Section of the Bill of Quantities and, therefore, this work must be carried out by the tenderer itself.'

15 Clause 4.4 of the tender specifications provides that if the tenderer wishes to rely on subcontractors it must indicate the volume of work that the latter are to carry out, which is to be limited to works defined as 'subsidiary', adding that the experience of those subcontractors is not taken into account for the verification of the requirements laid down in Clause 3.2.1.

16 Clause 7.2 of the tender specifications allows the port authority to clarify, on its own initiative, the procurement documents before the expiry of the time limit for submitting tenders.

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 On 2 April 2014, the port authority published a call for tenders under an open procedure for the award of a public works contract for the reconstruction of the quays of the national seaport of Klaipėda (Lithuania). That call for tenders was also published in the *Official Journal of the European Union* on 5 April 2014. Borta participated in the award procedure for that contract.

18 In its initial version, the tender specifications at issue in the main proceedings reproduced, in Clause 4.3 thereof, the provisions of Article 24(5) of the Law on public procurement concerning subcontracting work and also provided that where several tenderers submit a common tender under a joint-activity agreement, pursuant to Clause 4.2.3 thereof ('the common tender'), the requirements applicable regarding professional capacities laid down in Clause 3.2.1 thereof were to be satisfied either by all the subcontractors considered together, or by one of them.

19 Following two successive revisions, one carried out on the initiative of the port authority and the other after complaints made by Borta, Clause 4.3 adds to the requirements that, where such a common tender is submitted, the contribution of each tenderer, in order to satisfy the abovementioned criteria, must correspond proportionally to the share of the work that it undertakes to perform under the joint-activity agreement and that it will actually perform if the contract is awarded.

20 On account of those changes, published in the *Official Journal of the European Union*, the Seaport Authority extended the time limit for submitting tenders.

21 As the port authority dismissed the further complaints made by Borta with regard to the most recent changes, that company brought an action before the Klaipėdos apygardos teismas (Regional Court, Klaipėda, Lithuania) seeking annulment of the abovementioned Clause 4.3, challenging the legality of its content and the possibilty for the authority to change it. As the action was dismissed by that court by decision of 18 August 2014, which was confirmed on appeal by an order of the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania) of 13 November 2014, Borta brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania).

22 In order to decide the dispute before it, that court asks about the compatibility with EU law, and with Directive 2004/17 in particular, of Article 24(5) of the Law on public procurement, to which Clause 4.3 of the tender specifications at issue in the main proceedings refers, in so far as that article prohibits reliance on subcontracting activities for works defined by the contracting authority as 'main works'. In the light of that directive, it also expresses doubts as to the legality of Clause 4.3, as amended, where a common tender is submitted by a number of tenderers, as that clause requires, in order to satisfy the applicable requirements regarding professional capacities, that the contribution of each tenderer must correspond proportionally to the share of the works it will actually perform if the contract is awarded. In that context, the referring court also asks whether the port authority was able to change the first version of that clause after the publication of the contract notice without infringing that directive and, in particular, the principle of equal treatment and the obligation of transparency which derives from it.

23 That court considers that the Court of Justice has jurisdiction to give a preliminary ruling on those questions. It is true that the value of the contract at issue in the main proceedings is less than the threshold of EUR 5 186 000 laid down in Article 16(b) of Directive 2004/17, below which the latter is not applicable. However, first, that contract has a certain cross border interest, as evidenced by the participation in the award procedure of two foreign companies, which include the successful tenderer, and the publication of the call for tenders in the *Official Journal of the European Union*. Second, in any event, the port authority intended to make the call for tenders subject to the rules applicable to public procurement referred to in Directive 2004/17, and the Lithuanian legislature chose to extend certain rules laid down by that directive to contracts with a value less than the abovementioned threshold.

24 In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must the provisions of Articles 37, 38, 53 and 54 of Directive 2004/17 be understood and interpreted, whether together or separately (but without limitation to those provisions), as meaning that:

(a) they preclude a national rule under which, in the case where subcontractors are invited to perform a works contract, the main work, as identified by the contracting authority, must be carried out by the successful tenderer?

(b) they preclude a scheme, laid down in the procurement documents, for combining the professional capacities of successful tenderers, such as that specified by the contracting authority in the contested tender specification, which requires that the share representing the professional capacity of the relevant economic operator (a joint-activity partner) must correspond to the share of the specific work which it will actually carry out under the public procurement contract?

(2) Must the provisions of Articles 10, 46 and 47 of Directive 2004/17 be understood and interpreted, whether together or separately (but without limitation to those provisions), as meaning that:

(a) the principles of equal treatment of tenderers and transparency are not infringed in the case where the contracting authority:

— provides beforehand, in the procurement documents, a general option of combining the professional capacities of tenderers, but does not set out the scheme for implementing this option;

— subsequently, in the course of the public procurement procedure, it defines in greater detail the requirements governing the appraisal of the qualifications of tenderers by laying down certain restrictions on combining the professional capacities of tenderers;

— because of this more detailed definition of the content of the qualification requirements, it extends the deadline for tender submissions and announces this extension in the *Official Journal* [*of the European Union*]?

(b) a restriction on the combining of tenderers’ capacities does not have to be clearly indicated in advance if the specific character of the contracting authority’s activities and the special features of the public procurement contract make such a restriction foreseeable and justifiable?’

Consideration of the questions referred

Preliminary observations

25 In its written observations and at the hearing, the Lithuanian Government submitted that, in order to answer the questions referred, it is appropriate to take into account Directive 2004/17 and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243), as the Lithuanian legislature chose to include certain provisions of Directive 2014/25 into its domestic law even before its adoption, in particular Article 79(3) thereof relating to subcontracting activities.

26 The European Commission takes the opposite view, arguing that there is no need to interpret Directive 2004/17 or Directive 2014/25, but that it is appropriate to answer the questions referred in the light of the fundamental rules and general principles of the FEU Treaty.

27 First, as regards Directive 2014/25, it must be recalled, as a preliminary point, that according to settled case-law the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (see, to that effect, judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 83 and the case-law cited).

28 In the present case, the call for tenders at issue in the main proceedings was published on 2 April 2014, whereas Directive 2014/25 entered into force on 17 April 2014 and repealed Directive 2004/17 with effect from 18 April 2016, the date on which its period for transposition expired. Furthermore, although the Lithuanian Government claims to have incorporated into its national law certain provisions of Directive 2014/25 even before its adoption, that government also acknowledges in its written submissions that that directive had not yet been transposed at the material time.

29 In those circumstances, Directive 2014/25 cannot be taken into consideration in order to answer the questions referred.

30 Second, as regards Directive 2004/17, it is apparent from the decision to refer that the contract at issue in the main proceedings has a value which is less than the threshold of EUR 5 186 000 laid down in Article 16(b) of Directive 2004/17. Therefore, that directive is not applicable to the contract (see, by analogy, judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 15 and the case-law cited).

31 The referring court considers nonetheless that the Court of Justice has jurisdiction to give a ruling on the questions referred and that the interpretation of the provisions of that directive is justified for the reasons set out in paragraph 23 of the present judgment.

32 At the hearing, the Lithuanian Government, which shares the referring court's view, stated that under Lithuanian law the contracting entity can choose to make the award procedure for a contract with a value below the threshold mentioned above subject either to the rules laid down by Directive 2004/17 or to the simplified procedure laid down by national law for that type of contract. If, as in the present case, that entity chooses the first option, it is required, according to the Lithuanian Government, to apply all the provisions of that directive.

33 In that connection, it must be recalled that where, in regulating situations outside the scope of the EU measure concerned, 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 (see, to that effect, judgments of 18 October 2012, *Nolan*, C-583/10, EU:C:2012:638, paragraph 46, and of 7 November 2013, *Romeo*, C-313/12, EU:C:2013:718, paragraph 22).

34 Thus, an interpretation by the Court of provisions of EU law 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 internal situations and situations governed by EU law are treated in the same way (see, to that effect, judgments of 18 October 2012, *Nolan*, C-583/10, EU:C:2012:638, paragraph 47; of 7 November 2013, *Romeo*, C-313/12, EU:C:2013:718, paragraphs 22 and 23; and of 14 January 2016, *Ostas celtnieks*, C-234/14, EU:C:2016:6, paragraph 20).

35 That being the case, it is also clear from settled case-law that, where the conditions set out in the two preceding paragraphs of the present judgment are not met, in order to provide a useful answer to a national court which has referred a question to it, the Court may deem it necessary to consider rules

of EU law to which the national court has not referred in its request for a preliminary ruling (judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 17 and the case-law cited).

36 More particularly, with respect to the award of a contract which, having regard to its value, does not come within the scope of Directive 2004/17, the Court may take account of the fundamental rules and general principles of the FEU Treaty, in particular Articles 49 and 56 thereof and the principles of equal treatment and non-discrimination and the obligation of transparency which derive from them, provided that it is of certain cross-border interest. Although not covered by Directive 2004/17, such contracts are still subject to compliance with those rules and principles (see, to that effect, judgments of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraphs 22 to 24; of 18 December 2014, Gennerali-Providencia *Biztosító*, C-470/13, EU:C:2014:2469, paragraph 27; and of 6 October 2016, *Tecnoedi Costruzioni*, C-318/15, EU:C:2016:747, paragraph 19).

37 It is in the light of the foregoing that each of the questions referred must be examined to determine whether the interpretation of the provisions of Directive 2004/17 is justified in the present case, having regard to the considerations set out in paragraphs 33 and 34 of the present judgment, or whether those questions must be answered in the light of the fundamental rules and general principles in the FEU Treaty mentioned above, taking account of the considerations in paragraphs 35 and 36 of this judgment.

Question 1(a)

38 By Question 1(a), the referring court asks essentially whether Directive 2004/17 must be interpreted as precluding a provision of a national law, such as Article 24(5) of the Law on public procurement, which states that where subcontractors are invited to carry out a works contract, the main works, as defined by the contracting entity, must be performed by the successful tenderer itself.

39 As a preliminary point, it must be held that, as regards reliance on subcontracting activities, Directive 2004/17 merely lays down, in Article 37 and Annex XVI thereof, certain obligations relating to information and the liability of the tenderer. In Article 38, it adds that the contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with EU law.

40 However, as the referring court observed, that directive does not contain any provision having contents analogous to those in Article 24(5) of the Law on public procurement. Furthermore, according to that court, the Lithuanian legislature has not indicated that it took account of that directive when it adopted the latter provision.

41 In those circumstances, where Article 24(5) of the Law on public procurement applies to contracts which do not fall within the scope of Directive 2004/17, it cannot be held that that provision makes a direct and unconditional reference to the directive within the meaning of the case-law set out in paragraph 34 of the present judgment (see, by analogy, judgment of 7 July 2011, *Agafiței and Others*, C-310/10, EU:C:2011:467, paragraph 45).

42 It follows that the interpretation of that directive is not required in order to answer Question 1(a).

43 However, as set out in paragraphs 35 and 36 of the present judgment, in order to provide a useful answer to the referring court, the Court may take account of the fundamental rules and general principles of the FEU Treaty, in particular Articles 49 and 56 thereof and the principles of equal treatment and non-discrimination and the obligation of transparency which derive from them, provided that the contract at issue has a certain cross border interest.

44 A contract may have such interest, having regard in particular to the fact that is for a significant amount, in conjunction with the place where the work is to be carried out or the technical characteristics of the contract. The referring court may, in its overall assessment of the existence of certain cross-border interest, also take account of the existence of complaints brought by operators situated in other Member States, provided that it is determined that those complaints are real and not fictitious (see, to that effect, judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 20 and the case-law cited).

45 In the present case, the referring court has established that the contract at issue in the main proceedings had a certain cross-border interest. As the Advocate General observed, in point 37 of her Opinion, the value of that contract, although below the thresholds laid down in Article 16(b) of Directive 2004/17, is relatively significant. Furthermore, as the Lithuanian Government stated, that contract concerns the construction of quays of a seaport of strategic importance for national security. It is also apparent from the order for reference that two foreign undertakings, including the successful tenderer, participated in the call for tenders.

46 It follows that Question 1(a) must be answered in the light of the fundamental rules and general principles of the FEU Treaty, in particular Articles 49 and 56 thereof. Specifically, in order to give a useful answer to the referring court, it must be determined whether a provision of national law, such as Article 24(5) of the Law on public procurement, may constitute an unjustified impediment to the freedom of establishment and freedom to provide services.

47 For that purpose, it must be recalled that Articles 49 and 56 TFEU preclude any national measure which, even if it applies without discrimination as to nationality, prohibits, impedes or renders less attractive the freedom of establishment and/or the freedom to provide services (judgments of 27 October 2005, *Contse and Others*, C-234/03, EU:C:2005:644, paragraph 25; of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 41; and of 8 September 2016, *Politanò*, C-225/15, EU:C:2016:645, paragraph 37).

48 As regards public contracts, it is the concern of the European Union to ensure the widest possible participation by tenderers in a call for tenders, including contracts which are not covered by Directive 2004/17 (see, to that effect, judgments of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 29, and of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 55). The use of subcontractors, which is likely to facilitate access of small and medium-sized undertakings to public contracts, contributes to the pursuit of that objective.

49 A national measure, such as Article 24(5) of the Law on public procurement, is liable to prohibit, impede or render less attractive the participation of economic operators established in other Member States in the award procedure or the performance of a public contract, such as that at issue in the main proceedings, since it prevents them either from subcontracting to third parties all or part of the works identified as the ‘main works’ by the contracting entity, or from proposing their services as subcontractors for that part of the works.

50 Therefore, that provision constitutes a restriction on the freedom of establishment and the freedom to provide services.

51 However, such a restriction may be justified in so far as it pursues a legitimate objective in the public interest, and to the extent that it complies with the principle of proportionality in that it is suitable for securing the attainment of that objective and does not go beyond what is necessary in order to attain it (see, to that effect, judgments of 27 October 2005, *Contse and Others*, C-234/03, EU:C:2005:644, paragraph 25, and of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 44).

52 In the case in the main proceedings, it is clear from the documents before the Court, first, that Article 24(5) of the Law on public procurement aims to ensure that the works are properly executed. Thus, it was adopted specifically with the aim of preventing a current practice which consists in a tenderer claiming to have professional capacities solely in order to win the contract concerned, not with the intention of performing the works itself, but of entrusting all or most of those works to subcontractors, a practice which affects the quality of the works and their proper performance. Second, by limiting the reliance on subcontractors to works identified as 'subsidiary', Article 24(5) of the Law on public procurement aims to encourage the participation of small and medium-sized undertakings in public contracts as joint-tenderers in a group of economic operators rather than as subcontractors.

53 First, as regards the objective of the proper execution of the works, it must be held that it is legitimate.

54 However, it is possible that such an objective may justify certain limits on the use of subcontracting (see, to that effect, judgments of 18 March 2004, *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 45, and of 14 July 2016, *Wrocław - Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraph 34), it must be held that a provision of a national law, such as Article 24(5) of the Law on public procurement, goes beyond what is necessary in order to achieve that objective, in that it prohibits in a general manner reliance on subcontractors for works treated as 'main' works by the contracting entity.

55 That prohibition applies whatever the economic sector concerned by the contract at issue, the nature of the works and the qualifications of the subcontractors. Furthermore, such a general prohibition does not allow for any assessment on a case-by-case basis by that entity.

56 It is true that the contracting entity is free to specify which works are to be treated as 'main' works. However, it must still stipulate, with respect to all contracts, that those works are to be carried out by the tenderer itself. Thus, Article 24(5) of the Law on public procurement prohibits reliance on subcontractors for those works, including in situations in which the contracting entity is able to verify the capacities of the subcontractors concerned and to take the view, after that verification, that such a prohibition is unnecessary for the proper execution of the works having regard, in particular, to the nature of the tasks that the tenderer plans to delegate to those subcontractors.

57 Thus, as the Advocate General observed in point 51 of her Opinion, an alternative less restrictive measure which guarantees the achievement of the objective pursued would have been to require the main contractor to indicate in their tender the proportion of the contract that they intend to contract out, the proposed subcontractors and their capacities. It might also be possible for the contracting entity to prohibit tenderers from changing subcontractors if that entity was not able beforehand to verify the identity and capacity of the latter.

58 Moreover, in so far as the referring court and the Lithuanian Government submit that Article 24(5) of the Law on public procurement was adopted in order to prevent a current practice by which tenderers claim to have professional capacities solely in order to win the contract concerned with the intention of entrusting the largest part or most of the works to subcontractors, it must be observed that that provision does not specifically target that practice. Thus, it prohibits the tenderer from delegating the performance of all the works identified as the 'main' works by the contracting entity, including the tasks which represent, proportionally, only a small part of those works. Therefore, that provision goes beyond what is necessary to prevent the abovementioned practice.

59 Second, as regards the justification based on the encouragement of small and medium-sized undertakings to participate in a contract as tenderers rather than subcontractors, it is of course conceivable that such an objective may, in certain circumstances and under certain conditions, constitute a legitimate objective (see, by analogy, judgment of 25 October 2007, *Geurts and Vogten*, C-464/05, EU:C:2007:631, paragraph 26).

60 However, and in any event, none of the evidence before the Court explains how a provision of national law, such as Article 24(5) of the Law on public procurement, is necessary in order to achieve that objective.

61 Having regard to the foregoing considerations, the answer to Question 1(a) is that, as regards a public contract which is not covered by the scope of Directive 2004/17, but which has a certain cross-border interest, Articles 49 and 56 TFEU must be interpreted as precluding a provision of national law, such as Article 24(5) of the Law on public procurement, which provides that, where subcontractors are relied on for the performance of a public works contract, the tenderer is required to carry out the main works itself, as defined by the contracting entity.

The second question

62 By the second question, the referring court asks essentially whether Directive 2004/17 and, in particular, the principles of equal treatment and non-discrimination and the obligation of transparency which derives from that directive must be interpreted as meaning that they allow the contracting entity, after publication of the tender notice, to change certain clauses in the tender specifications, such as Clause 4.3 at issue in the main proceedings, if that entity has, on account of the changes made which have been announced by publication in the *Official Journal of the European Union*, extended the time limit for submission of tenders.

63 As a preliminary point, it must be observed that such a possibility to amend the procurement documents is provided for in Article 27(4) of the Law on public procurement.

64 As the referring court states in its reference for a preliminary ruling, Directive 2004/17 does not contain any provision in that respect.

65 In those circumstances, it cannot be held that Article 27(4) of the Law on public procurement, when it applies to contracts falling outside the scope of that directive, makes a direct and unconditional reference to it within the meaning of the case-law set out in paragraph 34 of the present judgment (see, by analogy, judgment of 7 July 2011, *Agafiței and Others*, C-310/10, EU:C:2011:467, paragraph 45).

66 It follows that the interpretation of that directive is not necessary in order to answer the second question.

67 That being the case, in order to provide a useful answer to the referring court, for the reasons set out in paragraphs 43 to 45 of the present judgment, that question must be answered in the light of the fundamental rules and general principles of the FEU Treaty, among which are the principles of non-discrimination and equal treatment and the obligation of transparency which derive, in particular, from Articles 49 and 56 TFEU, and to which the national court refers.

68 In that connection, it must be recalled that, according to settled case-law, those principles and that obligation require, in particular, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority. The obligation of transparency aims more specifically to preclude any risk of favouritism or arbitrariness on the part of the contracting authority (see, to that effect, judgments of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44, and of 14 July 2016, *TNS Dimarso*, C-6/15, EU:C:2016:555, paragraph 22).

69 Those principles and that obligation require, in particular, that the subject matter and the award criteria for the contract concerned are clearly determined from the beginning of the award procedure for that contract and that the conditions and detailed rules of the award procedure must be drawn up

in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the bids submitted satisfy the criteria applying to the contract in question (see, to that effect, judgments of 10 May 2012, *Commission* v *Netherlands*, C-368/10, EU:C:2012:284, paragraphs 56, 88 and 109; of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44; and of 14 July 2016, *TNS Dimarso*, C-6/15, EU:C:2016:555, paragraph 23). The obligation of transparency also means that the subject matter and the award criteria must be adequately publicised by the contracting authorities (see, to that effect, judgment of 24 January 2008, *Lianakis and Others*, C-532/06, EU:C:2008:40, paragraph 40).

70 It is also clear from the case-law of the Court that the contracting authority cannot, in principle, during an award procedure, amend the scope of the essential conditions of the contract, which include the technical specifications and the award criteria, and on which the economic operators concerned have legitimately relied in order to take the decision to prepare the submission of a tender, or to the contrary to decide not to participate in the award procedure for the contract concerned (see, to that effect, judgments of 10 May 2012, *Commission* v *Netherlands*, C-368/10, EU:C:2012:284, paragraph 55, and of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraphs 27 to 29).

71 That being the case, it does not follow that any amendment to the tender specifications after the publication of the tender notice would, as a matter of principle and in all circumstances, be prohibited.

72 Thus, the contracting authority has the possibility, on an exceptional basis, to correct or amplify the information in the tender specifications which require mere clarification, or to correct obvious material errors, provided that all the tenderers are informed (see, by analogy, judgment of 29 March 2012, *SAG ELV Solvensko and Others*, C-599/10, EU:C:2012:191, paragraph 40).

73 That entity must also be authorised to make certain amendments to the tender specifications, in particular as regards the conditions and the scheme for combining professional capacities, provided that the principles of non-discrimination and equal treatment and the obligation of transparency are respected.

74 That stipulation requires, first, that the amendments concerned, although they may be substantial, must not be so substantial that they have attracted potential tenderers which, in the absence of such changes, would not be in a position to submit a tender. That might be the case, in particular, where the changes make the contract noticeably different in nature from the way it was initially described.

75 Second, it requires that those changes are adequately publicised, so as to enable all those potential tenderers which are reasonably informed and exercising ordinary care to become acquainted with it under the same conditions and at the same time.

76 Third, that stipulation also requires, first, that those changes are made before the tenderers submit their bids and, second, that the time limit for the submission of those tenders is extended where those changes are substantial, the length of the extension depending on the extent of those changes and that it is sufficient to allow the economic operators concerned to adapt their tender as a consequence.

77 Having regard to the foregoing considerations, the answer to the second question is that, as regards a public contract which is not covered by the scope of Directive 2004/17, but which has a certain cross-border interest, the principles of equal treatment and non-discrimination and the obligation of transparency which derive from Articles 49 and 56 TFEU must be interpreted as meaning that they do not preclude the contracting entity from making changes to a clause in the tender specifications, after publication of the tender notice, relating to the conditions and scheme for combining professional

capacities, such as Clause 4.3 at issue in the main proceedings, provided, first, that the changes made are not so substantial that they have attracted potential tenderers which, in the absence of such changes, would not be in a position to submit a tender, second, they are adequately publicised and, third, they are made before the tenderers submit their bids, that the time limit for submitting those tenders is extended when the changes concerned are substantial, the length of that extension depending on the extent of those changes, and that the length of time is sufficient to allow the economic operators concerned to adapt their tender as a consequence, which is for the referring court to ascertain.

Question 1(b)

78 By Question 1(b), the referring court asks essentially whether Directive 2004/17 must be interpreted as precluding a clause in tender specifications, such as Clause 4.3 at issue in the main proceedings, which, in circumstances in which a common tender is submitted by several tenderers, requires that the contribution of each of them in order to satisfy the requirements applicable with regard to professional capacities corresponds proportionally to the share of the works they will actually carry out if the relevant contract is awarded to them.

79 As a preliminary point, the port authority stated essentially at the hearing that Clause 4.3 of the tender specifications at issue in the main proceedings had to be read together with Clause 4.2.3 thereof. According to the latter clause, tenderers wishing to submit a common tender must indicate in a joint-association agreement the share of works that each of them undertakes to perform, it being stated that that division is freely determined by those tenderers. Clause 4.3 enables the contracting authority to verify when examining the tenders that each of the tenders concerned has professional capacities corresponding proportionally to the share of the works it undertakes to perform in accordance with that contract, and that it will actually execute if the contract is awarded.

80 As the Advocate General pointed out in point 56 of her Opinion, Clause 4.3 of the tender specifications at issue in the main proceedings concerns the award of the contract and, more specifically, the possibility for tenderers to submit a common tender to combine their professional capacities in order to satisfy the requirements of those specifications.

81 Such a possibility is provided for in Article 32(3) of the Law on public procurement.

82 It is apparent from the decision to refer that that provision, which applies to all works contracts, whatever their value, faithfully reproduces the content of Article 54(6) of Directive 2004/17. Furthermore, the referring court indicated that, during the transposition of that directive into Lithuanian law, the national legislature chose to extend some of its provisions to contracts with a value less than the thresholds established in Article 16(b) thereof, in particular, by laying down similar provisions *expressis verbis* to those in that directive.

83 In those circumstances, it must be held that Article 54(6) of Directive 2004/17 was made applicable directly and unconditionally to contracts excluded from its scope by Article 32(3) of the Law on public procurement.

84 Therefore, having regard to the case-law set out in paragraphs 33 and 34 of the present judgment, Question 1(b) must be examined in the light of Article 54(6) of Directive 2004/17.

85 That provision recognises the right of every economic operator, where the contracting entity lays down a qualitative selection criterion consisting of requirements relating to technical or professional abilities, to rely for a particular contract upon the capacities of other entities, regardless of the nature of the links which it has with them, provided that it proves to the contracting authority that it will have at its disposal the resources necessary for the performance of the contract (see, by analogy, judgment of

7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 33 and the case-law cited). In accordance with that provision, that right extends to groups of economic operators submitting a common tender, which may, under the same conditions, rely on the capacities of their participants or of other entities.

86 Therefore, Directive 2004/17 does not preclude the exercise of the right established in Article 54(6) thereof from being limited in exceptional circumstances (see, by analogy, judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 39).

87 In particular, it is conceivable that, in specific circumstances, having regard to the nature and objectives of a particular contract, the capacities of a third party entity, which are necessary for the performance of a particular contract, cannot be transferred to the tenderer. Accordingly, in such circumstances, the tenderer may rely on those capacities only if the third party entity directly and personally participates in the performance of the contract concerned (see, to that effect, judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 41).

88 In such circumstances, the contracting entity may, for the purposes of the proper performance of the contract concerned, expressly set out in the tender notice or the tender specifications the specific rules authorising an economic operator to rely on the capacities of other entities, provided that those rules are related and proportionate to the subject matter and objectives of that contract (see, to that effect, judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraphs 54 to 56).

89 Likewise, it cannot be excluded from the outset that, in specific circumstances, having regard to the nature of the works concerned and the subject matter and purpose of the contract, the capacities of the various participants of a group of economic operators submitting a common tender which are necessary for the proper execution of that contract cannot be transmitted to those participants. In such a case, the contracting entity is therefore justified in requiring each of the participants to execute the works corresponding to its own capacities.

90 In the present case, the port authority and the Lithuanian Government submit essentially that Clause 4.3 of the tender specifications at issue in the main proceedings aims to avoid the situation in which, in order to win the contract, a tenderer relies on capacities that he does not intend to use or, conversely, that a tenderer may be awarded a contract and perform part of the works without having the capacities and resources necessary for the proper performance of those works.

91 In that connection, it is of course possible that, taking account of the technical nature and size of the works at issue in the main proceedings, their proper performance requires that, in cases in which a common tender is submitted by several tenderers, each one of them performs specific tasks corresponding to its own professional capacities, having regard to the subject matter or the nature of those works or tasks.

92 However, that does not appear to be the scope of Clause 4.3 of the tender specifications at issue in the main proceedings. As the Advocate General noted essentially, in points 63 and 64 of her Opinion, that clause requires there to be an arithmetic correspondence between the contribution of each of the tenderers concerned to satisfy the requirements applicable with regard to professional capacity and the share of the works that that tenderer undertakes to perform and that it will in fact perform if the contract is awarded. However, that clause does not take account of the nature of the tasks to be carried out or to the technical capacities specific to each of them. In those circumstances, Clause 4.3 does not prevent one of the tenderers concerned from carrying out specific tasks for which it does not in fact have the experience or capacities required.

93 Furthermore, the port authority and the Lithuanian Government stated that Clause 4.3 of the tender specifications at issue in the main proceedings does not prevent the tenderers concerned from relying on subcontractors for carrying out works defined as 'subsidiary' and that, in accordance with Clause 4.4 of the tender specifications, the professional capacities of the subcontractors are not verified. If such is the case, which is for the referring court to ascertain, it must be held, first, that Clause 4.3 does not guarantee that the tenderers will actually use the capacities that they have declared in the procurement procedure and which were taken into consideration by the port authority for the purpose of examining the bids. Second, it does not prevent works defined as 'subsidiary' from being carried out by subcontractors without the professional capacities required.

94 It follows that Clause 4.3 of the tender specifications at issue in the main proceedings is not appropriate to ensure the attainment of the objectives pursued.

95 Therefore, it must be held that the limit on the right laid down in Article 54(6) of Directive 2004/17 resulting from that clause in unjustified having regard to the subject matter and purpose of the contract at issue in the main proceedings.

96 In those circumstances, the answer to Question 1(b) is that Article 54(6) of Directive 2004/17 must be interpreted as precluding a clause in tender specifications, such as Clause 4.3 at issue in the main proceedings, which, in a case where a common tender is submitted by several tenderers, requires that the contribution of each of them in order to satisfy the requirements applicable with regard to professional capacities correspond, proportionally, to the share of the works that it will actually perform if that bid is successful.

Costs

97 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **As regards a public contract which is not covered by the scope of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, as amended by Commission Regulation (EU) No 1336/2013 of 13 December 2013, but which has a certain cross-border interest, Articles 49 and 56 TFEU must be interpreted as precluding a provision of national law, such as Article 24(5) of the Lietuvos Respublikos viešųjų pirkimų įstatymas (Law on public procurement), which provides that, where subcontractors are relied on for the performance of a public works contract, the tenderer is required to perform itself the main works, as defined by the contracting entity.**

2. **As regards such a public contract, the principles of equal treatment and non-discrimination and the obligation of transparency which derive from Articles 49 and 56 TFEU must be interpreted as meaning that they do not preclude the contracting entity from making changes to a clause in the tender specifications, after publication of the tender notice, relating to the conditions and scheme for combining professional capacities, such as Clause 4.3 at issue in the main proceedings, provided, first, that the changes made are not so substantial that they have attracted potential tenderers which, in the absence of such changes, would not be in a position to submit a tender, second, they are adequately publicised and, third, they are made before the tenderers submit their bids, that the time limit for submitting those tenders is extended when the changes concerned are substantial, the length**

of that extension depending on the extent of those changes, and that the length of time is sufficient to allow the economic operators concerned to adapt their tender as a consequence, which is for the referring court to ascertain.

3. **Article 54(6) of Directive 2004/17, as amended by Regulation No 1336/2013, must be interpreted as precluding a clause in tender specifications, such as Clause 4.3 at issue in the main proceedings, which, in a case where a common tender is submitted by several tenderers, requires that the contribution of each of them in order to satisfy the requirements applicable with regard to professional capacities correspond, proportionally, to the share of the works that it will actually perform if that bid is successful.**

[Signatures]