Reports of Cases

OPINION OF ADVOCATE GENERAL
Sharpston
delivered on 1 December 2016 [1]

Case C-298/15

UAB "Borta"

(Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania))

(Public contracts — Qualitative selection criteria — Requirement for the successful tenderer to carry out 'the main work' itself — Demonstration of professional capacity — Tender submitted by a group of operators — Requirement that each partner's contribution be proportionate to its contribution in demonstrating professional capacity — Contract award procedure — Modification of tender specifications in the course of the procedure — Principles of equal treatment and transparency)

1. This request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) concerns a tender specification for the award of a public works contract for constructing a quay at the port of Klaipėda (Lithuania). The specification in question contains provisions governing tenders submitted by joint-activity partners. These require each partner to *perform* a proportion of the contract equivalent to its contribution to establishing the partnership's professional experience, at the level of the *award* of the public contract. The referring court has doubts as to whether such a requirement is compatible with the rules on the pooling of professional capacities under EU public procurement law. Since the contested specification was only made known several weeks after the call for tenders had been published, the referring court also seeks guidance on whether (and if so in what circumstances) contracting authorities may change the tender specifications during the course of the contract award procedure. It also raises of its own motion the question whether EU public procurement law precludes a provision of Lithuanian law that prohibits subcontracting 'the main work' in the context of public works contracts.

2. An initial difficulty arises as to the Court's jurisdiction to answer those questions. The referring court expresses its concerns in the context of Directive 2004/17/EC. [2] However, it is common ground that the estimated value of the public contract at issue does not reach the relevant threshold and that that directive therefore does not apply in the main proceedings. Has that directive been rendered directly and unconditionally applicable to the contract by Lithuanian law? If so, it is settled case-law that the Court has jurisdiction to interpret the relevant provisions of that directive. Alternatively, if the contract at issue has a clear cross-border interest, its award will be subject to the fundamental rules and general principles of the TFEU (in particular the free movement principles in Articles 49 and 56 TFEU) and it is then the Court's duty to provide useful guidance to the referring court on that basis.

1 — Original language: English.

2 — Directive 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). The relevant version of that directive is that last amended by Commission Regulation (EU) No 1336/2013 of 13 December 2013 (OJ 2013 L 335, p. 17).

Legal background

EU law

3. Recital 9 of Directive 2004/17 states:

'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. Such coordination is based on the requirements inferable from Articles 14, 28 and 49 of the EC Treaty and from Article 97 of the Euratom Treaty, namely the principle of equal treatment, of which the principle of non-discrimination is no more than a specific expression, the principle of mutual recognition, the principle of proportionality, as well as the principle of transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.

…'

4. Recital 43 indicates that it is advisable to include provisions on subcontracting in order to encourage small and medium-sized undertakings to become involved in the public contracts procurement market.

5. Article 10 provides that 'contracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way'.

6. Article 11(2) states:

'Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting entities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent to which this change is necessary for the satisfactory performance of the contract.'

7. Article 37 ('Subcontracting') provides:

'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.'

8. Pursuant to Article 38 ('Conditions for performance of contracts'):

'Contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with [EU] law and are indicated in the notice used as a means of calling for competition or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

9. Article 53 ('Qualification systems') provides in particular:

'1. Contracting entities which so wish may establish and operate a system of qualification of economic operators.

…

2. The system under paragraph 1 may involve different qualification stages.

It shall be operated on the basis of objective criteria and rules for qualification to be established by the contracting authority.

…

5. Where the criteria and rules for qualification referred to in paragraph 2 include requirements relating to the technical and/or professional abilities of the economic operator, the latter may where necessary rely on the capacity 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 those resources will be available to it throughout the period of the validity of the qualification system, for example by producing 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.

…'

Lithuanian law

10. Article 2(29) of the Lietuvos Respublikos Viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on Public Procurement; 'the Law on public procurement') defines a supplier in general terms as any economic operator, whether a natural person, a private legal person, a public legal person, other organisations or branches thereof, or a group of such persons, which is able to offer, or is offering, goods, services or works.

11. According to Article 24(5) of the Law on public procurement, the procurement documents require the candidate or tenderer to 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 work, as specified by the contracting authority, must be performed by the supplier.

12. According to 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.

13. Article 32(3) of the Law on public procurement states that, where necessary in a specific tendering context, a supplier may rely on the capacities of other economic operators, irrespective of the nature of its legal relationship with them. In this case, the supplier 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.

Factual background, procedure and questions referred

14. On 2 April 2014, VĮ Klaipėdos valstybinio jūrų uosto direkcija (Klaipėda State Seaport Authority; 'the Seaport Authority'), a Lithuanian public undertaking, published an open call for tenders for 'Construction work relating to "Reconstruction of Quays No 67 and No 68. Stage 1"'. That call for tenders was also published in the *Official Journal of the European Union* on 5 April 2014. [3]

15. Paragraph 3.2.1 of the tender specifications included the following requirement: 'Suppliers' 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 supplier (in the case where the supplier has operated for less than five years) shall correspond to a value of at least LTL 5 000 000 (EUR 1448100.09), excluding VAT.'

16. Paragraph 4.2.3 of the tender specifications required any tender 'to specify the commitments of the partners operating under a joint-activity agreement in relation to the implementation of the contract, together with the percentage share of those commitments, and to state that this division of the volume of services applies only to the partners and creates no obligations for the client (contracting authority)'.

17. The original version of paragraph 4.3 of the tender specifications provided as follows:

'Where the tender is submitted by suppliers 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. … Pursuant to Article 24(5) of [the Law on public procurement], [the Seaport Authority] states that the main work consists of Item 1.2.8 in the Construction Section of the Bill of Quantities and, therefore, this work must be carried out by the supplier itself.' [4]

18. The Seaport Authority, acting of its own motion, issued a first amendment to paragraph 4.3 of the specifications on 24 April 2014. That new version, which was published in the *Official Journal of the European Union*, provided, in particular, that, where the tender was submitted by suppliers operating under a joint-activity agreement, each partner engaged in the joint-activities had to satisfy at least 50% of the requirement under paragraph 3.2.1. As a result of that change, the Seaport Authority extended the deadline for submitting tenders.

19. On 3 May 2014, UAB Borta, a limited company incorporated under Lithuanian law, challenged that redefinition before the Seaport Authority. As a result, the Seaport Authority, by decision of 9 May 2014, amended paragraph 4.3 of the tender specifications for the second time. [5] The new (and final) version of that paragraph provided as follows:

'Where the tender is submitted by suppliers operating under a joint-activity agreement, the requirements of paragraphs 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

3 — OJ 2014/S 68-117458.

4 — The referring court explains that this main work consists, inter alia, in building a grooved steel wall supported by positional girders.

5 — At the same time, the contracting authority slightly redrafted of its own motion paragraph 4.2.3 of the tender specifications. That change to the tender specification is however not at issue in the main proceedings.

volume of work that will actually be carried out by it in the event of a successful bid (contract implementation) [6] … Pursuant to Article 24(5) of [the Law on public procurement], [the Seaport Authority] states that the main work consists of Item 1.2.8 in the Construction Section of the Bill of Quantities and, therefore, this work must be carried out by the supplier itself.'

20. As a result of that last change, which was published in the *Official Journal of the European Union*, the deadline for submitting tenders was extended for the second time and fixed as 12 June 2014.

21. Borta submitted a tender on 12 June 2014, in which it proposed to carry out these works for the equivalent in LTL of approximately EUR 4 761 460. That was the most expensive bid.[7]

22. Borta however contested the final version of paragraph 4.3 of the tender specifications before the Seaport Authority and, following rejection of that challenge, before the Klaipėdos apygardos teismas (Klaipėda Regional Court). The Klaipėda Regional Court dismissed that action on 18 August 2014. Borta appealed against that decision to the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania), which rejected the appeal on 13 November 2014. Both courts considered in essence that the contested tender specification was justified by the nature of the subject matter of the contract and its significance for the public interest, and that the joint and several liability of joint-activity partners vis-à-vis the Seaport Authority did not, by itself, guarantee successful implementation of the public procurement contract. They also rejected the claim that successive changes in the tender specifications were illegal, as Article 27(4) of the Law on public procurement expressly entitled the Seaport Authority to clarify those specifications.

23. Borta appealed on a point of law against the judgment of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), which stayed the proceedings and requested a preliminary ruling on the following questions:

'(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 supplier? [8]

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

6 — I shall refer to that latter requirement as the 'correspondence requirement'. The 'volume of work' is presumably measured in money terms.

7 — The successful tenderer's bid amounted to the equivalent in LTL of approximately EUR 3 168 400.

8 — The order for reference records that that court has raised that question 'of its own motion' for the protection of the public interest.

(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 suppliers 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 suppliers, 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 suppliers by laying down certain restrictions on combining the professional capacities of suppliers;

— 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 suppliers' 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?'

24. The Seaport Authority, the Lithuanian Government and the European Commission have submitted written observations. The same parties and Borta presented oral argument at the hearing on 1 June 2016.

Assessment

Preliminary remarks

25. The Lithuanian Government submitted at the hearing that Article 24(5) of the Law on public procurement transposed the new rule on subcontracting in Article 79(3) of Directive 2014/25/EU [9] before the expiry of the period prescribed for transposing that directive and that, consequently, the Court should examine the present reference from the perspective of that directive only. [10] The Seaport Authority took a similar position. The Commission argued that, on the contrary, Directive 2014/25 could not be taken into account. First, Article 24(5) of the Law on public procurement was passed before that directive was adopted. Second, Lithuania had omitted to notify the measures transposing Directive 2014/25 into Lithuanian law to the Commission.

9 — Directive 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 (OJ 2014 L 94, p. 243). Pursuant to that provision, 'in the case of works contracts, service contracts and siting and installation operations in the context of a supply contract, contracting entities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 37(2), a participant in that group'. A similar rule is laid down in Article 63(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

10 — It appears from the Lithuanian Government's written submissions that, at the material time, Directive 2014/25 had not yet been fully transposed into Lithuanian law.

26. 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 a prior call for competition must 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. [11]

27. Directive 2014/25 repealed Directive 2004/17 with effect from 18 April 2016. It therefore does not apply to the main proceedings, in which the call for tenders was published on 2 April 2014. As the Court has held recently in relation to Directive 2014/24, to apply that directive before the expiry of the period prescribed for its transposition would prevent not only the Member States but also contracting authorities and economic operators from benefiting from a sufficient period in which to adapt to the new provisions it introduced. [12] In my view, to do so would also be inconsistent with the principle of legal certainty. [13] The same applies by analogy to Directive 2014/25.

28. Next, it is common ground that the value of the contract at issue (which can presumably be assessed by reference to the most expensive bid submitted, that is to say, the equivalent in LTL of EUR 4761459.72) is below the threshold of EUR 5 186 000 set out for works contracts, at the material time, in Article 16(b) of Directive 2004/17. As the referring court observes, the public contract at issue thus falls outside the scope of Directive 2004/17.

29. The referring court however submits that the Court has jurisdiction to answer the questions referred. First, the Seaport Authority clearly intended to regard the call for tenders as having international scope by publishing it and the subsequent amendments to the tender specifications in the *Official Journal of the European Union*. That is confirmed by the fact that two non-Lithuanian companies submitted tenders. The referring court also indicates in essence that the Lithuanian legislature, when it transposed Directive 2004/17 in the Law on public procurement, decided to apply certain rules laid down in that directive to procurement procedures falling outside the directive's scope of application.

30. At the hearing, the Lithuanian Government added that Lithuanian law requires contracting authorities to make a procedural choice when they organise an award procedure for a contract whose estimated value is below the relevant threshold. They may decide to apply either the simplified procedure under national law for such contracts or the procedure applicable to public contracts above the relevant threshold. In that latter case, and applying the EU legislation in force at the material time, the provisions of – depending on the subject matter of the public contract – Directive 2004/17 or Directive 2004/18/EC [14] would have become binding on the contracting authority. The national courts would also have been under a duty to apply them.

31. In certain circumstances, the purely internal nature of a situation does not prevent the Court from replying to a question referred pursuant to Article 267 TFEU. [15] That is so, in particular, where national law requires the referring court to allow a national of the Member State of its jurisdiction to enjoy the same rights as those which a national of another Member State would derive from EU law in the same situation, or where the request for a preliminary ruling concerns provisions of EU law to which the national law of a Member State refers in order to determine the rules applicable to a purely internal situation within that State. [16]

11 — Judgments of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 31 and the case-law cited, and of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 83.

12 — Judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 86.

13 — See, by analogy, judgment of 15 October 2009, *Hochtief and Linde-Kca-Dresden*, C-138/08, EU:C:2009:627, paragraph 29 and the case-law cited. See also judgment of 5 October 2000, *Commission* v *France*, C-337/98, EU:C:2000:543, paragraph 40.

14 — Directive 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).

15 — See, inter alia, order of 3 July 2014, *Tudoran*, C-92/14, EU:C:2014:2051, paragraph 38.

16 — See, inter alia, orders of 3 July 2014, *Tudoran*, C-92/14, EU:C:2014:2051, paragraph 39 and the case-law cited, and of 12 May 2016, *Security Service and Others*, C-692/15 to C-694/15, EU:C:2016:344, paragraph 27.

32. As regards the latter situation, the Court's jurisdiction extends to questions concerning provisions of EU law where the facts of the main proceedings are outside the scope of EU law but where those provisions have been rendered *directly* and *unconditionally* applicable by domestic law, in order to ensure that internal situations and situations governed by EU law are treated in the same way. [17] It is indeed in the European Union's interest that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly 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, in order to ensure that internal situations and situations governed by EU law are treated in the same way, irrespective of the circumstances in which the provisions or concepts taken from EU law are to apply. [18]

33. In the present case, however, there are no sufficiently precise indications to suggest that the provisions of EU law cited have been 'rendered directly and unconditionally applicable by domestic law', in order to ensure that internal situations and situations governed by EU law are all subject to the same rules. [19] In particular, neither the referring court nor the Lithuanian Government have identified for the Court any specific provision of Lithuanian law making Directive 2004/17 directly and unconditionally applicable to public contracts with a value below the relevant threshold laid down in Article 16 of that directive. [20] I therefore conclude that the Court has no jurisdiction to interpret Directive 2004/17 in the context of the present proceedings.

34. The questions referred seek interpretation of Directive 2004/17 only. However, 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. [21]

35. It is therefore necessary to ascertain whether the Court has jurisdiction to answer the questions referred on the basis of the general principles of the TFEU, in particular the principles of equal treatment and non-discrimination on grounds of nationality and the consequent obligation of transparency. That presupposes, according to settled case-law, that the contract concerned has a clear cross-border interest in the light of, inter alia, its value and the place where it is carried out. [22] The existence of such a cross-border interest must be assessed on the basis of all the relevant factors, such as the financial value of the contract, the place where it is to be performed or its technical features, and having regard to the particular characteristics of the contract concerned. [23]

17 — Judgments of 22 December 2008, *Les Vergers du Vieux Tauves*, C-48/07, EU:C:2008:758, paragraph 21 and the case-law cited, and of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 23.

18 — Judgment of 7 November 2013, *Romeo*, C-313/12, EU:C:2013:718, paragraph 22 and the case-law cited.

19 — See, inter alia, judgment of 18 October 2012, *Nolan*, C-583/10, EU:C:2012:638, paragraph 51. In its judgment of 14 January 2016, *Ostas celtnieks* (C-234/14, EU:C:2016:6, paragraphs 19 to 21), the Court agreed to interpret Directive 2004/18 taking into account, in particular, the submission made by the Latvian Government that the Latvian law on public works contracts was applicable to public works contracts of an amount less than the threshold laid down by Directive 2004/18. The Court however accepted its jurisdiction to answer the question referred only 'subject to the verifications to be made by the referring court'.

20 — See, by analogy, judgment of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 25.

21 — See, inter alia, judgments of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 24 and the case-law cited, and of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 17 and the case-law cited.

22 — See, inter alia, judgments of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 23; of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 24; and of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 27.

23 — See, most recently, judgment of 14 July 2016, *Promoimpresa and Others*, C-458/14 and C-67/15, EU:C:2016:558, paragraph 66 and the case-law cited. See also my Opinion in *Commission v Finland*, C-195/04, EU:C:2007:28, point 55.

36. The Court has already held that the existence of a cross-border interest may be established, in particular, by the fact that the contract in question 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.[24] Thus, a works contract can be of cross-border interest because of its estimated value in conjunction with its technical complexity or the fact that the works are to be located in a place which is likely to attract the interest of foreign operators.[25]

37. The Court will on occasion leave it to the national court to ascertain the existence of a cross-border interest.[26] In the present case, however, there are sufficient elements available to the Court to conclude that the public contract at issue does indeed have such a cross-border interest. First, the estimated value of the contract is significant.[27] Moreover, Klaipėda seaport is one of the major ports of the Baltic Sea. Seaport quay construction such as that envisaged by the contract award procedure at issue moreover requires high technical skills which only a limited number of undertakings can be assumed to possess. Lastly, this public contract's attractiveness for foreign operators is confirmed by the fact that two non-Lithuanian undertakings submitted tenders,[28] one of which ultimately obtained the contract.

38. The questions referred must therefore be examined against the background of the general principles of transparency and equal treatment arising from Articles 49 and 56 TFEU, which must be respected when awarding public contracts.[29] Given that Articles 49 and 56 TFEU apply to a contract such as the contract at issue in the main proceedings, the Seaport Authority is required to respect the prohibition on discrimination on the grounds of nationality and the obligation as to transparency which those articles lay down.[30]

The restriction on subcontracting in Article 24(5) of the Law on public procurement (point (a) in question 1)

39. By point (a) in the first question, the referring court asks whether EU law precludes a provision such as Article 24(5) of the Law on public procurement, which requires that, in the case of public works contracts, the tenderer itself should carry out the 'main work', as identified by the contracting authority.

40. Borta did not challenge the lawfulness of that restriction on subcontracting in its appeal on a point of law before the referring court. The latter has raised the question 'of its own motion' in the public interest. It is, indeed, not immediately clear whether the facts in the main proceedings involve subcontracting. A tender submitted under a joint-partnership agreement may imply that, where that tender is successful, all partners become individual parties to the public contract with the contracting authority. Such a situation does not involve subcontracting, which occurs only where (all or part of)

24 — Judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 20.

25 — See judgments of 15 May 2008, *SECAP and Santorso*, C-147/06 and C-148/06, EU:C:2008:277, paragraph 24, and of 17 November 2015, *RegioPost*, C-115/14, EU:C:2015:760, paragraph 51.

26 — See, inter alia, judgments of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 25, and of 14 November 2013, *Belgacom*, C-221/12, EU:C:2013:736, paragraph 30 and the case-law cited.

27 — See, by analogy, judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 20.

28 — See judgments of 15 May 2008, *SECAP and Santorso*, C-147/06 and C-148/06, EU:C:2008:277, paragraph 24, and of 17 November 2015, *RegioPost*, C-115/14, EU:C:2015:760, paragraph 51.

29 — See, inter alia, judgments of 13 November 2007, *Commission v Ireland*, C-507/03, EU:C:2007:676, paragraph 26, and of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 27. The Court has held on many occasions that the purpose of coordinating the procedures for the award of public contracts at EU level is precisely to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, for example, judgments of 3 October 2000, *University of Cambridge*, C-380/98, EU:C:2000:529, paragraph 16; of 18 October 2001, *SIAC Construction*, C-19/00, EU:C:2001:553, paragraph 32; and of 24 January 2008, *Lianakis and Others*, C-532/06, EU:C:2008:40, paragraph 39).

30 — See, by analogy, judgment of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 32 and the case-law cited.

the contract is carried out by third parties to the contract.[31] Conversely, a joint-partnership agreement would involve subcontracting if only one of the partners were formally to operate as the tenderer but all of them perform the contract or if they set up a joint venture company, which will become the signatory to the contract in place of the partners themselves. Only limited information is available about the tender Borta submitted and it is not for this Court to ascertain whether that tender actually or potentially involved subcontracting.

41. According to settled case-law, the Court cannot give a ruling on a question referred by a national court where it is quite obvious that the interpretation or the assessment of the validity of a provision of EU law sought by the national court bears no relation to the actual nature of the case or to the subject matter of the main action.[32] That is not however the case here. Paragraph 4.3 of the tender specifications, which lies at the centre of the dispute in the main proceedings, contains an express reference to Article 24(5) of the Law on public procurement. Against that background, it does not appear that point (a) in the first question manifestly bears no relation to the actual nature or the subject matter of the action and that question is therefore admissible.[33]

42. I turn now to the substance.

43. According to settled case-law, Articles 49 and 56 TFEU preclude any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to prohibit, impede or render less attractive the exercise by nationals of the European Union of the freedom of establishment and the freedom to provide services guaranteed by those provisions.[34]

44. As regards public contracts and the freedom of establishment and the freedom to provide services, the European Union is concerned to ensure the widest possible participation by tenderers in a call for tenders, even where directives on public procurement are not applicable.[35] That is in the interest of the contracting authority itself, which will thus have greater choice as to the most advantageous tender which is most suitable for its needs.[36] One of the principal functions of the principle of the equal treatment of tenderers and the corollary obligation of transparency is thus to ensure the free movement of services and the opening-up of undistorted competition in all the Member States.[37]

45. Subcontracting contributes to those objectives as it is likely to encourage small and medium-sized undertakings to get involved in the public contracts procurement market and therefore to increase the number of potential candidates for the award of public contracts.[38]

46. In the present case, a provision such as Article 24(5) of the Law on public procurement clearly limits the possibility for undertakings established in other Member States to exercise their rights under Articles 49 and 56 TFEU, in so far as it precludes them, if they tender for the contract, from either subcontracting all or part of 'the main work' as defined by the contracting authority or proposing their own services as subcontractors for that part of the contract. As the Commission correctly submits, Article 24(5) of the Law on public procurement therefore restricts the freedom to provide services and the freedom of establishment.

31 — See, as regards that distinction, the Opinion of Advocate General Jääskinen in *Partner Apelski Dariusz*, C-324/14, EU:C:2015:558, point 22.

32 — See, inter alia, judgment of 12 May 2011, *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291, paragraph 33.

33 — See, by analogy, judgment of 12 May 2011, *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291, paragraph 34.

34 — Judgments of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 41, and of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 28 and the case-law cited.

35 — See judgments of 23 December 2009, *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 37; of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 29; and of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 51 and the case-law cited.

36 — Judgment of 23 December 2009, *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 37 and the case-law cited.

37 — Judgment of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 28.

38 — See, by analogy, judgments of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 34, and of 14 January 2016, *Ostas celtnieks*, C-234/14, EU:C:2016:6, paragraph 24. See also my Opinion in *Wrocław - Miasto na prawach powiatu*, C-406/14, EU:C:2015:761, point 30.

47. 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. [39]

48. The Lithuanian Government explains that the restriction on subcontracting at issue was introduced in order to make it easier for contracting authorities to protect their interests and to ensure that subcontracted works are properly executed. That restriction was aimed in particular at addressing the common situation where economic operators participated in tendering procedures with a view, if successful, to subcontracting the major part of the contract. Lower quality work or difficulties in their execution was often the result. The Lithuanian Government argues in addition that Article 24(5) of the Law on public procurement is in line with the common position reached on similar issues within the Council and which resulted, in particular, on the rule now contained in Article 79(3) of Directive 2014/25. [40] At the hearing, the Seaport Authority submitted, in essence, that it had a legitimate interest in ensuring that public works such as those at issue in the main proceedings, which are of strategic importance for national security, were correctly executed.

49. A contracting authority may legitimately seek to ensure that a public work contract will be effectively and properly carried out. [41] That applies in particular where the works in question are deemed necessary for safeguarding national security, which, according to Article 4(2) TEU, is among the essential State functions that the European Union must respect. [42] Thus, a tenderer may be required to produce evidence that it actually has available to it the resources of the entities or undertakings on which it relies, which it does not itself own, and which are necessary for the performance of the contract. [43] Accordingly, the contracting authority is entitled to prohibit the use of subcontractors whose capacities could not be verified during the examination of tenders and selection of the contractor for the performance of essential parts of the contract. [44]

50. However, the restriction on the freedom to provide services and freedom of establishment that Article 24(5) of the Law on public procurement involves does not appear proportionate to that objective.

51. First, that restriction applies even where the contracting authority is in fact in a position to verify the technical and economic capacity of subcontractors during the contract award procedure. An alternative to that restriction would (for example) have been to require the main contractor to identify subcontractors when submitting his tender and to demonstrate both that he will actually have available to him the resources of those subcontractors necessary for the performance of the contract and that those subcontractors are suitable for carrying out the tasks he intends to entrust to them.

39 — See, inter alia, judgments of 27 October 2005, *Contse and Others*, C-234/03, EU:C:2005:644, paragraph 25, and of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 31. See also, on the principle of proportionality applied as a general principle of EU law in the context of contract award procedures falling outside the scope of Directive 2004/17 or Directive 2004/18, judgment of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 29.

40 — Directive 2004/17 contains no rule comparable to that provision.

41 — See, by analogy, judgment of 14 July 2016, *Wrocław - Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraph 34 and the case-law cited. See also my Opinion in that case, EU:C:2015:761, point 32 and the case-law cited.

42 — Whether considerations of national security might be such as to justify a restriction to the Treaty principles relevant to the present proceedings is a different question which does not require to be addressed here.

43 — See, by analogy, judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 37 and the case-law cited.

44 — See, by analogy, 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.

52. Second, Article 24(5) is also both *too rigid* and *too vague* to satisfy the proportionality test. Although contracting authorities appear to enjoy flexibility when defining, for each contract, what 'the main work' is, the restriction on subcontracting resulting from that provision is defined in particularly broad terms. It applies regardless of the subject matter of the public works contract and is binding upon contracting authorities when they conclude any type of public works contract, even when they may consider that there is no obvious reason for imposing such a restriction at all.

53. As the Commission submits, the restriction on subcontracting in Article 24(5) of the Law on public procurement differs in that regard from Article 79(3) of Directive 2014/25. That provision merely *enables* a contracting authority, in particular, to require that certain *critical* tasks be performed directly by the tenderer itself. Contracting authorities may thus assess whether such a limitation is opportune, depending on the circumstances. It follows that, even if, as the Lithuanian Government submits, Article 24(5) of the Law on public procurement were to be regarded as transposing Article 79(3) of Directive 2014/25 into Lithuanian law,[45] that transposition would be incorrect.

54. For those reasons, I consider that, in the context of a public contract not subject to Directive 2004/17 or Directive 2004/18, but which has a clear cross-border interest, the prohibition on discrimination on the grounds of nationality and the obligation of transparency which arise under Articles 49 and 56 TFEU preclude a national rule such as that contained in Article 24(5) of the Law on public procurement, under which the tenderer has itself to carry out the 'main work', as identified by the contracting authority, without it being possible to subcontract that part of the contract.

Lawfulness of paragraph 4.3 of the tender specifications (point (b) in question 1)

55. Point (b) in the first question raises the issue whether EU law precludes tender specifications requiring that, where partners propose to combine their professional capacities by submitting a common tender, there must be an arithmetic correspondence between the proportion of the contract which each joint-activity partner performs and its contribution in fulfilling a condition concerning professional experience.

56. In the case before the national court, paragraph 4.3 of the tender specifications relates to the award of the public contract. That specification must be read together with point 4.2.3 of the tender specifications, which requires tenders submitted by joint-activity partners to indicate the commitments (works or services) that will be carried out by each of them and the percentage share of those commitments. The contracting authority is thus in a position to verify, when examining the tenders and selecting the successful tender, that each partner will be responsible for a part of the work or services corresponding to its contribution to the requirement relating to professional experience in point 3.2.1 of the tender specifications.

57. The principles that I have set out above regarding subcontracting are equally relevant to joint-activity partners pooling their capacities.[46]

58. As I see it, a requirement such as that laid down in paragraph 4.3 of the tender specifications is liable to limit the flexibility of joint-activity partners. It not only affects how they agree to share responsibilities at the time of submitting their common tender but also precludes them from modifying each partner's contribution to the works contract at a later stage if the contract is attributed to them.

45 — See point 25 above.

46 — See points 43 to 45, 47 and 49 of this Opinion.

59. Thus, the requirement in paragraph 4.3 of the tender specifications is capable of having a dissuasive effect on economic operators established in other Member States. It will affect operators wishing to establish themselves in the Member State concerned through the establishment of a permanent consortium, possibly composed of national and foreign companies. It will also affect operators wishing to offer their services by joining consortia of that kind already in existence, in order to be able to participate more easily in public tendering procedures launched by the contracting authorities of that Member State.[47] Such specification therefore constitutes a restriction within the meaning of Articles 49 and 56 TFEU.

60. The Seaport Authority and the Lithuanian Government submit, in essence, that paragraph 4.3 of the tender specifications merely seeks to ensure that each joint-activity partner has the professional capacity to perform that part of the public works contract for which it will be responsible.

61. I have already indicated that the objective of ensuring proper performance of a public contract can justify a (non-discriminatory) restriction to the freedom to provide services and freedom of establishment.[48] Partners acting under a joint-activity agreement may be able to satisfy *collectively* the condition(s) relating to professional capacity (including professional experience) stipulated by the contracting authority when they submit a tender. That however offers no guarantee that each partner will then actually be entrusted with those specific tasks for which its professional capacity has been verified prior to the award of that contract. Articles 49 and 56 TFEU do not therefore in principle preclude a contracting authority from requiring tenders submitted under joint-activity agreements to specify how the various tasks will be distributed among the partners, from verifying the capacity of each partner to carry out the tasks for which it will be responsible and from monitoring that, following the award of the contract, each partner duly performs those tasks for which its professional capacity has been demonstrated.[49]

62. However, paragraph 4.3 of the tender specifications at issue here is not suitable for ensuring attainment of that objective.

63. That paragraph requires there to be an arithmetic correspondence between the contribution of each partner to the professional experience requirement in paragraph 3.2.1 and the 'volume' (or money value) of tasks effectively carried out by that partner when performing the contract.

64. As the Commission correctly submits, that specification is *unrelated* to the *specific works or services* required to perform the public contract at issue properly. For example, each partner under a joint-activity agreement might be able to demonstrate that it has acquired experience in seaport quay construction or reconstruction over the last 5 years. Collectively, the partners thus fulfil the professional experience requirement in paragraph 3.2.1 of the tender specifications. However, each of them might specialise in a different aspect of seaport quay construction, such as dredging harbour basins, laying foundation works, building grooved steel walls, or supplying and installing seaport quay equipment. The requirement set out in paragraph 4.3 does not preclude an individual partner from carrying out specific tasks for which it actually has no such experience (although, in arithmetical terms, those tasks might correspond to its contribution in fulfilling the requirement in paragraph 3.2.1 of the tender specifications and thus comply with paragraph 4.3 thereof).

47 — See, by analogy, judgment of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 42.

48 — See point 49 of this Opinion.

49 — The underlying rationale is the same as in the context of subcontracting. See point 49 of this Opinion and the case-law cited by analogy in footnotes 43 and 44.

65. I therefore consider that the objective of ensuring proper performance of the public contract cannot, in a situation such as that in the main proceedings, justify the restriction on freedom to provide services and freedom of establishment which results from paragraph 4.3 of the tender specifications. That is all the more the case since even tasks which represent a small proportion of the total value of the contract may be critical to its proper performance. [50]

66. The Seaport Authority argues that compliance with the principles of equal treatment of tenderers and transparency requires that only professional capacities that will effectively be utilised for performing the public contract can be taken into account when assessing the professional capacity of individual joint-activity partners.

67. Although these objectives are legitimate, [51] that argument cannot succeed. In answer to a question from the Court at the hearing, the Seaport Authority explained that the tender specifications did not preclude partners tendering under a joint-activity agreement, in the same ways as other tenderers, from subcontracting performance of the public works contract (with the exception of the 'main work') and that, in those circumstances, subcontractors' professional experience did *not* have to be declared when the joint tender was submitted. Therefore, contrary to the submission made by the Seaport Authority, the tender specifications in the main proceedings did not in fact ensure that professional capacities that partners declared they possessed when submitting a common tender and that the contracting authority had verified would effectively be utilised to carry out the public works contract at issue.

68. I therefore conclude that, in the context of a public contract with a value below the threshold laid down in Directive 2004/17 or Directive 2004/18, but with a clear cross-border interest, the prohibition on discrimination on the grounds of nationality and the obligation of transparency which flow from Articles 49 and 56 TFEU preclude a tender specification such as paragraph 4.3 of the tender specifications at issue, which requires that, where partners propose to combine their professional capacities by submitting a common tender, there must be an arithmetical correspondence between the proportion of the contract which each joint-activity partner performs and its contribution in fulfilling a condition concerning professional experience.

Lawfulness of the changes to paragraph 4.3 of the tender specifications in the course of the contract award procedure (question 2)

69. Did the principles of equal treatment and of non-discrimination on grounds of nationality flowing from Articles 49 and 56 TFEU, and the consequent obligation of transparency, preclude the Seaport Authority from modifying clause 4.3 of the tender specifications as it did?

70. The Court's case-law interpreting Article 2 of Directive 2004/18 offers useful guidance to answer that question. According to that provision, 'contracting authorities shall treat economic operators equally and non-discriminatorily, and shall act in a transparent way'. That provision is therefore based on the principles of equal treatment and non-discrimination and the obligation of transparency which arise from the TFEU. [52]

50 — For example, water proofing an infrastructure.

51 — See to that effect judgments of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraphs 31 and 32 and the case-law cited, and of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 36.

52 — Judgment of 7 September 2016, *Finn Frogne*, C-549/14, EU:C:2016:634, paragraph 34.

71. Thus, the Court has held that both the principle of equal treatment and the obligation of transparency which flows from it require the subject matter of each contract and the criteria governing its award to be clearly defined from the beginning of the award procedure.[53] Equal treatment requires tenderers to be afforded equality of opportunity when formulating their bids. That implies that the bids of all tenderers must be subject to the same conditions.[54] Furthermore, the obligation of transparency is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It means that all 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.[55]

72. Therefore, a contracting authority cannot, even by means of corrections, change the meaning of the essential contractual conditions as they were formulated in the specifications, upon which the economic operators concerned legitimately relied in taking the decision to prepare to submit a tender or, on the other hand, not to participate in the procurement procedure concerned.[56]

73. The same principles apply where a contract not governed by Directive 2004/18 has a clear cross-border interest. In *Enterprise Focused Solutions*,[57] the Court held that a contracting authority cannot, after publication of a contract notice, amend the technical specification in respect of an element of the contract in breach of the principles of equal treatment and of non-discrimination and the obligation of transparency.[58] That is consistent with other judgments where the Court has made clear that the principle of equal treatment and the obligation of transparency, as a general rule, preclude a tender from being amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned, unless the amendment corrects an obvious material error or clarifies a point of detail in the tender.[59]

74. In the present case, the Seaport Authority acted in breach of those principles in twice amending paragraph 4.3 of the tender specifications.

75. First, as the Commission submits, those amendments cannot be regarded as minor clarifications of that paragraph or corrections of a clerical error. The original version of paragraph 4.3 clearly allowed the professional capacity requirement laid down in point 3.2.1 of the tender specifications to be satisfied by at least one partner engaged in the joint activities *or* by all of the partners taken together. Both modifications (on 24 April and on 9 May 2014) introduced restrictions concerning the demonstration of professional capacity in the case of joint-partnership. Those restrictions plainly did not form part of the original version of that paragraph. On the contrary, they altered the essence of paragraph 4.3 of the tender specifications, on which the operators concerned were already legitimately relying in taking the decision to prepare to submit a tender or not to participate in the procurement procedure. For that reason, I disagree with the Seaport Authority's submission that reasonably informed tenderers could anticipate the changes in question.

53 — Judgments of 10 December 2009, *Commission v France*, C-299/08, EU:C:2009:769, paragraph 41, and of 10 May 2012, *Commission* v *Netherlands*, C-368/10, EU:C:2012:284, paragraph 56.

54 — Judgment of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44.

55 — See, inter alia, judgment of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44 and the case-law cited; see also judgment of 10 May 2012, *Commission v Netherlands*, C-368/10, EU:C:2012:284, paragraph 88.

56 — Judgment of 10 May 2012, *Commission v Netherlands*, C-368/10, EU:C:2012:284, paragraph 55.

57 — Judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228.

58 — Judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 29.

59 — See, inter alia, judgment of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraphs 31 and 32.

76. Furthermore, the Seaport Authority has not advanced any objective justification to explain why it twice made substantial modifications to paragraph 4.3 of the tender specifications after publishing the initial call for tenders. Thus, whilst this is ultimately a matter for the referring court to verify, as sole judge of fact, nothing in the material available to the Court suggests that those amendments were rendered necessary by a fundamental change of the circumstances under which the public contract at issue was to be awarded or performed since the call for tenders was published.

77. It is possible to imagine circumstances in which such a fundamental change might occur and in which the contracting authority would be faced with the dilemma of either restarting the tender procedure *ab initio* or changing the tender specifications. Either solution would entail disadvantages, in terms of wasted costs for those already engaged in the original tendering process; and obvious issues would arise, particularly as regards the risk of abuse or manipulation, the need for transparency and equality of treatment between (potential) tenderers and (possibly) reimbursement of (some part of) wasted costs. Fortunately, none of those thorny points require to be decided by the Court here and I do not propose to explore them further.

78. In the circumstances of the present case, I therefore conclude that the prohibition on discrimination on the grounds of nationality and the obligation of transparency which flow from Articles 49 and 56 TFEU preclude changes of the tender specifications such as those at issue in the main proceedings, which introduce restrictions concerning the demonstration of professional capacity by joint-activity partners that were plainly not included in the original version of the specifications.

79. That conclusion is not called into question by the fact that the changes took place before any tender was submitted or by the fact that the Seaport Authority both published the changes in the *Official Journal of the European Union* and extended the deadline for submitting tenders. As I have explained, the successive amendments of paragraph 4.3 of the tender specifications by the Seaport Authority entailed an essential modification of the conditions under which a tender could be submitted by joint-activity partners, without objective justification. [60]

80. Finally, I would emphasise that the analysis I offer here flows from the specific situation in the main proceedings. It therefore does not in any way prejudge how the principles of equal treatment and non-discrimination and the obligation of transparency arising from the TFEU would apply in different circumstances.

Conclusion

81. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the questions raised by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) to the following effect:

(1) In the context of a public contract not subject to 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 or to 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, but which has a clear cross-border interest, the prohibition on discrimination on the grounds of nationality and the obligation of transparency which arise under Articles 49 and 56 TFEU must be interpreted as precluding a national rule, such as that contained in Article 24(5) of the Lietuvos Respublikos Viešųjų pirkimų įstatymas (Law on public procurement), under which the tenderer has itself to carry out itself the 'main work', as identified by the contracting authority, without it being possible to subcontract that part of the contract.

60 — See points 75 and 76 above.

(2) In the same context, the prohibition on discrimination on the grounds of nationality and the obligation of transparency which flow from Articles 49 and 56 TFEU preclude a tender specification such as paragraph 4.3 of the tender specifications at issue in the main proceedings, which requires that, where partners propose to combine their professional capacities by submitting a common tender, there must be an arithmetic correspondence between the proportion of the contract which each joint-activity partner performs and its contribution in fulfilling a condition concerning professional experience.

(3) The prohibition on discrimination on the grounds of nationality and the obligation of transparency which arise under Articles 49 and 56 TFEU preclude changes of the tender specifications such as those at issue in the main proceedings, which introduce without objective justification restrictions concerning the demonstration of professional capacity by joint-activity partners that were plainly not included in the original version of the specifications.