Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

8 July 2021 *

(Reference for a preliminary ruling – Public procurement – Award of a public contract for waste treatment services – Directive 2014/24/EU – Articles 58 and 70 – Classification of the operator's obligation to hold written prior consent for cross-border shipments of waste – Condition of performance of the contract)

In Case C-295/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), made by decision of 2 July 2020, received at the Court on 2 July 2020, in the proceedings

'Sanresa' UAB

v

Aplinkos apsaugos departamentas prie Aplinkos ministerijos,

other parties:

'Toksika' UAB,

'Žalvaris' UAB,

'Palemono keramikos gamykla' AB,

'Ekometrija' UAB,

THE COURT (Ninth Chamber),

composed of N. Piçarra, President of the Chamber, D. Šváby (Rapporteur) and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure,

* Language of the case: Lithuanian.

having considered the observations submitted on behalf of:

– ‘Žalvaris’ UAB, by K. Kačerauskas, advokatas,

– the Lithuanian Government, by K. Dieninis and R. Dzikovič, acting as Agents,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the European Commission, by L. Haasbeek, A. Steiblytė, K. Talabér-Ritz and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 18, 42, 56, 58 and 70 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), and of Articles 2(35), 3 to 7, 9 and 17 of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190, p. 1).

2 The request has been made in proceedings between ‘Sanresa’ UAB and the Aplinkos apsaugos departamentas prie Aplinkos ministerijos (Environmental Protection Department under the Ministry of Environment, Lithuania) (‘the contracting authority’) and relates to the decision of that department to exclude Sanresa from a public procurement procedure.

Legal framework

European Union law

Directive 2014/24

3 Article 18 of Directive 2014/24, which concerns the ‘principles of procurement’, provides:

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

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

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental,

social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.'

4 Article 42 of that directive makes provision for contracting authorities to formulate 'technical specifications' and take them into account in selecting tenders.

5 Article 49 of the directive, which is headed 'Contract notices', provides:

'Contract notices shall be used as a means of calling for competition in respect of all procedures, without prejudice to the second subparagraph of Article 26(5) and Article 32. Contract notices shall contain the information set out in Annex V part C and shall be published in accordance with Article 51.'

6 Article 56 of the directive, which sets out the 'general principles' for the choice of participants and the award of contracts, provides in paragraph 1:

'Contracts shall be awarded on the basis of criteria laid down in accordance with Articles 67 to 69, provided that the contracting authority has verified in accordance with Articles 59 to 61 that all of the following conditions are fulfilled:

…

(b) the tender comes from a tenderer that is not excluded in accordance with Article 57 and that meets the selection criteria set out by the contracting authority in accordance with Article 58 and, where applicable, the non-discriminatory rules and criteria referred to in Article 65.

Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2).'

7 Article 58 of that directive, which is headed 'Selection criteria', provides:

'1. Selection criteria may relate to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.

2. With regard to suitability to pursue the professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their Member State of establishment, as described in Annex XI, or to comply with any other request set out in that Annex.

In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.

3. With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for instance, between assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance.

The minimum yearly turnover that economic operators are required to have shall not exceed two times the estimated contract value, except in duly justified cases such as relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate the main reasons for such a requirement in the procurement documents or the individual report referred to in Article 84.

The ratio, for instance, between assets and liabilities may be taken into consideration where the contracting authority specifies the methods and criteria for such consideration in the procurement documents. Such methods and criteria shall be transparent, objective and non-discriminatory.

Where a contract is divided into lots this Article shall apply in relation to each individual lot. However, the contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots in the event that the successful tenderer is awarded several lots to be executed at the same time.

Where contracts based on a framework agreement are to be awarded following a reopening of competition, the maximum yearly turnover requirement referred to in the second subparagraph of this paragraph shall be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, on the basis of the estimated value of the framework agreement. In the case of dynamic purchasing systems, the maximum yearly turnover requirement referred to in the second subparagraph shall be calculated on the basis of the expected maximum size of specific contracts to be awarded under that system.

4. With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract.

…’

8 Annex XII to the directive, which is headed 'Means of proof of selection criteria' refers in paragraph (g) of Part II to 'an indication of the environmental management measures that the economic operator will be able to apply when performing the contract', as one of the means of providing evidence of the economic operators' technical abilities, as referred to in Article 58.

9 Under Article 70 of Directive 2014/24, which is headed 'Conditions for performance of contracts':

'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.'

10 Annex V to the directive, which is headed 'Information to be included in notices' contains a Part C, devoted to 'Information to be included in contract notices (as referred to in Article 49)', paragraph 17 of which reads:

'Where appropriate, particular conditions to which the performance of the contract is subject.'

Regulation No 1013/2006

11 Article 2(35) of Regulation No 1013/2006 defines the 'illegal shipment' of waste as follows:

'For the purposes of this Regulation:

…

35. "illegal shipment" means any shipment of waste effected:
   (a) without notification to all competent authorities concerned pursuant to this Regulation; or
   (b) without the consent of the competent authorities concerned pursuant to this Regulation; or
   (c) with consent obtained from the competent authorities concerned through falsification, misrepresentation or fraud; or
   (d) in a way which is not specified materially in the notification or movement documents; or

…'

12 Articles 3 to 32 of the regulation are contained in Title II, headed 'Shipments within the [Union] or without transit through third countries'. Article 3 of the regulation, which is headed 'Overall procedural framework' provides in paragraph 1:

'Shipments of the following wastes shall be subject to the procedure of prior written notification and consent as laid down in the provisions of this Title:

(a) if destined for disposal operations:

all wastes;

(b) if destined for recovery operations:

(i) wastes listed in Annex IV, which include, inter alia, wastes listed in Annexes II and VIII to the Basel Convention,
(ii) wastes listed in Annex IVA,
(iii) wastes not classified under one single entry in either Annex III, IIIB, IV or IVA,
(iv) mixtures of wastes not classified under one single entry in either Annex III, IIIB, IV or IVA unless listed in Annex IIIA.'

13 Under Article 4 of that regulation, which is headed 'Notification':

'Where the notifier intends to ship waste as referred to in Article 3(1)(a) or (b), he/she shall submit a prior written notification to and through the competent authority of dispatch and, if submitting a general notification, comply with Article 13.

When a notification is submitted, the following requirements shall be fulfilled:

1. notification and movement documents:

   Notification shall be effected by means of the following documents:
   (a) the notification document set out in Annex IA; and
   (b) the movement document set out in Annex IB.

   In submitting a notification, the notifier shall fill in the notification document and, where relevant, the movement document.

   When the notifier is not the original producer in accordance with point 15(a)(i) of Article 2, the notifier shall ensure that this producer or one of the persons indicated in point 15(a)(ii) or (iii) of Article 2, where practicable, also signs the notification document set out in Annex IA.

   The notification document and the movement document shall be issued to the notifier by the competent authority of dispatch;

2. information and documentation in the notification and movement documents:

   The notifier shall supply on, or annex to, the notification document information and documentation as listed in Annex II, Part 1. The notifier shall supply on, or annex to, the movement document information and documentation referred to in Annex II, Part 2, to the extent possible at the time of notification.

   A notification shall be considered properly carried out when the competent authority of dispatch is satisfied that the notification document and movement document have been completed in accordance with the first subparagraph;

3. additional information and documentation:

   If requested by any of the competent authorities concerned, the notifier shall supply additional information and documentation. A list of additional information and documentation that may be requested is set out in Annex II, Part 3.

A notification shall be considered properly completed when the competent authority of destination is satisfied that the notification document and the movement document have been completed and that the information and documentation as listed in Annex II, Parts 1 and 2, as well as any additional information and documentation requested in accordance with this paragraph and as listed in Annex II, Part 3, have been supplied by the notifier;

4. conclusion of a contract between the notifier and the consignee:

   The notifier shall conclude a contract as described in Article 5 with the consignee for the recovery or disposal of the notified waste.

   Evidence of this contract or a declaration certifying its existence in accordance with Annex IA shall be supplied to the competent authorities involved at the time of notification. A copy of the contract or such evidence to the satisfaction of the competent authority concerned shall be provided by the notifier or consignee upon request by the competent authority;

5. establishment of a financial guarantee or equivalent insurance:

   A financial guarantee or equivalent insurance shall be established as described in Article 6. A declaration to this effect shall be made by the notifier through completion of the appropriate part of the notification document set out in Annex IA.

   The financial guarantee or equivalent insurance (or if the competent authority so allows, evidence of that guarantee or insurance or a declaration certifying its existence) shall be supplied as part of the notification document at the time of notification or, if the competent authority so allows, pursuant to national legislation, at such time before the shipment starts;

6. Coverage of the notification:

   A notification shall cover the shipment of waste from its initial place of dispatch and including its interim and non-interim recovery or disposal.

   If subsequent interim or non-interim operations take place in a country other than the first country of destination, the non-interim operation and its destination shall be indicated in the notification and Article 15(f) shall apply.

   Only one waste identification code shall be covered for each notification, except for:
   (a) wastes not classified under one single entry in either Annex III, IIIB, IV or IVA. In this case, only one type of waste shall be specified;
   (b) mixtures of wastes not classified under one single entry in either Annex III, IIIB, IV or IVA unless listed in Annex IIIA. In this case, the code for each fraction of the waste shall be specified in order of importance.’

14 Article 11 of Regulation No 1013/2006, which is headed 'Objections to shipments of waste destined for disposal', provides in paragraph 1:

'Where a notification is submitted regarding a planned shipment of waste destined for disposal, the competent authorities of destination and dispatch may, within 30 days following the date of transmission of the acknowledgement of the competent authority of destination in accordance with Article 8, raise reasoned objections based on one or more of the following grounds and in accordance with the [TFEU]:

(a) that the planned shipment or disposal would not be in accordance with measures taken to implement the principles of proximity, priority for recovery and self-sufficiency at Community and national levels in accordance with Directive 2006/12/EC [of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9)], to prohibit generally or partially or to object systematically to shipments of waste; or

(b) that the planned shipment or disposal would not be in accordance with national legislation relating to environmental protection, public order, public safety or health protection concerning actions taking place in the objecting country; or

…'

15 Article 17 of the regulation, which is headed 'Changes in the shipment after consent', provides:

'1. If any essential change is made to the details and/or conditions of the consented shipment, including changes in the intended quantity, route, routing, date of shipment or carrier, the notifier shall inform the competent authorities concerned and the consignee immediately and, where possible, before the shipment starts.

2. In such cases a new notification shall be submitted, unless all the competent authorities concerned consider that the proposed changes do not require a new notification.

3. Where such changes involve competent authorities other than those concerned in the original notification, a new notification shall be submitted.'

Lithuanian law

16 The Lietuvos Respublikos viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on public procurement), in the version applicable to the main proceedings ('the Law on public procurement') provides, in Article 35, headed 'Contents of procurement documents':

'1. In the procurement documents, the contracting authority shall provide full information as to the terms of the contract and the conduct of the procedure.

2. The procurement documents must:

(1) state the requirements as to the formulation of tenders;

(2) state the grounds for exclusion of suppliers, the capacity conditions and, where relevant, the required standards of quality management and environmental management, such requirements being equally capable of applying to the individual members of a group of suppliers making a joint request to participate or a joint tender;

(3) state that, in the event that the right to pursue the activity in question is dependent on some capacity of the supplier which has not been verified, or not fully verified, the supplier must undertake to the contracting authority that the contract will only be performed by persons holding that right;

…

(5) contain a list of the documents evidencing that none of the grounds for exclusion are applicable to the suppliers, that they meet the capacity conditions and, where relevant, particular standards of quality management and environmental management, state that the supplier must provide the European single procurement document (ESPD) in accordance with Article 50 of this Law, and state (in the case of an open procedure) that the option provided for by Article 59(4) of this Law, to evaluate a supplier's tender in the first instance and verify that it meets the capacity conditions at a later date, will be exercised;

…

(8) state the nature of the goods, services or works to be supplied, their quantity (scope), the nature of the services to be supplied with goods, and the schedule for the supply of goods, provision of services or execution of works;

…

(13) contain the contractual terms proposed by the contracting authority and/or the draft contract as referred to in Article 87 of this Law, if it is already available. If a framework agreement is to be concluded, the procurement documents must likewise contain the terms of the framework agreement and/or the draft framework agreement, if it is already available;

…

(19) indicate when, where and how tenders are to be submitted;

…

4. The contracting authority shall draw up the procurement documents in accordance with the provisions of this Law. The procurement documents must be precise, clear and unambiguous, such that the suppliers are able to submit tenders and the contracting authority is able to procure that which it requires.'

17 Article 40 of the Law, which is headed 'Submission of requests to participate and tenders', provides:

'1. The contracting authority shall set a deadline which allows sufficient time for the submission of requests to participate and tenders, so as to enable suppliers to prepare and submit their requests for participation and their tenders in an appropriate and timely manner. The time

allowed may not be less than the shortest period laid down in Articles 60, 62, 65, 69 and 74 of this Law for submission of requests to participate and tenders. In setting the deadline, the contracting authority shall have regard to the complexity of the contract and the time required to formulate requests to participate and tenders.

…

3. Where tenders can only be made after a visit to the place where the services are to be provided or the works executed, or after a site visit for the purposes of familiarisation with the terms laid down in the procurement documents, the contracting authority shall set a deadline for submission of tenders which allows more time than those provided for in Articles 60, 62, 65, 69 and 74 of this Law, in order for all suppliers concerned to have the opportunity to acquaint themselves with all the information necessary to formulate their tenders.

4. The contracting authority shall extend the deadline for submission of tenders, in order for all suppliers wishing to participate in the procedure to have the opportunity to acquaint themselves with all the information necessary to formulate their tenders, in the following cases:

(1) where, for any reason, further information, though requested by the supplier in a timely manner, is provided less than six days before the deadline for submission of tenders, or less than four days in the case of a simplified procedure. In the case of an open procedure, a restricted procedure, or a competitive procedure with expedited negotiations, as referred to in Article 60(3) and Article 62(7) of this Law, this period is four days, and in the case of a simplified expedited procedure, it is three days;

(2) where significant changes are made to the procurement documents.

5. In extending the deadline for submission of tenders in the cases referred to in paragraph 4 of this article, the contracting authority shall have regard to the significance of the information or the changes to the procurement documents. Where the further information was not requested in a timely manner or is not a decisive factor in the preparation of tenders, it shall be open to the contracting not to extend the deadline.

…’

18 Under Article 47 of the Law, which is headed ‘Verification of the capacities of the supplier’:

‘1. Given that the contracting authority is required to determine whether the supplier is sufficiently skilful and reliable – and possesses the necessary capacities – to comply with the terms of the contract, it may define, in the contract notice or other procurement documents, the capacities required of the candidates or tenderers, and the documents or information to be submitted in order to certify that they possess those capacities. The capacities which the contracting authority requires of the candidates or tenderers may not artificially limit competition. They must be proportionate, must relate to the purposes of the contract, and must be clear and precise. For the purposes of verifying the suppliers’ capacities, the contracting authority may choose to have reference to:

(1) their right to pursue the activity in question;

(2) their financial and economic standing;

(3) their technical and professional ability.

2. The contracting authority is entitled to require, in the procurement documents, that the supplier has the right to pursue the activity required for performance of the contract. In relation to a contract for services, the contracting authority may require the suppliers to possess specific authorisations or to be members of particular organisations, if that is an obligatory condition of the right to supply the services concerned in their country of origin.

…'

The main proceedings and the questions referred for a preliminary ruling

19 On 7 October 2018, the contracting authority published an international open call for tenders relating to a contract for hazardous waste management services.

20 The contracting authority stated in paragraph 9 of the call for tenders that, in order to prevent an environmental disaster, it was necessary to take swift action to halt the operation of a high risk facility in which hazardous waste was stored, and to have that waste treated. In paragraph 11 of the same document, the contracting authority stated that the waste was stored in the open, in deteriorating containers which were in direct contact with the ground and lay stacked on top of one another, under compression. Furthermore, the waste contained hazardous chemicals which were accessible to unauthorised persons. According to the contracting authority, it was justified in those circumstances to use the expedited procedure and reduce the time allowed for submission of tenders.

21 Paragraph 23 of the call for tenders at issue in the main proceedings defined the capacity requirements which tenderers were required to meet as at the deadline for submission of tenders. The contracting authority stated that only the first-ranked tenderer would be required to produce the documents evidencing its capacity, as referred to in the table set out in that paragraph. Furthermore, in the event that the right to pursue the activity in question was dependent on some capacity of the supplier which had not been verified, or not fully verified, the supplier was required to undertake to the contracting authority that the contract would only be performed by persons holding that right.

22 The call for tenders at issue in the main proceedings also made provision for tenderers to visit the site before submitting their tenders. Nevertheless, as it was impossible to gain access to a large number of containers, or determine how full they were, the actual quantity of hazardous waste was unknown.

23 The contracting authority received four tenders. One of these was made by Sanresa, in its capacity as the lead entity of a temporary association of Lithuanian undertakings. That tender designated two subcontractors, respectively established in Denmark and the Czech Republic.

24 On 22 November 2018, the contracting authority asked Sanresa to provide it, within five working days, with further information clarifying its tender, relating in particular to the division of the various waste management operations between its partners and subcontractors, and to the issue of which of its subcontractors held authorisation for international shipments of waste.

25 On 7 December 2018, the contracting authority informed Sanresa that, under Regulation No 1013/2006, international shipments of waste required prior authorisation from the authorities of the States concerned, and that none of the economic operators designated by Sanresa held such authorisation. Accordingly, the contracting authority gave Sanresa until 17 December 2018 to address those deficiencies, permitting it to supplement its tender or submit a new list of subcontractors.

26 On 26 February 2019, however, the contracting authority decided to terminate the tender procedure, on the basis that the call for tenders at issue in the main proceedings was unclear, before reversing that decision on 18 March 2019. The following day, it informed Sanresa in writing that it had 40 days to supply an authorisation for the international shipment of waste or to change subcontractors.

27 The contracting authority rejected Sanresa's tender on 21 May 2019, on the ground (amongst others) that Sanresa did not hold the authorisation required under Regulation No 1013/2006 for the international shipment of waste, and thus had not demonstrated that it had the right to pursue the activity in question.

28 On 30 May 2019, Sanresa lodged a complaint against the rejection of its tender, arguing that it met the supplier capacity requirement as set out in the call for tenders. Sanresa considered that the call for tenders did not require the tender to be accompanied by consent from the national authorities for an international shipment of waste. The complaint was rejected, and Sanresa then brought legal proceedings which were dismissed both at first instance and on appeal. It then appealed on a point of law to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania).

29 According to that court, the main issue arising relates to the proper classification of the clause of the call for tenders under which the tenderer is required, in the course of the procurement procedure, to produce consent from the competent authorities, in accordance with Regulation No 1013/2006, to the international shipment of the waste, the parties being in dispute as to whether that clause is a condition relating to supplier capacity, or a condition relating to the performance of the contract once concluded.

30 The referring court observes, first of all, that the parties to the main proceedings consider that that clause does not expressly require the consent of the competent authorities to the international shipment of waste to be attached to the tender.

31 It then states that, like Sanresa, it considers that the obligation to produce the consent does not relate to the capacity of the supplier, but to the performance of the contract. Although the technical specifications are required to be sufficiently precise for tenderers to be able to identify the subject matter of the contract, and for the contracting authority to be able to award it, the contracting authority defined the subject matter of the contract – more specifically the composition of the hazardous waste to be removed, and its code – in an imprecise manner. Thus, *ex hypothesi*, it was impossible to supply all of the information at the time of submission of the tender.

32 Moreover, a situation in which the contracting authority has failed to exhaustively describe the subject matter of the contract may also be incompatible with Regulation No 1013/2006, given that the lawfulness of a shipment of waste depends (amongst other things) on compliance with the original conditions, on the basis of which consent for the shipment was given. In particular,

Article 17 thereof requires the notification procedure to be recommenced in the event that the composition and actual quantity of the hazardous waste, considered in its entirety, become apparent in the course of performance of the contract.

33 Furthermore, the referring court states that under that regulation, and particularly Article 11(1)(b) thereof, the competent authorities of the States of dispatch, destination and transit have a broad discretion to raise objections to the shipment of waste for disposal or recovery, for example on the grounds of national legislation or public order. There is thus a non-negligible risk of the successful tenderer finding that it is legally impossible for it to perform the contract. In those circumstances, the referring court doubts that the risk of refusal of consent should be laid on the contracting authority which has chosen a tenderer and entered into a contract with it.

34 Last, the referring court states that when it provided, in paragraph 23.1.2 of the call for tenders, that 'in the event that the right to pursue the activity in question is dependent on some capacity of the supplier which has not been verified, or not fully verified, the supplier must undertake to the contracting authority that the contract will only be performed by persons holding that right' – this wording being identical to that of Article 35(2)(3) of the Law on public procurement – the contracting authority in question was laying down a condition relating to the capacity of tenderers to perform the contract.

35 In that regard, the referring court states that, up until 2017, calls for tender did not state any requirement as to the tenderers' right to pursue the contractual activity, and it was therefore a matter for tenderers to determine, in the light of the definition of the subject matter of the contract and the technical specifications, what certificates, permits and declarations would be necessary to demonstrate that they possessed the specific right required.

36 The referring court indicates that since a judgment of 14 February 2017, reversing the previous position, it considers that contracting authorities are not entitled to reject tenders on the ground that they do not meet requirements which were not made public, even if those requirements arise from mandatory legal standards. Furthermore, where requirements relating to the right to pursue the activity in question, imposed by specific laws, have not been clearly set out in the terms of the contract, and tenderers do not meet those requirements, those tenderers must be given the opportunity to remedy the deficiencies in their tenders, and this extends to designating a new partner or subcontractor for the performance of the contract, even after the deadline for submission of tenders has passed.

37 The referring court adds that, in enacting the Law on public procurement, by which it transposed Directive 2014/24, the Lithuanian legislature was seeking to avoid a situation where the contracting authorities could reject tenders on the basis that the tenderers did not have the necessary capacity, when the capacity conditions had not been clearly set out in the procurement documents. To that end, the referring court observes, Article 35(2)(3) of the Law on public procurement now expressly provides that it is open to contracting authorities not to verify, or not fully to verify, the relevant capacities of the suppliers.

38 The referring court nevertheless questions whether the unlimited power thus conferred on the contracting authorities not to verify that the tenderers have the right to pursue the relevant activity is compatible with the principles of transparency and the protection of legitimate expectations, and with the rational organisation of public procurement procedures.

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

'(1) Are Article 18(2), point (b) of the first subparagraph and the second subparagraph of Article 56(1), point (a) of the first subparagraph of Article 58(1) and the second subparagraph of Article 58(2) of Directive 2014/24 and Articles 3 to 6 and other provisions of Regulation No 1013/2006 (together or separately but without limitation thereto) to be interpreted as meaning that consent issued to an economic operator, which is necessary to ship waste from one Member State of the European Union to another, is to be classified as a requirement for performance of a service contract and not a requirement concerning the right to pursue an activity?

(2) If the aforementioned consent to ship waste is to be regarded as a supplier selection criterion (suitability to pursue the professional activity), are the principles of transparency and fair competition laid down in the first and second subparagraphs of Article 18(1) of Directive 2014/24, point (a) of the first subparagraph of Article 58(1) and the second subparagraph of Article 58(2) of that directive, the free movement of persons, goods and services enshrined in Article 26(2) TFEU and Articles 7 to 9 of Regulation No 1013/2006 (together or separately but without limitation thereto) to be interpreted and applied in such a way that conditions for the public procurement of waste management services, especially concerning closing dates for the submission of tenders, must create for domestic or foreign suppliers seeking to transport waste across the borders of the Member States of the European Union conditions enabling unrestricted participation in such procurement procedures, and they must inter alia be allowed to produce the aforementioned consent if it has been granted on a later date than the closing date for the submission of tenders?

(3) If the aforementioned consent to ship waste, in accordance with Article 49 of and point 17 of Part C of Annex V to Directive 2014/24 and Article 70 thereof, is to be regarded as a requirement for performance of a public procurement contract, should the principles of public procurement laid down in Article 18 of that directive and the general contract award procedure laid down in Article 56 thereof be interpreted as meaning that in public procurement procedures the tender of a participant who has not produced that consent may not be rejected?

(4) Are Article 18, point (b) of the first subparagraph of Article 56(1), point (a) of the first subparagraph of Article 58(1) and Article 58(2) of Directive 2014/24 to be interpreted as precluding national legislation under which contracting authorities are entitled to define in advance in public procurement documents a tender evaluation procedure under which the suppliers' right to pursue an activity (suitability to pursue the professional activity) will be verified partially or not verified at all even though the possession of that right is a prerequisite for lawful performance of the public procurement contract and contracting authorities may be aware in advance of the need for that right?

(5) Are Article 18 and the first subparagraph of Article 42(1) of Directive 2014/24 and Articles 2(35), 5 and 17 of Regulation No 1013/2006 as well as other provisions of that regulation to be interpreted as meaning that, in the case of procurement of waste management services, contracting authorities may lawfully procure such services only if they

clearly and precisely define in the public procurement documents the quantity and composition of the waste and other important conditions for performing the contract (for example, packaging)?'

Consideration of the questions referred

The first question

40 By its first question, the referring court is essentially asking whether Article 18(2) and Articles 58 and 70 of Directive 2014/24 are to be interpreted as meaning that, in the context of a public procurement procedure for waste management services, the obligation of an economic operator wishing to ship waste from a Member State to another State to possess, in compliance inter alia with Article 2(35) and Article 3 of Regulation No 1013/2006, the consent of the competent authorities of the States concerned by the shipment, is a condition relating to its suitability to pursue the professional activity or a condition of performance of the contract.

41 First, it is apparent from Article 56(1)(b), and from Articles 57 and 58 of Directive 2014/24, that only qualitative selection criteria can be imposed by contracting authorities as conditions of participation in a public procurement procedure. As is apparent from the second subparagraph of Article 58(1) of that directive, the criteria are those set out in paragraphs 2 to 4 thereof, relating to suitability to pursue the professional activity, economic and financial standing and technical and professional ability.

42 In the present case, it is necessary to determine whether the obligation to obtain the consent of the competent authorities to transfer hazardous waste from a Member State to another State, as required under the contract at issue in the main proceedings, can relate to one of the three categories of qualitative selection criteria set out in Article 58(1)(a) to (c) of that directive, and particularised in paragraphs 2 to 4 thereof.

43 Article 58(2) of Directive 2014/24, which relates to the suitability of an economic operator to pursue the professional activity relevant to a public contract, makes provision in that regard permitting contracting authorities to require economic operators to be enrolled in a professional or trade register in their Member State of establishment. Similarly, in procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.

44 However, the obligation to obtain the consent of the competent authorities concerned in order to ship waste from a Member State to another State cannot be equated either with the obligation to be enrolled in a professional or trade register or to the obligation to possess a particular authorisation or to be a member of a particular organisation.

45 It is thus apparent that the obligation to obtain such consent does not relate to suitability to pursue the professional activity as referred to in Article 58(1)(a) of the directive.

46 Equally, that obligation does not relate to the economic and financial standing of an economic operator as referred to in Article 58(1)(b) of the directive.

47 There remains the question of whether the obligation might relate to technical and professional ability as referred to in Article 58(1)(c). Article 58(4) of Directive 2014/24 provides that contracting authorities may impose on economic operators, as a condition of participation in a procurement procedure, a requirement for them to possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard. They may require, in particular, that economic operators have a sufficient level of experience, demonstrated by suitable references from contracts performed in the past.

48 The assessment of the technical and professional ability of a candidate or a tenderer thus depends, in particular, on a retrospective evaluation of the experience gained by the operators through the performance of previous contracts, as is apparent from the two references to experience in Article 58(4) of the directive.

49 Thus, the obligation to obtain the consent of the competent authorities concerned, in order to transfer waste from a Member State to another State, equally does not relate to the technical and professional ability of a candidate or tenderer as referred to in Article 58(1)(c) of the directive.

50 That assessment is not called into question by the fact that paragraph (g) of Part II of Annex XII to Directive 2014/24 permits economic operators to provide evidence of their technical ability through an indication of the environmental management measures they will be able to apply when performing the contract. The environmental management measures referred to in that provision are measures that an economic operator intends to apply on its own initiative.

51 Second, Article 70 of the directive, which is headed 'Conditions for performance of contract', provides that contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract within the meaning of Article 67(3) thereof. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

52 In that regard, it is apparent that the obligation to obtain the consent of the competent authorities of the States of dispatch, transit and destination prior to the shipment of waste, laid down by Articles 3 to 6 of Regulation No 1013/2006, relates to the performance of the contract. Its purpose is to lay down special conditions addressing environmental considerations, which are to apply on export of the waste to another State. Accordingly, this requirement can only sensibly be raised in relation to an economic operator intending to export waste to another State.

53 Furthermore, by imposing such an obligation, the contracting authority complies with Article 18(2) of Directive 2014/24, which requires Member States to take appropriate measures to ensure that in the performance of public contracts economic operators comply inter alia with applicable obligations in the field of environmental law established by Union law.

54 Last, it does not appear that classifying the obligation as a 'condition of performance of the contract' would undermine the performance of the contract at issue in the main proceedings. The fact that an economic operator has already carried out activities practically equivalent to that required by the contract provides reason to believe that it is suitable to perform that contract. Furthermore, as the European Commission pointed out in its written observations, the contracting authority would have been able to protect itself against the risk of non-performance of the contract by imposing selection criteria designed to reduce the risk of consent not being granted, for example by giving weight to previous experience in the shipment of hazardous waste.

55 In the light of the foregoing considerations, the answer to the first question is that Article 18(2) and Articles 58 and 70 of Directive 2014/24 are to be interpreted as meaning that, in the context of a public procurement procedure for waste management services, the obligation of an economic operator wishing to ship waste from a Member State to another State to have the consent of the competent authorities of the States concerned by the shipment, in accordance inter alia with Article 2(35) and Article 3 of Regulation No 1013/2006, is a condition of performance of the contract.

The second question

56 Having regard to the answer given to the first question, there is no need to answer the second question.

The third question

57 By its third question, the referring court is essentially asking whether Article 70 of Directive 2014/24, read in conjunction with Article 18(1) of that directive, is to be interpreted as meaning that a tenderer's bid may not be rejected solely on the ground that, at the time of submitting the bid, the tenderer has not produced proof that it meets a condition of performance of the contract concerned.

58 Article 70 of Directive 2014/24 provides that the conditions for performance of the contract must be indicated in the call for competition or the procurement documents.

59 In the present case, it is apparent from the order for reference that the contracting authority was not in a position to state the exact quantity of hazardous waste to be treated, and also that it is not in dispute, between the parties to the main proceedings, that none of the procurement documents contained an express requirement for the competent authorities' consent to the international shipment of waste to be attached to the tender.

60 However, while a contracting authority is required, in principle, to state any condition of performance in the call for tenders or the procurement documents, the failure to do so does not make the procurement procedure unlawful where the condition of performance in question clearly arises from EU legislation applicable to the contractual activity, and from the decision of an economic operator not to perform the contract on the territory of the State in which the contracting authority is located.

61 In that regard, under Article 4 of Regulation No 1013/2006, an economic operator intending to ship waste, as referred to in Article 3(1)(a) or (b) thereof, must submit to the competent authority of dispatch, amongst other things, the notification and movement documents, the contract it has concluded with the consignee responsible for the recovery or disposal of the notified waste, and a financial guarantee or equivalent insurance. Those provisions thus presuppose that the tenderer is in possession of detailed information as to the quantity and composition of the waste, the shipment itinerary and the modes of transport to be used in the course of shipment.

62 Furthermore, under Article 58 of Directive 2014/24, in order to participate in a procurement procedure, a tenderer is required to demonstrate that, at the time of submitting the tender, it meets the qualitative selection criteria set out in Article 58(1)(a) to (c) of that directive. In

contrast, the tenderer can wait until it is awarded the contract before supplying proof that it fulfils the conditions of performance of the contract. The qualitative selection criteria enable the contracting authority to restrict the tendering procedure to economic operators whose technical and professional ability, grounded in recent experience, suggests that they will be able to perform the contract in question, obtaining the required authorisations or logistical services as necessary. Furthermore, to oblige tenderers to satisfy all the conditions of performance of the contract at the time of submission of their tenders would be to impose an excessive requirement – one which might therefore dissuade economic operators from participating in procurement procedures – and would thus infringe the principles of proportionality and transparency guaranteed by Article 18(1) of the directive.

63 In those circumstances, the answer to the third question is that Article 70 of Directive 2014/24, read in conjunction with Article 18(1) of that directive, is to be interpreted as meaning that a tenderer's bid may not be rejected solely on the ground that, at the time of submitting the tender, the tenderer has not produced proof that it meets a condition of performance of the contract concerned.

The fourth question

64 By its fourth question, the referring court is essentially asking whether Article 18, point (b) of the first subparagraph of Article 56(1), point (a) of the first subparagraph of Article 58(1) and Article 58(2) of Directive 2014/24 are to be interpreted as precluding national legislation under which contracting authorities are entitled to define in the procurement documents a tender evaluation procedure under which the suitability of tenderers to pursue the contractual activity may or may not be verified, when suitability is a prerequisite of lawful performance of the contract, and this ought to be known to the contracting authority before the procurement documents are drawn up.

65 That question is based on the premiss that the obligation of an economic operator wishing to ship waste from a Member State to another State to possess, in compliance inter alia with Article 2(35) and Article 3 of Regulation No 1013/2006, the consent of the competent authorities concerned, constitutes a qualitative selection criterion falling within Article 58 of Directive 2014/24.

66 However, since this obligation is to be classified as a condition for performance of the contract within the meaning of Article 70 of that directive, as is apparent from the answer to the first question, it is not necessary to answer the fourth question.

The fifth question

67 By its fifth question, the referring court is essentially asking whether Article 18 and the first subparagraph of Article 42(1) of Directive 2014/24 are to be interpreted as meaning that, in a public contract for waste management services, the contracting authority may only procure such services lawfully if it specifies the quantity and composition of the waste, as well as the other important terms of performance of the contract, in a clear and precise manner in the procurement documents.

68 Questions relating to the interpretation of EU law which are referred by the national court, under the procedure provided for in Article 267 TFEU, enjoy a presumption of relevance. The Court may thus refuse to rule on a question referred by a national court only where it is quite obvious that the

interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. The Court's function in preliminary rulings is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see, to that effect, judgment of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraphs 41 to 43 and the case-law cited).

69 Besides the fact that this question is formulated in abstract and general terms, the order for reference does not contain the minimum of explanatory material that would be necessary to establish a link between the question and the dispute in the main proceedings.

70 In those circumstances, the question is hypothetical and therefore inadmissible.

Costs

71 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Ninth Chamber) hereby rules:

1. **Article 18(2) and Articles 58 and 70 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 are to be interpreted as meaning that, in the context of a public procurement procedure for waste management services, the obligation of an economic operator wishing to ship waste from a Member State to another State to have the consent of the competent authorities of the States concerned by the shipment, in accordance inter alia with Article 2(35) and Article 3 of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, is a condition of performance of the contract.**

2. **Article 70 of Directive 2014/24, read in conjunction with Article 18(1) of that directive, is to be interpreted as meaning that a tenderer's tender may not be rejected solely on the ground that, at the time of submitting the tender, the tenderer has not produced proof that it meets a condition of performance of the contract concerned.**

[Signatures]