



REPORT FOR THE HEARING
in Case E-7/19

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Public Procurement Complaints Committee (*Kærunefnd útboðsmála*), in the case between

Tak – Malbik ehf.

and

the Icelandic Road and Coastal Administration and Þróttur ehf.,

concerning the interpretation 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, and in particular Article 2(6), 2(7) and 2(9) thereof.

I Introduction

1. By a letter of 17 September 2019, registered at the Court on 23 September 2019, the Public Procurement Complaints Committee (“PPCC”) made a request for an Advisory Opinion in a case pending before it between Tak – Malbik ehf. (“the Complainant”), and the Icelandic Road and Coastal Administration (“the Defendant”) and Þróttur ehf. (“Þróttur”).

2. The case before the PPCC concerns the validity of a decision taken by the Defendant on 1 April 2019 to award a contract (“the Contract”) for the production of material from a quarry near Fossamelar to Þróttur, and the liability of the Defendant to pay compensation and damages to the Complainant on the basis that the decision was invalid. During the proceedings, the PPCC has further sought to determine whether the Contract was a “works contract” or a “service contract” within the meaning of Article 2 of Directive 2014/24/EU (“the Directive”), in order to ascertain whether the invitation to tender was correctly advertised.

II Legal background

EEA law

3. The Directive was incorporated into the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) by Decision of the EEA Joint Committee No

97/2016 (OJ 2017 L 300, p. 49, and EEA Supplement 2017 No 73, p. 53), which repealed and replaced Directive 2004/18/EC (“Directive 2004/18/EC”) of the European Parliament and of the Council of 31 March 2004 in the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2014 L 94, p. 65 and EEA Supplement 2016 No 27, p. 1057) at point 2 of Annex XVI to the EEA Agreement. Constitutional requirements were indicated and fulfilled by Iceland, Liechtenstein and Norway in November 2016, and consequently the decision entered into force on 1 January 2017, and the time limit to implement the Directive expired on the same date.

4. Recitals 2, 4, 8 and 9 of the Directive read:

(2) Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled ‘Europe 2020, a strategy for smart, sustainable and inclusive growth’ (‘Europe 2020 strategy for smart, sustainable and inclusive growth’), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council and Directive 2004/18/EC of the European Parliament and of the Council should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

(4) The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that of Directive 2004/18/EC. The Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract. It should be clarified that such acquisitions of works, supplies or services should be subject to this Directive whether they are implemented through purchase, leasing or other contractual forms.

The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question, not necessarily requiring a transfer of ownership to the contracting authorities. Furthermore, the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall within the scope of the public procurement rules. Similarly, situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement but simple authorisation schemes (for instance licences for medicines or medical services).

(8) A contract should be deemed to be a public works contract only if its subject-matter specifically covers the execution of activities listed in Annex II, even if the contract covers the provision of other services necessary for the execution of such activities. Public service contracts, in particular in the sphere of property management services, may, in certain circumstances, include works. However, in so far as such works are incidental to the principal subject-matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the public service contract as a public works contract.

However, in view of the diversity of public works contracts, contracting authorities should be able to make provision for contracts for the design and execution of work to be awarded either separately or jointly. This Directive is not intended to prescribe either joint or separate contract awards.

(9) The realisation of a work corresponding to the requirements specified by a contracting authority requires that the authority in question must have taken measures to define the type of the work or, at the very least, have had a decisive influence on its design. Whether the contractor realises all or part of the work by his own means or ensures their realisation by other means should not change the classification of the contract as a works contract, as long as the contractor assumes a direct or indirect obligation that is legally enforceable to ensure that the works will be realised.

5. Title I of the Directive, entitled “Scope, Definitions and General Principles”, contains Articles 2, 4, 6 and 23 of the Directive.

6. Article 2 of the Directive entitled “Definitions”, reads as follows:

1. For the purposes of this Directive, the following definitions apply:

[...]

(5) ‘public contracts’ means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;

(6) ‘public works contracts’ means public contracts having as their object one of the following:

(a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II;

(b) the execution, or both the design and execution, of a work;

(c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;

(7) *‘a work’ means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function;*

[...]

(9) *‘public service contracts’ means public contracts having as their object the provision of services other than those referred to in point 6;*

[...]

7. Article 4 of the Directive, entitled “Threshold amounts”, as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts (OJ 2017 L 337, p. 19) incorporated into the EEA Agreement by Joint Committee Decision No 26/2018 amending Annex XVI (Procurement) to the EEA Agreement (OJ 2019 L 323, p. 51, and EEA Supplement 2019 No 98, p. 46) (“Commission Delegated Regulation (EU) 2017/2365”), reads as follows:

This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

(a) EUR 5 548 000 for public works contracts;

(b) EUR 144 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; [...]

8. Article 6 of the Directive, entitled “Revision of the thresholds and of the list of central government authorities”, provides as follows:

1. Every two years from 30 June 2013, the Commission shall verify that the thresholds set out in points (a), (b) and (c) of Article 4 correspond to the thresholds established in the World Trade Organisation Agreement on Government Procurement (GPA) and shall, where necessary, revise them in accordance with this Article.

9. Article 23 of the Directive, entitled “Nomenclatures”, provides as follows in its first paragraph:

1. Any references to nomenclatures in the context of public procurement shall be made using the Common Procurement Vocabulary (CPV) as adopted by Regulation (EC) No 2195/2002.

10. Title II of the Directive, entitled “Rules on Public Contracts”, contains Articles 42, 49 and 51 of the Directive.

11. Article 42 of the Directive, entitled “Technical specifications”, provides as follows:

1. The technical specifications as defined in point 1 of Annex VII shall be set out in the procurement documents. The technical specification shall lay down the characteristics required of a works, service or supply.

Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

[...]

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:

(a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

(b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when any of those do not exist - national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words 'or equivalent';

(c) in terms of performance or functional requirements as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;

(d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.

[...]

12. Article 49 of the Directive, entitled "Contract notices", provides as follows:

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.

13. Article 51 of the Directive, entitled “Form and manner of publication of notices”, provides in its second paragraph as follows:

2. Notices referred to in Articles 48, 49 and 50 shall be drawn up, transmitted by electronic means to the Publications Office of the European Union and published in accordance with Annex VIII. [...]

14. Annex II to the Directive, entitled “List of the activities referred to in Point 6(a) of Article 2(1)”, lists works activities in accordance with the statistical classification of economic activities in the European Community¹ (“NACE”) and Common Procurement Vocabulary (“CPV”) codes.² The first sentence of Annex II provides that:

In the event of any difference of interpretation between the CPV and the NACE, the CPV nomenclature will apply.

15. Annex II to the Directive lists “Construction” under CPV Code 45000000 and “Site preparation” under CPV Code 45100000.

16. Annex II to the Directive also lists “Demolition and wrecking of buildings; earth moving” under CPV Code 45110000. The “Notes” provide as follows:

This class includes:

[...]

— earth moving: excavation, landfill, levelling and grading of construction sites, trench digging, rock removal, blasting, etc. [...]

17. Annex II to the Directive lists “Building of complete constructions or parts thereof; civil engineering” under CPV Code 45200000.

18. Annex II to the Directive also lists “Construction of highways, roads, airfields and sport facilities” under CPV Code 45230000. The “Notes” provide as follows:

This class includes:

— construction of highways, streets, roads, other vehicular and pedestrian ways,

[...]

— painting of markings on road surfaces and car parks.

¹ Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community (OJ 1990 L 293, p. 1).

² Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) (OJ 2002 L 340, p. 1, and EEA Supplement 2004 No 15, p. 18), incorporated into the EEA Agreement by Joint Committee Decision No 180/2003 of 5 December 2003 amending Annex XVI (Procurement) to the EEA Agreement (OJ 2004 L 88, p. 61 and EEA Supplement 2004 No 15, p. 18)(“Regulation No 2195/2002”).

This class excludes:

— *preliminary earth moving, see 45.11.*

19. Annex II to the Directive also lists “Other construction work involving special trades” under CPV Codes 45250000 and 45262000. The “Notes” provide as follows:

This class includes:

— *construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment, [...]*

20. Annex VII to the Directive, entitled “Definition of certain technical specifications”, provides as follows in its first paragraph:

For the purposes of this Directive:

(1) ‘technical specification’ means one of the following:

(a) in the case of public works contracts the totality of the technical prescriptions contained in particular in the procurement documents, defining the characteristics required of a material, product or supply, so that it fulfils the use for which it is intended by the contracting authority; those characteristics include levels of environmental and climate performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods at any stage of the life cycle of the works; those characteristics also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;

(b) in the case of public supply or service contracts a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures;

21. Annex I to Regulation No 2195/2002 entitled “Common Procurement Vocabulary (“CPV”), provides as follows:

Structure of the classification system

1. *The CPV consists of a main vocabulary and a supplementary vocabulary.*
2. *The main vocabulary is based on a tree structure comprising codes of up to nine digits associated with a wording that describes the supplies, works or services forming the subject of the contract.*

The numerical code consists of 8 digits, subdivided as follows:

- *the first two digits identify the divisions;*
- *the first three digits identify the groups;*
- *the first four digits identify the classes;*
- *the first five digits identify the categories.*

Each of the last three digits gives a greater degree of precision within each category.

A ninth digit serves to verify the previous digits. [...]

22. The threshold amounts set out in Article 4 of the Directive as amended by Commission Delegated Regulation (EU) 2017/2365 are also expressed in ISK in the ESA notice entitled “Threshold values referred to in Directives 2014/23/EU, 2014/24/EU, 2014/25/EU and 2009/81/EC, expressed in the national currencies of the EFTA States” (OJ 2018 C 146, p. 7) which sets out the following table:

Thresholds in EUR	Thresholds in NOK	Thresholds in CHF	Thresholds in ISK
144 000	1 335 475	156 807	18 734 400
221 000	2 049 583	240 656	28 752 100
443 000	4 108 441	482 400	57 634 300
750 000	6 955 600	816 705	97 575 000
1 000 000	9 274 133	1 088 940	130 100 000
5 548 000	51 452 889	6 041 439	721 794 800

23. The section “Main Vocabulary” of Annex I (entitled “Common Procurement Vocabulary”) to Commission Regulation (EC) No 213/2008 of 28 November 2007 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV) and Directives 2004/17/EC

and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards the revision of the CPV (OJ 2008 L 74, p. 1), incorporated into the EEA Agreement by Joint Committee Decision No 14/2010 amending Annex XVI (Procurement) to the EEA Agreement (OJ 2010 L 101, p. 24, and EEA Supplement 2010 No 19, p. 26) lists under CPV Code 45254000-2 “Construction work for mining and manufacturing”.

National law

24. The Directive has been implemented in Iceland by way of Act No 120/2016 on Public Procurement (*Lög nr. 120/2016 um opinber innkaup*) (the “Icelandic Public Procurement Act”).³

25. Chapter I of the Icelandic Public Procurement Act, entitled “Purpose, definitions and scope”, contains Article 4.

26. Article 4 of the Icelandic Public Procurement Act, entitled “Contracts governed by the Act”, provides as follows in its second and fourth paragraphs:

(2) Work contracts are contracts having as their object either the execution, or both the design and execution of works, or the execution of works, by whatever means corresponding to the requirements specified by the contracting authority. A work in this sense is the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

[...]

(4) Service agreements are contracts having as their object the provision of services, other than that referred to in works contracts, according to paragraph 2 [...]

27. Article 21 of the Icelandic Public Procurement Act within Chapter II “General Provisions”, entitled “Common procurement vocabulary”, provides as follows:

All references to classification systems in connection with public procurement that exceed threshold amounts for the EEA, according to paragraph 4 of Article 23, shall be based on the common procurement vocabulary (CPV).

28. Chapter III of the Icelandic Public Procurement Act, entitled “Threshold amounts”, contains Article 23. Article 23, paragraphs 1 and 4, of the Icelandic Public Procurement Act, entitled “Threshold amounts”, provides as follows:

Any public procurement of supplies and services exceeding ISK 15,500,000 and procurement of works exceeding ISK 49,000,000 shall be put up for tender and made in accordance with the procurement procedures stipulated in Chapter IV. Threshold

³ All translations of national legal provisions are unofficial.

amounts for procurement of public service contracts relating to social services and other specialised services according to Chapter VIII shall comply with paragraph 4.

[...]

The Minister shall publish threshold amounts for public procurement within the European Economic Area nominated in ISK through regulations in accordance with the commitments made by the Icelandic state according to the EEA Agreement. The threshold amounts shall be revised every two years, for the first time on 1 January 2018.

29. Chapter XI of the Icelandic Public Procurement Act, entitled “The Public Procurement Complaints Committee”, details, inter alia, the role and composition of the PPCC and the manner in which complaints are to be processed. Article 108 therein, entitled “Processing of the complaint and pre-trial evidence gathering”, provides in its seventh paragraph that the processing of complaints before the PPCC shall otherwise be governed by the Administrative Procedures Act.⁴

30. Regulation No 178/2018 on the Advertisement of procurement on a tender website, the reference amounts for public procurement and procurement pursuant to the World Trade Organisation Agreement on public procurement⁵ (“Icelandic Regulation No 178/2018”) provides in its Article 2 as follows:

Reference amounts for the obligation of domestic tenders according to paragraph 1, Article 23 of the Act on Public Procurement are ISK 15,500,000 for the procurement of goods and services and ISK 49,000,000 for works contracts.

31. Article 3 of Icelandic Regulation No 178/2018 provides as follows:

Reference amounts for the tender obligation in the European Economic Area according to paragraph 4, Article 23 of the Public Procurement Act shall be as follows:

Public entities, other than local authorities, their agencies, other public entities under their auspices or organisations that such entities may be organised into:

Goods contracts ISK 18,734,400

Service contracts ISK 18,734,400

Work contracts ISK 721,794,800

⁴ Stjórnslutlög nr. 37/1993.

⁵ Reglugerð nr. 178/2018 um auglýsingu innkaupa á útbodsvef, viðmiðunarfjárhæðir vegna opinberra innkaupa og innkaup samkvæmt samningi Alþjóðaviðskiptastofnunarinnar (WTO) um opinber innkaup.

32. Regulation No 2195/2002 has been implemented in Iceland by Icelandic Regulation No 411/2008⁶, as amended by Icelandic Regulation No 933/2010⁷.

33. Article 29 paragraph 2 of the Road Act No 80/2007⁸ (“Icelandic Road Act”) provides as follows:

The Minister is authorised to set a Regulation further specifying the minimum distance between connections to national roads and set further provisions on the structure and finishing of such connections. Provisions shall specify further rules by road categories and traffic density, always having regard to traffic safety.

34. Article 42 of the Icelandic Road Act provides as follows:

The Minister is authorised to set general rules on the design of roads open to the public for free traffic and supervision of their construction. The entity responsible for road maintenance is responsible for these requirements being satisfied.

35. Rules on the construction of roads and the design of national highways open to the public for free traffic are set out in Rules No 180/2015 on the design of national highways open to the public for free traffic (“Icelandic Rules No 180/2015”).⁹

III Facts and procedure

36. In March 2019, the Defendant called for bids for the production of material from a quarry near Fossamelar, Iceland. The procurement documentation stated that the successful bidder should produce base materials of specific sizes and stockpile them within a specified area. The material produced was to meet the detailed specifications prescribed by the procurement documentation. The contractor would be responsible for producing material in accordance with the wishes of the buyer, and production tests should be carried out to verify this. The buyer would provide the contractor with undisturbed material and bedrock for processing. The cost of the services tendered was estimated to be ISK 91 million. The Contract was not advertised within the EEA.

37. On 26 March 2019, bids were opened. Þróttur’s bid was the lowest at ISK 92,579,082. The Complainant’s bid was the second lowest, at ISK 92,965,700. On 1 April 2019, the Defendant announced to the tenderers that the Contract would be awarded to Þróttur.

38. In an email sent on 11 April 2019, the Complainant contested the Defendant’s decision to award the Contract to Þróttur and requested, inter alia, documentation

⁶ Reglugerð nr. 411/2008 um gildistöku reglugerða Evrópusambandsins um sameiginlegt innkaupaorðasafn vegna opinberra innkaupa.

⁷ Reglugerð nr. 933/2010 um (1.) breytingu á reglugerð nr. 411/2008, um gildistöku reglugerða Evrópusambandsins um sameiginlegt innkaupaorðasafn vegna opinberra innkaupa

⁸ Vegalög nr. 80/2007.

⁹ Reglur nr. 180/2015 um hönnun þjóðvega sem opnir eru almenningi til frjálsrar umferðar.

outlining the means by which the lowest bidder had been determined. The Complainant alleges that Þróttur did not fulfil the general conditions of the procurement as regards practical experience and the conditions for the experience of the chief project supervisor, and, therefore, that Þróttur's offer was invalid. .

39. On 12 April 2019, the Defendant responded to the Complainant by email declining to disclose information regarding the determination of the lowest bidder. The Defendant maintains that Þróttur fulfilled all the conditions of the procurement documents and that, therefore, as the lowest bidder, Þróttur should be contracted.

40. On 12 April 2019, the Complainant also lodged a complaint with the PPCC, asking it to annul the Defendant's decision to award the Contract to Þróttur. The complaint had the effect of automatically suspending the procurement process. The PPCC is an administrative body which must resolve complaints from economic operators regarding alleged infringements of the Icelandic Public Procurement Act, as stated in Article 103(2) thereof. Pursuant to Article 108(7) of the Icelandic Public Procurement Act, the PPCC is, inter alia, under a duty to properly investigate all matters concerning each case before it. The PPCC thus considers it within its competence to examine whether procurements, which are subject to appeal, have been properly advertised, including whether EEA public procurement obligations have been met, regardless of whether the parties to the matter raise such issues.

41. On 13 May 2019, the PPCC requested information from the Defendant as to whether or not the call for tenders had been advertised in the EEA and, if not, on what grounds. On 20 May 2019, the Defendant responded saying that the call for tenders had not been advertised in the EEA, as it involved the award of a "works contract" pursuant to Article 4(2) of the Icelandic Public Procurement Act, and Article 2(6) and (7) of the Directive, the value of which fell below the threshold amount for the obligation to tender under Icelandic Regulation No 178/2018.

42. On 7 June 2019, the PPCC rejected the Defendant's application to lift the automatic suspension of the contract, on the basis that there was a substantial likelihood that the Defendant had infringed the Icelandic Public Procurement Act. The suspension of the procurement is thus pending until the Complainant's claims have been resolved. The PPCC stated in its decision that it considered that the appealed procurement was intended to conclude a "service contract", within the meaning of Article 4(4) of the Icelandic Public Procurement Act and Article 2(9) of the Directive, not a works contract. The PPCC noted that the "materials processing" involved in the procurement at issue does not seem to fall within the scope of the activities specified in Annex II to the Directive, in view of the CPV codes contained therein. For this reason, the PPCC considered that the threshold amount for a service contract prescribed by Icelandic Regulation No 178/2018 was exceeded, and that the call for tenders should have been advertised in the EEA.

43. On 15 July 2019, the PPCC notified the parties that it was considering seeking an advisory opinion of the EFTA Court in order to determine what kind of contract was involved in the call for tenders, cf. the Directive, and invited the parties to make

statements. The Defendant and Þróttur maintained that the Contract was a “works contract”, as it involved the manufacture of road construction material, which is an integral part of civil engineering activities in the form of road construction. The Complainant agreed with the PPCC’s characterisation of the Contract as a “service contract”.

44. The request, dated 17 September 2019, was registered at the Court on 23 September 2019.

45. The PPCC has referred the following question to the Court:

Is a contract to be pursued following an invitation to tender, in which tenderers undertake to process and stockpile certain raw materials provided by the contracting authority, and in accordance with the contracting authority’s requirements, considered a works contract within the meaning of Directive 2014/24/EU, cf. in particular paragraphs 6 and 7 of Article 2, or a service contract within the meaning of the Directive, cf. in particular Article 2(9)?

IV Written observations

46. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the Defendant, represented by Eypóra Hjartardóttir, Attorney; and
- the EFTA Surveillance Authority (“ESA”), represented by Ewa Gromnicka, Ingibjörg-Ólöf Vilhjálmisdóttir and Carsten Zatschler, members of its Department of Legal & Executive Affairs, acting as Agents.

V Summary of the arguments submitted

The Defendant

47. The Defendant is of the view that the Contract is a “work contract” pursuant to Article 4, paragraph 2 of the Icelandic Public Procurement Act. That provision provides that a “work contract” comprises a contract with the aim of construction, or construction and design, of a particular project or the implementation of a project, by whatever methods corresponding to the requirements set out by the purchaser. Work, in the context of that provision, is the result of construction or engineering methods that may have an economic or technical function. The procurement at issue relates to the implementation of a project with methods corresponding to special requirements of the Road and Coastal administration as the purchaser, and thus corresponds to Article 4, paragraph 2 of the Icelandic Public Procurement Act.

48. A comparable definition of a “work” is found in Article 2(1)(6) and (7) of the Directive. Article 2(1)(6)(a) of the Directive states that public works contracts are, inter

alia, concerned with the “execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II”. Annex II to the Directive contains an overview of the activities referred to in Article 2(1)(6)(a) of the Directive. Annex II includes item 45.25 on “Other construction work involving special trades”, which includes “construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment” with the CPV codes 45250000 and 45262000. The Defendant submits that, according to Recital 8 to the Directive, a contract should only be considered a “public works” contract if its subject-matter specifically covers the execution of the activities listed in Annex II, even if the contract covers other services necessary to perform such activities.

49. The Defendant submits that it has, since 1996, tendered materials processing in two manners: as an independent tender covering the processing of materials ground into piles for the maintenance of roads and other communication structures, or as part of a total execution of a specific work. The Defendant has, therefore, in good faith and without objections classified these as works contracts and used the corresponding reference amounts. The estimated value of the procurement at issue was ISK 91,000,000. It was thus the assessment of the Defendant that the work concerned did not need to be tendered in the EEA, pursuant to Article 3 of Icelandic Regulation No 178/2018.

50. Taking into account the CPV codes for the procurement at issue, the Defendant is of the opinion that “materials processing” should be tendered on the basis of CPV codes 45250000 and 45262000.

51. The Defendant also refers to the earlier ruling of the PPCC in case No 13/2005. That case concerned the definition of the nature of a contract on the surface markings for streets in Reykjavík. The PPCC considered whether the proposed Contract was a “work contract”, where the list comprised “construction of road, buildings, railway lines et al.”. The PPCC found that the proposed Contract was a “work contract”, rather than a “service contract”, as surface markings on roads are an integral part of road construction. The PPCC also observed that work on the basis of the Contract covered precisely defined works, not undefined services, and that the quantities were specifically defined in a precise manner.

52. The Defendant considers that “materials processing” is an equally “inseparable part of road construction” as surface markings, since a road cannot be constructed unless adequate materials for road construction are at hand. There are strict rules in effect on the construction of roads and the design of national highways open to the public for free traffic (reference is made to Icelandic Rules No 180/2015 and to paragraph 2, Article 29 and Article 42 of the Icelandic Road Act). The requirements for materials for national highways, their quality and processing, are specified in the tender documents in each case. The materials must meet different standards and be processed in a special manner using civil engineering methods. Work on a materials processing contract has precise requirements on size, granular shape, proportion, quantity, adhesiveness etc., and sampling and the maintenance of records during the work phase is required in order to ascertain that processing takes place in the manner required. Quantities are defined

specifically, and quality is monitored by the purchaser. Specific equipment is required and used in consultation with the purchaser, and testing methods and precision requirements are specified. The Defendant has issued a “Quality Guideline”, in addition to various guidelines on the use of rock and the processing of materials for road construction.

53. Service contracts are, on the other hand, defined in Article 4, paragraph 4, of the Icelandic Public Procurement Act and in Article 2(1)(9) of the Directive as concerning public contracts on the provision of services other than those in work contracts. In light thereof, it is possible to conclude that the Contract is a “work contract” pursuant to the Icelandic Public Procurement Act and the Directive, in addition to CPV code 45254000-2, “Construction work for mining and manufacturing”. The Defendant views materials processing as an “inseparable part of road construction”, since it represents “construction activity that is specialised in one area that is common for different types of structures and requires special skill or equipment”. The Contract should thus be viewed as a work contract in line with a practice that has been carried out for many decades, without comments being made.

54. The Defendant does not propose any specific wording for the answer of the Court.

ESA

55. As a preliminary point, ESA notes that the Directive applies to public contracts above specified financial thresholds. The threshold applicable to public works contracts is significantly higher than those applicable to public service contracts. Whether a contract is to be characterised as a public works or service contract depends on the exact nature of the activity to be performed under the contract. Before commencing a procurement procedure, a contracting authority needs to determine the category into which the contract falls in order to ascertain whether the procurement will be subject to the Directive. ESA submits that a contract such as the one at hand does not result in “a work”, and therefore should be categorised as a public service contract.

56. At the outset, and for the avoidance of doubt, ESA submits that the reference in this case is admissible. The PPCC has the power to request advisory opinions of the Court. On the question whether a body making a reference is a “court or tribunal” within the meaning of Article 267 of the Treaty on the Functioning of the European Union (“TFEU”) the Court of Justice of the European Union (“ECJ”) has established a number of factors to facilitate this determination.¹⁰ The Court has, in applying the factors established by the ECJ, recognised various appeals bodies as “courts or tribunals” capable of requesting advisory opinions from the Court.¹¹ Furthermore, the PPCC’s

¹⁰ Reference is made to the judgments in *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH*, C-54/96, EU:C:1997:413, paragraph 23, and *Camera di Commercio, Industria, Artigianato e Agricoltura (CCIAA) di Cosenza v Grillo Star Srl.*, C-443/09, EU:C:2012:213, paragraph 20 and case law cited.

¹¹ Reference is made to Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraphs 7 to 31; Case E-9/17 *Edmund Falkenhahn AG v the Liechtenstein Financial Market Authority* [2018] EFTA Ct. Rep. 153; Case E-5/16 *Municipality of Oslo* [2017] EFTA Ct. Rep. 52; Joined Cases E-8/94 and E-9/94 *Forbrukerombudet v Mattel Scandinavia A/S and Lego Norge A/S* [1994-1995] EFTA Ct. Rep. 113,

ability to request advisory opinions from the Court is explicitly recognised in Article 108(3) of the Icelandic Public Procurement Act.

57. Secondly, ESA notes that the nature of the Contract in the present case was not disputed by the parties, but by the PPCC itself. However, the fact that the parties did not raise this issue does not preclude the PPCC from requesting an advisory opinion. Article 108(3) of the Icelandic Public Procurement Act empowers the PPCC to make such a request, as long as the parties are given the opportunity to state their views. In line with Article 10 of the Icelandic Administrative Procedures Act, the PPCC is an administrative body which, when reaching its conclusions, applies the so-called “investigation principle” that all cases be investigated in such a way that a sufficiently well-informed decision may be made. ESA submits that, if the PPCC has doubts as to the interpretation of the EEA law applicable in the case referred, the reference is admissible.

58. Considering the question referred, the essence of the question is whether a contract such as the one in question is a public works contract or a public service contract. “Public works contracts” are defined in Article 2(1)(6) of the Directive as having as their object one of the activities listed in Article 2(1)(6)(a) to (c). The definition of “public service contracts” in Article 2(1)(9) of the Directive is negative, in the sense that they are defined as public contracts having as their object the provision of services other than those referred to in Article 2(1)(6).

59. The notion of a public works contract is an autonomous and objective concept of EEA law. The ECJ has considered that the aims pursued by authorities are irrelevant, focusing instead on whether the criteria for the existence of the public contract are fulfilled.¹² Pursuant to this, the ECJ has applied public procurement directives to various arrangements described domestically as “development agreements” when they have been held to fulfil the objective requirements of the relevant directive.¹³ As noted by Advocate General Mengozzi in Case C-451/08 *Helmut Müller*¹⁴ in relation to the essentially identical provisions of the predecessor directive to the Directive, the concept of a public works contract includes: (i) the execution of specific works of the types listed in Annex II to the Directive; and (ii) the realisation of a completed property fulfilling an economic or technical function, normally defined as a “work”.

60. In order to answer the question referred each of the three alternative definitions of public works contracts in Article 2(6)(1)(a), (b) and (c) of the Directive must be examined. Under Article 2(6)(1)(a) of the Directive, the concept of a public works contract includes a contract that has as its object the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II to

paragraph 15, and E-4/04 *Pedice AS and Sosial og helsedirektoratet* [2005] EFTA Ct. Rep. 113, paragraphs 20 and 21.

¹² Reference is made to the judgment in *La Scala*, C-399/98, EU:C:2001:401, paragraph 52.

¹³ Reference is made to the judgments of 21 February 2008, *Commission v Italy*, C-412/04, EU:C:2008:102, paragraph 70; *Jean Auroux and Others v Commune de Roanne*, C-220/05, EU:C:2007:31, paragraph 40; and *Commission v France*, C-264/03, EU:C:2005:620, paragraph 36.

¹⁴ Reference is made to Opinion of Advocate General Mengozzi of 17 November 2009, in *Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben*, C-451/08, EU:C:2009:710, point 28.

the Directive. Annex II provides that, in the event of a difference in interpretation between the CPV and the NACE, the CPV nomenclature will apply. Therefore, ESA will focus on the CPV nomenclature.

61. The CPV vocabulary is based on a tree structure comprising codes of up to nine digits associated with a wording that describes the supplies, works or services forming the subject of the contract (see Annex I, point 2 of Regulation No 2195/2002). The activities listed in Annex II to the Directive all fall under division number 45, which describes construction work. According to a review of the functioning of the CPV codes and system, commissioned by the European Commission, the coverage of the CPV is generally complete and is binding.¹⁵ No widening of the activities covered beyond Annex II is to be deduced from the words “related to” in the wording of Article 2(1)(6)(a) of the Directive. Recital 8 of the Directive clarifies that a contract should be deemed to be a public works contract only if its subject-matter specifically covers the execution of activities listed in Annex II. Even if Annex II does not cover every activity in the construction sector, it has been designed as a legally exhaustive binding instrument.

62. Regarding the present case, ESA notes that the classification of works for the purposes of Annex II to the Directive is primarily a question of fact for the contracting authority to determine, subject to review by national courts.¹⁶ From the facts, it is not clear whether the Defendant announced in its invitation to tender which codes would be applicable in the process. Nonetheless, “materials processing” is not explicitly listed in Annex II.¹⁷

63. According to the guide to the CPV codes, the national authority should try to find a code that suits its needs as accurately as possible. More than one code may be used. The first one will be considered the title, which may be more general than the other codes in cases where no more accurate code is available.¹⁸ Notwithstanding that the application of Annex II to the Directive to the Contract remains a question of fact for the PPCC to review, ESA offers some observations. ESA considers that the relevant CPV codes would most likely fall within class 4511xxxx and class 4523xxxx. Class 4511xxxx concerns “Building demolition and wrecking work and earthmoving work”, and the activities under the Contract may fall within this class. However, Class 4511xxxx falls under group 451xxxxx, “Site preparation activities”. Given the tree structure of the CPV, ESA submits that specific activities must be read in the context

¹⁵ Reference is made to the “Final Report: Review of the Functioning of the CPV Codes/System”, December 2012 Ref. Ares(2017)936841 - 21/02/2017, pp. 11, 28 and 37; and the judgment in *Walter Tögel v Niederösterreichische Gebietskrankenkasse*, C-76/97, EU:C:1998:432, paragraph 37.

¹⁶ Reference is made to the judgment in *Felix Swoboda GmbH v Österreichische Nationalbank*, C-411/00, EU:C:2002:660, paragraph 62.

¹⁷ Reference is made to page 4 of the request for an advisory opinion.

¹⁸ Reference is made to the European Commission’s Guide, “Public Procurement in the European Union; Guide to the Common Procurement Vocabulary”.

of the higher level codes, which would mean that earth moving is to be understood as relating to site preparation.¹⁹

64. Class 4523xxxx includes construction work for highways and roads. However, it excludes preliminary earth moving in the notes on the NACE categorisation and the explanatory notes on the CPV.²⁰ Preliminary earthmoving work for road construction may therefore only fall under CPV class 4511xxxx. On the basis of the facts available to ESA, and taking into account the literal meaning of the terms in Annex II, it would seem that activities such as those at issue do not fall within Annex II. A mere relationship with road construction is not sufficient if the activity itself cannot be considered to fall under, for example, class 4523xxxx, or indeed category 45233xxx, in its own right. It is for the PPCC to verify whether the activities in the Contract and the relevant numbers of the CPV nomenclature in fact correspond.²¹

65. Under Article 2(1)(6)(b) of the Directive, the concept of a public works contract also includes a contract which has as its object the execution, or both the design and execution, of a work. A work is defined by Article 2(1)(7) of the Directive as the outcome of building or civil engineering works taken as a whole “which is sufficient in itself to fulfil an economic or technical function”. The outcome of the material processing in this case cannot be considered in itself to fulfil an economic or technical function. The fact that the material may have been earmarked by the Defendant for future road building, repairing or reconstruction is irrelevant for that definition: the subjective intention of the contracting authority is irrelevant.²² As a result, ESA submits that Article 2(1)(6)(b) of the Directive does not appear capable of covering the activity in the procurement at issue.

66. ESA considers that Article 2(1)(6)(c) of the Directive also does not appear to apply, for essentially the same reason that renders Article 2(1)(6)(b) of the Directive inapplicable: namely that the processing of materials does not result in a “work”. From the request of the PPCC, it seems that the Defendant relies on the fact that they consider that under the Contract, they exercise a “decisive influence on the type and design of the work” by specifying the requirements for the material produced. ESA submits that this approach is misconceived for at least two reasons, in addition to the fact that it cannot overcome the absence of a “work”, as already referred to above.

67. Firstly, “requirements specified by the contracting authority” should not be confused with technical specifications. Annex VII of the Directive, which should be read in conjunction with Article 42 of the Directive, provides a clear definition of “technical specifications”. Requirements concerning the materials to be processed, such as those at issue, constitute technical specifications within the meaning of those

¹⁹ Reference is made to the Opinion of Advocate General Mischo in *Felix Swoboda GmbH v Österreichische Nationalbank*, C-411/00, EU:C:2002:238, point 73.

²⁰ Reference is made to the “CPV 2008 Explanatory Notes”.

²¹ Reference is made to *Walter Tögel*, C-76/97, and *Felix Swoboda*, C-411/00, both cited above. For the purpose of establishing the correct code, additional information about the use of CPV codes is also provided in “The CPV 2008 Explanatory Notes” (pp. 23 and 24).

²² Reference is made to the Opinion of Advocate General Kokott in *Jean Auroux and Others v Commune de Roanne*, C-220/05, EU:C:2006:410, points 42 and 43.

provisions, which do not of themselves result in the Contract falling within the scope of Article 2(1)(6)(c) of the Directive. Secondly, the notion of “decisive influence” for the purposes of Article 2(1)(6)(c) of the Directive is concerned with whether the action in question can be attributed to the contracting authority, and whether what arises is a public contract rather than some other form of arrangement falling outside the Directive. It is not a qualifier that transforms a contract into a public works contract if it is in fact a public service contract.

68. In this regard, ESA submits that it is useful to compare the wording of Article 2(1)(6)(c) of the Directive with that of its predecessor provision, namely Article 1(2)(b) of Directive 2004/18/EC. In Case C-451/08 *Helmut Müller*, in interpreting Article 1(2)(b) of Directive 2004/18/EC, the ECJ emphasised that the crucial point in interpreting that provision is the fact that the decisive influence emanates from the contracting authority.²³ The words “contracting authority exercising a decisive influence on the type or design of the work” have thus been added to the Directive explicitly to clarify the meaning of “corresponding to the requirements specified by the contracting authority”. In this regard, recital 9 of the Directive is pertinent as it explains that the authority in question must have taken measures to define the type of work or, at the very least, have had a decisive influence on its design.

69. In summary, as the activities constituting the object of the Contract do not appear to result in a work within the meaning of Article 2(1)(7) of the Directive, unless they fall within Annex II to the Directive, such a contract does not fall within the definition of a public works contract within the meaning of Article 2(1)(6) of the Directive. In such circumstances, the contract would be characterised as a public service contract within the meaning of Article 2(1)(9) of the Directive. It is for the PPCC to verify the relevant facts.

70. ESA submits that the question referred should be answered as follows:

Article 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 must be interpreted to the effect that a contract for material processing such as the one in the case at hand is only to be classified as a public works contract if its object is activities which in fact correspond to the relevant reference numbers of the CPV set out in Annex II of that directive. If that is not the case, it is to be classified as a public service contract. The application of Annex II to such a contract is for the referring court to verify.

Bernd Hammermann
Judge-Rapporteur

²³ Reference is made to the judgment in *Helmut Müller*, C-451/08, cited above, paragraphs 68 and 69.