OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 25 March 1999 *

1. By order of 27 January 1998 the Bundesvergabeamt, Republic of Austria, sought from the Court of Justice a preliminary ruling on two questions concerning the interpretation of Article 18 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (hereinafter 'the Directive'). [1]

2. The questions are concerned essentially with the compatibility of the Federal Austrian rules on contracts (Bundesgesetz über die Vergabe von Aufträgen, hereinafter 'the BVergG') with Article 18 of the Directive, which contains the general principles concerning arrangements for awarding contracts, in view of the fact that Article 55(2) of the abovementioned Austrian rules provides that the administration may withdraw a tender notice where, after exclusion of tenders not meeting the legal requirements, only one tender remains. The issue is therefore whether the Directive requires the administration, after examining the suitability of the tenderers, to award the contract even if only one tender has been admitted as valid.

The Community and national provisions

3. The Directive coordinates the national provisions on the award of public works contracts. The preamble indicates that 'the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts' (second recital). The next recital adds that 'such coordination should take into account as far as possible the procedures and administrative practices in force in each Member State'. The first sentence of the 10th recital makes it clear that 'to ensure the development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community'.

4. Title I of the Directive is 'General provisions'. Of relevance to this case is Article 8(2), according to which: 'The contracting authority shall inform candi-

* Original language: Italian.

1 — OJ 1993 L 199, p. 54, recently amended by European Parliament and Council Directive 97/52/EEC of 13 October 1997 (OJ 1997 L 328, p. 1).

dates or tenderers who so request of the grounds on which it decided not to award a contract in respect of which a prior call for competition was made, or to recommence the procedure. It shall also inform the Office for Official Publications of the European Communities of that decision.'

Title IV contains the 'Common rules on participation'. Under Article 18: 'Contracts shall be awarded on the basis of the criteria laid down in Chapter 3 of this title, taking into account Article 19, after the suitability of the contractors not excluded under Article 24 has been checked by the contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 26 to 29.'

5. The Austrian rules on public works contracts are contained in the BVergG, which has been in force since 1 January 1994. [2] That Law provides that contracts for works and services must, after accomplishment of the prescribed procedure, be awarded in conformity with the principles of free and fair competition and equal treatment for all bidders and tenderers to authorised, efficient and reliable undertakings at appropriate prices (Article 16(1)). The same Law provides, however, that tendering procedures are required to be concluded only where there is an express provision to that effect (Article 16(5)). Consistently therewith, Article 56(1) of the BVergG provides that the procedure for awarding a public contract terminates upon conclusion of the contract or cancellation of the competition.

The last relevant provision is Article 55(2) of the Austrian Law, whose compatibility with the Directive is at issue in the proceedings before the national court and according to which the contract notice may be withdrawn where, after exclusion of tenders under Article 52, only one tender remains. I would point out for the sake of completeness that Article 52(1) of the BVergG provides that, before the successful tenderer is chosen, the contracting authority, relying on the results of the preliminary inquiries, is required immediately to eliminate tenders submitted by undertakings which fail to fulfil any of the requirements. This involves the exclusion, for example, of tenders submitted without the necessary authorisations, or those which are defective as regards economic, financial or technical capacity or the requisite credibility of the undertaking (paragraph 1), and tenders for which the total price has not been determined plausibly (paragraph 3).

The facts and the questions referred

6. The proceedings before the national court derive from a decision of the Amt der Salzburger Landesregierung (Office of

2 — The Law was republished following codification of the provisions on public works contracts by the Law of 27 May 1997, in BGBl. No 56/1997.

the Federal Government, Salzburg) to publish in spring 1996 a contract notice for the execution of construction works on the A1 Westautobahn. On completion of the requisite procedures, the contract was awarded to the company ARGE Betondecke-Salzburg West. In November of the same year, the same contracting authority, after a further technical evaluation of the works involved, announced a competition for a contract for works along 'the carriageway of the Salzburg Westautobahn from km 292.7 to km 297.7, final extension; supply and installation of a steel guard rail'. By tender notice of 24 April 1997, it formally opened the procedure for final award of the contract for the work in question. Following verification of the eligibility of the four competing undertakings, only one was left in contention, namely the consortium comprising Bietergemeinschaft Metalmeccanica Fracasso SpA-Leitschutz Handels- und Montage GmbH. The contracting authority therefore decided to avail itself of the power to terminate the tendering procedure under the abovementioned Article 55(2) of the BVergG. Following an amicable agreement reached in conciliation proceedings before a special federal supervisory commission (Bundes-Vergabekontrollkommission),[3] the consortium applied for review under Article 113 of the BVergG. The Third Chamber of the Bundesvergabeamt, to which the matter was assigned, decided to seek a preliminary ruling from the Court of Justice on the following question:

'Is Article 18(1) of Directive 93/37/EEC, according to which contracts are to be awarded on the basis of the criteria laid down in Chapter 3 of Title IV, taking into account Article 19, after the suitability of the contractors not excluded under Article 24 has been checked by contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 26 to 29, to be interpreted as requiring contracting authorities to accept a tender even if it is the only tender still remaining in the tendering procedure? Is Article 18(1) sufficiently specific and precise for it to be relied on by individuals in proceedings under national law and, as part of Community law, to be used to oppose provisions of national law?'

The first preliminary question

7. Albeit in the form of a single question, the national court has in fact requested a ruling on two separate points. In the first part of the question, the Austrian judge seeks to ascertain whether Article 18 of the Directive may have an impact on the outcome of the main proceedings. The latter, I repeat, concern the legality of the contracting authority's decision not to complete a tendering procedure in view of

3 — Articles 109 and 110 of the BVergG.

the fact that only one tender has been admitted as valid.

8. The Community Directive at issue, like all the directives on contract procedures, which constitute a consistent body of legislation as regards the principles and purposes which they embody and the manner in which their text is drafted, does not give specific guidance on this point. That fact is not surprising, moreover, since the Directive merely seeks to coordinate national procedures and does not purport to lay down exhaustive rules intended to supplant entirely the various national legal systems for the award of contracts. That conclusion follows from the Directive itself: the third recital states that such coordination must 'take into account as far as possible the procedures and administrative practices in force in each Member State'.

In the light of that fact, it is reasonable to entertain doubts as to whether the circumstances of this case might not fall outside the scope of the Directive, with the result that the answer to the question should remain within the purview of the Member State, by virtue of the principle just referred to whereby, '[a]s far as possible', national procedures and practices should be respected.

9. That view, attractive though it may be, is not convincing: the Commission, like the governments which have intervened in these proceedings, although considering that the Member States remain free to grant the contracting authorities the power to cancel a competitive procedure, lays emphasis on the risks which might arise if that power were abused.

I consider it reasonable for the Community rules, and in particular, so far as is relevant here, the Public Works Directive, not to be dissociated from the procedures governing cases of that kind in the various national laws. In that regard, it is appropriate to set out briefly the arguments of the parties to these proceedings.

10. The plaintiff in the main proceedings, in expounding its view that the contract must be awarded to the sole remaining tenderer, maintains that a systematic reading of the provisions of the Directive, in particular Articles 7, 8, 18 and 30 — as interpreted, in its view, by the Court[4] — shows that the right of the contracting authority to decline to award a contract or to recommence the procedure must be

4 — The applicant in the main proceedings refers in particular to Case 76/81 *Transporoute* [1982] ECR 417, Joined Cases 27/86, 28/86 and 29/86 *CEI* [1987] ECR 3347, Case 31/87 *Beentjes* [1988] ECR 4635, and Case C-304/96 *Hera* [1997] ECR I-5685.

limited to exceptional and particularly serious cases (death, insolvency and so forth).

The Commission, on the contrary, submits that specifically by virtue of Article 8(2) of the Works Directive, according to which 'The contracting authority shall inform candidates or tenderers who so request of the grounds on which it decided not to award a contract in respect of which a prior call for competition was made or to recommence the procedure', the opposite conclusion should be drawn. In its view, that provision shows indisputably that the Directive gives the contracting authority the right to terminate a tendering procedure by cancelling it. Furthermore, the Commission argues, it can clearly be inferred from the rationale of the Directive that it is based on the fundamental requirement of subjecting public works contracts to effective competition (10th recital) or real competition (see Article 22 regarding negotiated procedures), a requirement which would be frustrated by the alleged obligation on the contracting authority to conclude a contract even where there was only one tenderer.

The Amt der Salzburger Landesregierung, the defendant in the main proceedings, also stresses that the fundamental rationale of the Community Directive is to open the public contracts sector to competition and the fact that all the provisions of that Directive, starting with the criteria for awarding contracts in Article 30(1)(a) and (b) of the Directive, presuppose the possibility of comparing a number of tenders.

In addition, the Austrian Government, on the basis of similar arguments, states that Article 18 of the Directive merely lays down a common rule on participation, simply indicating what types of undertaking may be taken into account by the contracting authority for the award of contract.

Finally, the French Government, intervening in the oral procedure, emphasised that under French law also (in particular, under Article 95 *ter* of the Public Contracts Code) the contracting authority may, in the public interest, decide not to bring a tendering procedure to its conclusion.

11. Then, in the oral procedure, certain parties pointed out that the Court of First Instance recently disposed of a similar question, albeit with reference to the 'Services Directive', [5] holding that the contracting authority is not required to bring a

5 — Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

public tendering procedure to a conclusion by making an award of contract. [6]

12. I do not consider that the plaintiff's view can be upheld. First, there can be no question of disregarding a requirement such as that contained in Article 8(2), which expressly provides that a decision may be taken not to award a contract. Secondly, I consider that Article 18 is a procedural provision which binds the contracting authority as regards the criteria for awarding contracts (or those in Chapter 3 of the same Title), at the same time laying down common rules for the qualification of tenderers, which is in the nature of a precondition for participation in the procedure. No other conclusion can thus be drawn from Article 18 but that the criteria for the selection of candidates and the grounds for their exclusion from the procedure must be specifically those listed in that provision: to adopt any other interpretation — and particularly one which purports to perceive in the provision an obligation to award a contract even if only one undertaking has presented itself and been found eligible — would simply amount to stretching the legislative provision beyond its proper bounds.

13. Indeed, I think there can be no doubt but that the power to withdraw the administrative notice announcing a tendering procedure is the manifestation of a power vested in the contracting authorities by the laws of the Member States and that, until such time as a final decision awarding a contract is adopted, the contracting authority is essentially free to decline to award a contract on supervening grounds of public interest or because of a reappraisal of the feasibility of the planned works (lack of adequate resources, changes in the state of the art in a particular technological sector, and so forth). [7]

14. The considerations outlined so far do not imply that that power to adopt self-protective measures of that kind is absolute and not amenable to any judicial review. In principle, the comparison of several tenders is not an objective complete in itself, being rather the idea underlying the rules whereby administrative action is rationalised. Consequently, the possibility cannot be excluded that, in certain cases, dealing with a single candidate seeking a contract may produce even better results than recourse to a competition. In fact, whilst it is true that the provisions of the Directive

6 — Case T-203/96 *Embassy Limousines* [1998] ECR I-4239.

7 — Once again with reference to the case of a single tenderer, it may be noted that in Italy the rules on State accounts — which have been extended by the case-law to all public authorities — even provides that a public tendering procedure *must* be declared void if it does not attract at least two tenderers, 'except where the administration has indicated, in the contract notice, that since the procedure will be based on sealed tenders, a contract will be awarded even if only one tender is submitted' (Article 69 of Royal Decree No 827 of 23 May 1924). For a recent application of that provision, see the decision of the Corte dei Conti of 27 February 1997, No 33, in *Riv. Corte dei Conti*, volume 1, p. 36.

all presuppose a comparison of several tenders, it is also true that, by virtue of Article 18, the administration is required to notify candidates and tenderers of the reasons for which it has decided not to award a contract or to recommence the procedure.

15. In other words, if it cannot be inferred from the Directive that the contracting authority is required in every case to award a contract even where there is only one tender, it must conversely be conceded that that authority may sometimes award a contract, once the procedure has been conducted in accordance with the requirements of publicity and equal treatment contained in the Directive, even if it does so to the only tenderer who presented himself or remained in the procedure, and there can be no possible recourse to a non-existent principle of competition at any cost. In my opinion, the provisions of Article 8(2) of the Directive must be appraised in that light. They are without doubt intended to prevent the contracting authority from freeing itself of a potential contracting party in an entirely arbitrary manner or in disregard of fundamental principles of Community law.

16. As indicated earlier, the conclusion that the Directive does not exclude the possibility of the administration being entitled to withdraw a competition notice was recently upheld by the Court of First Instance with reference to a tendering procedure for a contract for transport services to be provided by chauffeur-driven vehicles, issued by the European Parliament. [8] In a context different from that of the present case (there were several tenders, not just one), the Court of First Instance stated that 'the contracting authority is not bound to follow through to its end a procedure for awarding a contract' (paragraph 54 of the judgment), observing that in that respect the contracting authority enjoys a broad discretion provided that its decision is in no way arbitrary (paragraph 60).

I am of the opinion that, although that case concerned the Services Directive, the principle is certainly sound and may be extended to the Public Works Directive, and also to all the other directives concerning contracts, the principle being a general one which is to be found in the legal traditions of the Member States, which those directives purport to respect.

17. It should be added, however, that the obligation to state the reasons for which the contracting authority decided not to award the contract or to recommence the procedure, referred to in Article 8(2) of the Directive, must be seen for what it is. It allows the legality of the administrative decision to be reviewed, at least in cases where the decision cancelling the procedure appears inappropriate or contrary to other provisions of Community law. That would be the case where, for example, the contracting authority adopted measures solely

8 — Case T-203/96 *Embassy Limousines*, cited above.

in order to waste time and purposely create urgency, which it then disingenuously invoked in order to award the contract under a negotiated procedure, doing so in breach of the Community rule that the urgency must not in any event be attributable to the contracting authorities (see Article 7(3)(c) of the Directive).

As far as this case is concerned, the withdrawal of the tender notice could in theory be seen as arbitrary if the contracting authority were to cancel the procedure not with a view to arriving at a less onerous technical solution than that originally envisaged, as in fact occurred in this case, but rather on the basis of alleged inappropriateness of the tender, which in fact had previously been considered abnormally low but had been found to be in order after the examination procedure referred to in Article 30(4) of the Directive was completed.

18. In short, therefore, it seems to me to be indisputable that the contracting authority may on occasion, on grounds of public interest, cancel a public tendering procedure and decline to award a contract where only one tender has been submitted or survived the preliminary stage, provided that the action taken is not arbitrary or unfair and does not involve any infringement of the Directive or of other provisions or principles of Community law.

19. I therefore propose that the Court rule in reply to the first preliminary question that Article 18 of Directive 93/37 does not preclude national legislation which allows a contracting authority to cancel a tendering procedure where, following the lawful exclusion of tenders not accepted as valid, only one tenderer remains in the procedure.

The second question

20. By its second question, the national court asks whether Article 18(1) of the Directive may be relied on in the national courts.

21. It should be pointed out that this question is relevant — in the national court's view — only if Article 18 is interpreted in the manner proposed by the plaintiff in the main proceedings. In the

light of the answer given to the first question, the second has become academic.

Nevertheless, I shall answer the question, merely stating that the answer must be in the affirmative. Article 18 imposes on the contracting authority unconditional and sufficiently precise obligations for it to be relied on by individuals before national courts. I would add that the same view has already been taken by the Court on previous occasions, albeit in relation to the equivalent provision of the previous version of the Directive. [9]

22. I therefore propose that the Court rule in response to the second question that Article 18 of Directive 93/37 is sufficiently clear and precise to be relied on before a national court.

9 — *Beentjes*, cited above, paragraph 44.

Conclusion

23. For the foregoing reasons, I suggest that the Court answer the questions submitted by the Bundesvergabeamt as follows:

(1) Article 18 of Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts does not preclude national legislation which allows the contracting authority to cancel the tendering procedure where, following lawful exclusion of tenders not accepted as valid, only one tenderer remains in the procedure.

(2) Article 18 of Directive 93/37/EEC is sufficiently clear and precise to be relied on before a national court.