# OPINION OF ADVOCATE GENERAL MISCHO

delivered on 27 February 2003 [1]

1. As a result of review proceedings initiated by a tenderer whose tender was rejected by the contracting authority and who contends that a criterion, relating to the supply of green electricity, for the award of a contract was unlawful, the Bundesvergabeamt (Federal Procurement Office) (Austria) has asked the Court to interpret Article 26 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [2] and Articles 1 and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. [3]

## I — The legal context

### A — *The Community legislation*

2. Article 26 of Directive 93/36 is headed 'Criteria for the award of contracts' and reads as follows:

'1. The criteria on which the contracting authority shall base the award of contracts shall be:

...

(b) or, when award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

1 — Original language: French.
2 — OJ 1993 L 199, p. 1.
3 — OJ 1989 L 395, p. 33.

2. In the case referred to in point (b) of paragraph 1, the contracting authority shall state in the contract documents or in the contract notice all the criteria they intend to apply to the award, where possible in descending order of importance.'

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

3. Article 1(3) of Directive 89/665 provides as follows:

'3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

4. Article 2(1)(b) and Article 2(6) of Directive 89/665 provide as follows:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

5. Article 3(2) of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [4] reads as follows:

'Having full regard to the relevant provisions of the Treaty, in particular Article 90, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to reliability, including reliability of supply, regularity, quality and price of supplies and to environmental protection. Such obligations must be clearly defined, transparent, non-discriminatory and verifiable; they, and any revision thereof, shall be published and notified to the Commission by Member States without delay. As a means of carrying out the abovementioned public service obligations, Member States which so wish may introduce the implementation of long-term planning.'

6. The second recital of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market [5] states that:

'The promotion of electricity produced from renewable energy sources is a high Community priority as outlined in the White Paper on Renewable Energy Sources... for reasons of reliability and diversification of energy supply, of environmental protection and of social and economic cohesion. That was endorsed by the Council in its resolution of 8 June 1998 on renewable sources of energy.'

7. The 12th recital of Directive 2001/77 states:

'The need for public support in favour of renewable energy sources is recognised in the Community guidelines for State aid for environmental protection, which, amongst other options, take account of the need to internalise external costs of electricity generation. However, the rules of the Treaty, and in particular Articles 87 and 88 thereof, will continue to apply to such public support.'

4 — OJ 1997 L 27, p. 20.

5 — OJ 2001 L 283, p. 33.

8. According to the 18th recital of the same directive:

'It is important to utilise the strength of the market forces and the internal market and make electricity produced from renewable energy sources competitive and attractive to European citizens.'

9. The purpose of Directive 2001/77 is, according to Article 1 thereof:

'to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity and to create a basis for a future Community framework thereof'.

10. Article 3(1) of the same directive provides as follows:

'Member States shall take appropriate steps to encourage greater consumption of electricity produced from renewable energy sources in conformity with the national indicative targets referred to in paragraph 2. These steps must be in proportion to the objective to be attained.'

11. Article 3(2) of Directive 2001/77 provides that each Member State is to set national indicative targets.

12. Article 3(4) of the same directive provides that, on the basis of the Member States' reports, the Commission is to assess whether the national indicative targets are consistent with the global indicative target of 12% of gross national energy consumption by 2010 and in particular with the 22.1% indicative share of electricity produced from renewable energy sources in total Community electricity consumption by 2010.

13. Article 5(1) of Directive 2001/77, entitled 'Guarantee of origin of electricity produced from renewable energy sources', provides that:

'Member States shall, not later than 27 October 2003, ensure that the origin of electricity produced from renewable energy sources can be guaranteed as such within the meaning of this Directive according to objective, transparent and non-discriminatory criteria laid down by each Member State. They shall ensure that a guarantee of origin is issued to this effect in response to a request.'

B — *The national legislation*

14. In Austria the conclusion of public contracts is governed by the Bundesvergabegesetz (Federal Procurement Law, *Bundesgesetzblatt für die Republik Österreich* I, 1997/56, 'the BVergG').

15. Paragraph 117 of the BVergG provides as follows:

'1. The Bundesvergabeamt shall set aside, by way of administrative decision, taking into account the opinion of the Conciliation Committee in the case, any decision of the contracting authority in an award procedure where the decision in question:

(1) is contrary to the provisions of this Federal Law or its implementing regulations and

(2) significantly affects the outcome of the award procedure.

2. The setting aside of an unlawful decision may, in particular, take the form of the removal of discriminatory conditions for undertakings relating to technical, economic or financial specifications in the contract documents or in any other document relating to the contract award procedure.

3. After the award of the contract, the Bundesvergabeamt shall, in accordance with the conditions of subparagraph 1, determine only whether the alleged illegality exists or not.'

**II — The main proceedings**

16. The Republic of Austria, as the contracting authority ('the defendant in the main proceedings'), invited tenders for the supply of electricity in an open procurement procedure. The subject of the award was the conclusion of a framework agreement, followed by individual contracts, for the supply of electricity to all the Federal Republic's administrative offices in the *Land* of Carinthia. The contract period was from 1 January 2002 to 31 December 2003. The invitation to tender, which was published in the *Official Journal of the European Communities* on 27 March 2001, included the following provision under the heading 'Award criteria':

'The economically most advantageous tender according to the following criteria:

effect of the services on the environment in accordance with the contract documents.'

17. The tender had to state a price in ATS per kilowatt hour. This was to apply for the whole contract period and was not to be subject to escalation or adjustment. In addition to supplying electricity, the supplier was required to provide other services (in particular, to measure the electricity used by the Federal offices, to calculate the annual consumption, etc.). The supplier had to undertake to supply the Federal offices, so far as technically possible, with electricity from renewable energy sources and in any case not knowingly to supply electricity generated by nuclear fission. However, the supplier was not required to submit proof of his sources of supply. In the event of a breach of the undertaking to supply electricity from renewable energy sources or the undertaking not to supply electricity generated by nuclear fission, it would be open to the contracting authority to terminate the contract and to impose a penalty.

18. In the introduction to the tender documents it was stated that the contracting authority was aware that for technical reasons no supplier could guarantee that the electricity he supplied to a particular customer had actually been generated from renewable sources. Nevertheless the authority had decided to contract with tenderers who could supply at least 22.5 gigawatt hours per annum of electricity generated from renewable sources. The annual consumption of the Federal offices to which the contract related had been estimated at approximately 22.5 gigawatt hours. However, any differences between this tentative figure and the quantity actually supplied would not affect the agreed price per kilowatt hour.

19. It was specified as a particular ground for elimination that tenders would be eliminated if they did not contain proof that 'in the past two years and/or in the next two years the tenderer has generated or purchased, and/or will generate or purchase, and has supplied and/or will supply to final customers, at least 22.5 gigawatt hours per annum of electricity generated from renewable sources'. The award criteria laid down were net price per kilowatt hour, which was given a weighting of 55%, and 'electricity from renewable sources', which was given a weighting of 45%. As regards the latter criterion, it was stipulated that 'only the amount of energy that can be supplied from renewable sources in excess of 22.5 gigawatt hours per annum will be taken into account'.

20. The tenders were opened on 10 May 2001. Four tenders had been submitted. That of the Kärntner Elektrizitäts-Aktiengesellschaft/Stadtwerke Klagenfurt ('KELAG') consortium stated a price of ATS 0.44 per kilowatt hour and, referring to a table showing the origin and the quantities of electricity generated or supplied by it, stated that it was able to supply an aggregate amount of renewable electricity of 3 406.2 gigawatt hours. Energie Oberösterreich AG also submitted a tender for a price of ATS 0.4191 per kilowatt hour

if consumption exceeded 1 million gigawatt hours per annum and included a table for 1999 to 2002 showing the different amounts of electricity which could be supplied from renewable sources in each year in that period. The largest quantity shown was 5 280 gigawatt hours per annum. A tender was also submitted by BEWAG, showing a price of ATS 0.465 per kilowatt hour and including a table showing the proportion of the total electricity generated or supplied by it which was accounted for by renewable energy. The contracting authority concluded from the table that the quantity stated was 449.2 gigawatt hours.

21. The last tender was submitted by a consortium consisting of EVN AG and Wienstrom GmbH ('the applicants in the main proceedings'), which offered a price of ATS 0.52 per kilowatt hour. This tender gave no specific figures for the amount of electricity which could be supplied from renewable energy sources, but merely stated that the applicants in the main proceedings had their own electricity generation plants in which they generated electricity from renewable energy sources in a quantity of many times the annual consumption shown in the invitation to tender, which was 22.5 gigawatt hours. In addition, they had option rights in respect of the electricity generated by hydroelectric power stations of Österreichische Elektrizitätswirtschafts-Aktiengesellschaft and other Austrian hydroelectric power stations, and other purchased energy derived mainly from long-term coordination contracts with the largest supplier of electricity certified as coming from renewable sources. In 1999 and 2000, only hydroelectric power from Switzerland was purchased and would continue to be purchased. In total, the quantity of electricity which would be supplied from renewable sources was many times greater than the amount which was the subject of the invitation to tender, and reference was made to the annual accounts for further information.

22. The defendant in the main proceedings considered that, of the four tenders submitted, the best was that of KELAG, which received the most points for each of the two award criteria. The applicants in the main proceedings received the fewest points in respect of both criteria.

23. After informing the contracting authority as early as 9 May and 30 May 2001 that they considered that various provisions of the invitation to tender, including the award criterion relating to 'electricity generated from renewable energy sources', were unlawful, the applicants in the main proceedings applied on 12 June 2001 for conciliation proceedings before the Bundes-Vergabekontrollkommission (Federal Pro-

curement Review Commission). The Commission refused to conduct conciliation proceedings on the ground that there was no prospect of success.

24. The applicants then lodged an application for review with the Bundesvergabeamt. They asked for the various decisions to be set aside, in particular the decision rejecting the tender for want of information on the generation and purchase of electricity from renewable energy sources during a certain period, the decision prescribing as an award criterion the provision of information on the generation and purchase of electricity from renewable energy sources in a certain quantity during a certain period, and the decision prescribing as an award criterion the availability of more than 22.5 gigawatt hours of electricity from renewable sources. In addition, the applicants applied for an interim order prohibiting the contracting authority from awarding the contract.

25. By decision of 16 July 2001 the Bundesvergabeamt granted the applicants' application and prohibited the award of the contract initially before 10 September 2001. On a further application by the applicants, the Bundesvergabeamt, by decision of 17 September 2001, made an interim order authorising the contracting authority to award the contract on condition that the award would be withdrawn and the contract rescinded if even only one of the applications to the Bundesvergabeamt by the applicants were granted or if the decision to award the contract in question to one of the applicants' co-tenderers were found to be unlawful as a result of any other finding of the Bundesvergabeamt.

26. On 24 October 2001 the framework agreement was awarded to KELAG, subject to the conditions subsequent set out in the aforementioned decision.

## III — The questions referred

27. In order to determine the applications in the review proceedings for certain decisions of the contracting authority to be set aside, the Bundevergabeamt, by order of 13 November 2001, referred the following questions to the Court for a preliminary ruling:

'1. Do the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, prohibit a contracting authority from laying down an award criterion in relation to the supply of electricity which is given a 45% weighting and which requires a tenderer to state, without being bound to a defined supply period, how much electricity he can supply from renew-

able sources to a group of consumers not more closely defined, where the maximum number of points is given to whichever tenderer states the highest amount and a supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the context of the contract to which the invitation to tender relates?

2. Do the provisions of Community law relating to the award of public contracts, in particular Article 2(1)(b) of Directive 89/665/EEC, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665/EEC dependent on proof that the unlawful decision was material to the outcome of the procurement procedure?

3. Do the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665/EEC dependent on proof that the unlawful decision was material to the outcome of the procurement procedure, where that proof has to be achieved by the review body examining whether the ranking of the tenders actually submitted would have been different had they been re-evaluated disregarding the unlawful award criterion?

4. Do the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, require the contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665/EEC that one of the award criteria it laid down is unlawful?'

## IV — Discussion

### A — *The Court's jurisdiction to reply to the questions*

28. In its written observations, the Commission is uncertain as to whether the Court of Justice has jurisdiction to reply to the questions referred to it, in view of the fact that, according to the Commission, decisions of the Bundesvergabeamt are not of the nature of judgments.

29. In this connection I refer to paragraphs 18 to 26 of my opinion in Case C-249/01 *Hackermüller*,[6] in which I took the view, after examining the same question, that the Bundesvergabeamt must be deemed a court or tribunal within the meaning Article 234 EC if it exercises its powers before the award of the contract, as in the present case.

30. Therefore I consider that the Court has jurisdiction to reply to the questions submitted by the Bundesvergabeamt.

B — *The first question*

31. The first question asked by the Bundesvergabeamt is whether the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, prohibit a contracting authority from laying down an award criterion in relation to the supply of electricity which is given a 45% weighting and which requires a tenderer to state, without being bound to a defined supply period, how much electricity he can supply from renewable sources to a group of consumers not more closely defined, where the maximum number of points is given to whichever tenderer states the highest amount and a supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the context of the contract to which the invitation to tender relates.

32. It appears from the observations in the order for reference that this question summarises a number of problems confronting the Bundesvergabeamt. Therefore I propose to deal with them in the order in which they arise.

1. Admissibility of criteria for obtaining advantages not susceptible of direct financial evaluation

33. First of all, the Bundesvergabeamt questions whether the Community law of public contracts permits the contracting authority to lay down criteria seeking to obtain advantages not susceptible of direct financial evaluation, such as respect for the environment. The Bundesvergabeamt has certain doubts on this point in view of the fact that, according to its findings, the Commission considers that an award criterion must procure a direct economic advantage to the contracting authority.

6 — Case C-249/01 Hackermüller [2003] ECR I-6319

34. It must be observed that, since the Bundesvergabeamt formulated its question and the interveners submitted their written observations, the Court has stated its position on this point in the judgment of 17 September 2002 in Case C-513/99 *Concordia Bus Finland*.[7]

35. In paragraph 69 of that judgment the Court held that 'where... the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria... provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination'.

36. In addition, in paragraph 55 of the same judgment, the Court expressly found that Article 36(1)(a) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts,[8] the text of which is in substance the same as that of Article 26(1)(b) of Directive 93/36, 'cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the most economically advantageous tender must necessarily be of a purely economic nature...'.

37. Therefore, subject to the conditions formulated by the Court which are set out above, it is lawful for a contracting authority to include in an invitation to tender award criteria relating to the environment. There is no doubt that the supply of green electricity can be described as such a criterion, which is confirmed by the judgment in Case C-379/98 *PreussenElektra*,[9] according to which 'the use of renewable energy sources for producing electricity... is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat'.[10]

2. Verification by the contracting authority of the question whether a tender meets the award criterion formulated in the invitation to tender

38. Secondly, according to the Bundesvergabeamt, a problem arises with regard to the way in which the contracting authority has specifically formulated the criterion of

7 — Case C-513/99 ECR I-7213.
8 — OJ 1992 L 209, p. 1.
9 — [2001] ECR I-2099.
10 — Paragraph 73.

'renewable energy'. The Bundesvergabeamt observes that the authority itself admitted that it was unable to check technically whether the electricity supplied was actually generated from renewable energy sources. In those circumstances, the question had to be asked whether the contracting authority was permitted to lay down an award criterion where it was impossible to ascertain whether that criterion enabled the desired objective to be attained.

39. The Netherlands Government alone expressly discusses this problem raised by the Bundesvergabeamt. According to that government, the provisions of Community law applying to the procedures for the award of contracts require a contracting authority to use only award criteria which permit the accuracy of the information given by suppliers regarding the award criteria to be actually checked.

40. I concur with the Netherlands Government's position.

41. As the Netherlands Government points out, '[if] a contracting authority were permitted to prescribe award criteria while at the same time stating that it was neither willing nor able to verify whether the suppliers presented correct information on that subject in their tenders, the authority's decision-making process could not take place in an objective and transparent manner.... Such a method of awarding a contract would be contrary to the general principles of the law of public contracts, as recognised by the Court in its case law, in particular the principles of equality and transparency, and the prohibition of arbitrary decisions'.

42. On this point reference may be made to the judgment in Case C-243/89 *Commission* v *Denmark*,[11] where the Court observed that 'observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure *an objective comparison* of the tenders submitted by the various tenderers'.[12]

43. In the same way, in the judgment in Case C-19/00 *SIAC Construction*[13] *the Court observed that 'when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers'*.[14]

44. It seems to me that there is no guarantee that an award criterion will be applied objectively and uniformly to all tenderers if

11 — [1993] ECR I-3353, paragraph 37.

12 — Emphasis added, See also the judgment in Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 70.

13 — [2001] ECR I-7725, paragraph 44.

14 — Emphasis added.

the contracting authority indicates in the invitation to tender that it will not check whether the tenderers actually meet that criterion.

45. Certainly it is not easy to establish the source of the electricity supplied to consumers because they have no means of knowing whether the current from the socket is generated from renewable energy sources or not.

46. This difficulty was recognised by the Court in the *PreussenElektra* judgment cited above, at paragraph 79 of which the court observed that 'the nature of electricity is such that, once it has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced'.

47. However, the Court added, at paragraph 80 of the same judgment, that 'in that respect, the Commission took the view, in its proposal for a Directive 2000/C 311 E/22 of the European Parliament and of the Council on the promotion of electricity from renewable energy sources in the internal electricity market (OJ 2000 C 311 E, p. 320), submitted on 31 May 2000 [which has in the meantime become Directive 2001/77] that the implementation in each Member State of a system of certificates of origin for electricity produced from renewable sources, capable of being the subject of mutual recognition, was essential in order to make trade in that type of electricity both reliable and possible in practice'.

48. It follows that, even though it is not easy to determine the source of the electricity supplied, there are means of doing so, for example, by requiring certificates or, as the Netherlands Government observes, 'by requiring tenderers to prove the quantity of electricity which is generated or purchased by them and comes from renewable sources, as well as the quantity from renewable sources which is intended, in accordance with the contracts they have made, for customers other than the contracting authority'.

3. The causal connection between the award criterion and the contracting authority's purpose

49. Thirdly, according to the Bundesvergabeamt, 'there is a further problem with regard to the award criterion laid down. Since all that is evaluated is the amount of electricity which can be supplied from renewable sources, whereas how far the actual recipient of the award, on the basis of his generation structure, in fact contributes to *increasing the generation of electricity from renewable sources* is not

examined, it appears questionable whether the purpose pursued by the authority can be achieved at all by means of this award criterion. It is certainly conceivable that the amount of electricity generated from renewable sources is not influenced at all by this award criterion, since it is entirely up to the award recipient whether he generates such electricity himself or purchases it from other sources'. [15]

50. On this point, as the Netherlands Government, which is the only participant in these proceedings to state its position on this problem raised by the Bundesvergabeamt, rightly observes, given the nature of the service to be provided, namely the supply of electricity from renewable sources, it is immaterial whether the supplier generates it himself or purchases it from other suppliers of the same kind of electricity. Electricity from a renewable source is by nature comparable, whether it is generated by the supplier or by a third party.

51. I also consider that the fact that the award criterion does not, according to the findings of the Bundesvergabeamt, permit the purpose pursued by the contracting authority, namely increasing the generation of electricity from renewable energy sources, to be achieved, is not in itself evidence that that criterion is contrary to the Community legislation on public contracts.

15 — Emphasis added.

52. Even if the aims relating to the protection of the environment pursued by the contracting authority by including that criterion are not achieved, it does not follow that an environmental criterion in an invitation to tender would be unlawful.

4. The connection between the award criterion and the subject-matter of the contract

53. Fourth, according to the Bundesvergabeamt, 'since the criterion in question was concerned only with how much could be supplied, and not how much could be supplied to the authority — in this regard the authority committed itself exclusively to electricity from renewable sources in any case — it appears questionable whether there are any direct economic advantages for the authority linked to such an award criterion'.

54. The question of the connection between the award criterion and the subject-matter of the contract has been discussed at length by the participants in these proceedings.

55. The defendant in the main proceedings and the Austrian Government consider that, when determining the most economically advantageous tender in the award

procedure in question, by taking into account, in addition to the price, the amount of green electricity which each tenderer was able to supply over and above 22.5 gigawatt hours, which had to be supplied in any case, the contracting authority gave the reliability of supply of electricity of a particular quality the status of an award criterion.

56. On this point the Austrian Government observes that, the greater the amount of power available to an undertaking, the greater the reliability of supply, thus guaranteeing supply of the amount required during periods of peak demand on the electricity network or when there is a large temporary rise in consumption by the electricity buyer.

57. According to the same Government, supported by the defendant in the main proceedings, the reliability of supply as such is certainly a criterion which has some bearing upon the contract, but rather an economic criterion: the more efficient a tenderer is, the smaller the risk that the contracting authority's demand for electricity will not be met and that it will have to find a costly alternative in the short term.

58. According to the Swedish Government, it does not appear from the actual wording of Directive 93/36 or from the case-law that the contracting entity must itself derive an economic advantage from the award criteria which it applies. The criteria laid down in the invitation to tender were, according to the same Government, likely to promote the generation of electricity from renewable energy sources, which results in advantages in the form of a smaller impact on the environment and thus to a better environment for everyone. This creates the conditions for lasting development, according to the same Government.

59. On the other hand, the applicants in the main proceedings, the Netherlands Government and the Commission consider that, in so far as the award criterion stipulates that only the amount of energy supplied from renewable sources in excess of 22.5 gigawatt hours per annum, which is the estimated annual consumption of the Federal offices covered by the contract, is to be taken into account, that criterion is contrary to Directive 93/36 because there is not a sufficient connection between that criterion and the subject-matter of the contract.

60. According to the applicants in the main proceedings, in fact the award criterion in question grades the tenderers' capacity to supply as much electricity as possible from renewable energy sources and, in that way, ultimately ranks the tenderers themselves. In fact, therefore, the criterion was a disguised criterion of selection.

61. How much weight should be attached to these arguments?

62. First of all, it is no doubt true, as the defendant in the main proceedings and the Austrian Government correctly observe, that in the judgment in Case C-324/93 *Evans Medical and Macfarlan Smith,* [16] the Court stated that 'reliability of supplies is one of the criteria which may be taken into account... in order to determine the most economically advantageous tender...'.

63. However, the question whether the criterion in the present case aims to ensure the reliability of supply is a question of fact which must be settled by the national court.

64. The order of the Bundesvergabeamt makes no reference to the fact that this criterion should in reality be understood as seeking to ensure the reliability of supply. In the following discussion, therefore, I shall proceed on the assumption that the criterion in question does not have that purpose.

16 — [1995] ECR I-563, paragraph 44.

65. Consequently the question arises of whether Directive 93/36 requires a connection between the award criterion and the subject-matter of the contract.

66. In my opinion in the *Concordia Bus Finland* case, cited above, referring to the judgment in Case C-225/98 *Commission* v *France,* [17] in which the Court found that an award criterion relating to employment, connected with a local campaign against unemployment, was in principle valid, I said that such a requirement was not apparent. [18]

67. However, in the *Concordia Bus Finland* judgment, cited above, the Court expressed its clear opinion on that question when it observed, in paragraph 69, that 'the contracting authority... may take into consideration ecological criteria ... *provided that they are linked to the subject-matter of the contract...*'. [19]

68. As the applicants in the main proceedings, the Netherlands Government and the Commission rightly observe, an award criterion consisting in allotting points for the amount of electricity generated from renewable energy sources which the tenderer will be able to supply to a group of

17 — [2000] ECR I-7445.

18 — Paragraphs 110 to 112 of my opinion. The subject of discussion was Directive 92/50, the relevant provisions of which are in essence the same as those of Directive 93/36. See paragraph 36 above.

19 — Emphasis added.

consumers not more closely defined, account being taken only of the supply volume exceeding the consumption to be expected in the context of the invitation to tender, is not connected with the subject-matter of the contract. It is clear from the very wording of this criterion that it does not relate specifically to the actual subject-matter of the contract.

69. In my opinion, therefore, such a criterion is contrary to the requirements arising from Directive 93/36.

70. In addition, in the present it seems to me that it may give rise to discrimination between suppliers, in particular between small suppliers and large suppliers.

71. Let us suppose there are two suppliers who are able to supply the amount of electricity which is the subject of the contract, namely approximately 22.5 gigawatt hours per annum of green electricity. One is a small supplier specialising in green electricity for whom the contract in question is an important one. The other is a very large supplier for which green electricity is only a small part of its business but which nevertheless, by virtue of its size, is capable of supplying more green electricity than the small supplier. By definition, the contract in question is only a small contract for the very large supplier.

72. This example, although hypothetical, shows that, of the two suppliers who are perfectly capable of fulfilling the contract conditions, in reality the criterion in question only favours the large supplier because of its size. However, the size of an undertaking is not in itself an objective reason justifying a difference in the treatment of two tenderers who are able to fulfil the conditions connected with the subject of a contract.

5. The contracting authority's omission to specify, in the invitation to tender, the period for which tenderers must state in their tenders the amount of electricity from renewable sources which they can supply

73. Fifth, the Bundesvergabeamt finds that 'the contracting authority omitted to fix any specific supply period for which the amount that could be supplied was to be stated'. The Bundesvergabeamt concludes from this that 'it appears that the criterion laid down was not at all open to exact examination and allowed the authority too wide a discretion, that is to say it was incompatible with the principle of comparability of tenders, which derives from the requirement of transparency'.

74. As the Netherlands Government, which is the only intervener to comment expressly on this point, correctly observes, the ten-

derers must be informed in advance of the award criteria chosen by the contracting authority and the criteria must be formulated in such a way that the different tenders can be compared fairly and objectively.

75. In this connection, reference may be made to the *SIAC Construction* judgment cited above, in paragraph 42 of which the Court observed that 'the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way'.

76. It is for the national court to determine whether, having regard to all the documents submitted in the main proceedings, the award criteria of the contract in question meet that requirement.

6. The 45% weighting given to the award criterion

77. Finally, according to the Bundesvergabeamt, 'it appears that giving the disputed criterion a weighting of 45% is problematic, since it could be objected that the authority must not permit considerations not open to monetary evaluation to influence the award decision to such a degree'.

78. On this point I consider that, provided that the authority applies valid criteria, it is free to decide on the weighting of those criteria, as the defendant in the main proceedings observes.

79. In paragraph 42 of the *Evans Medical and Macfarlan Smith* judgment, cited above, the Court stated that 'in selecting the most economically advantageous tender, contracting authorities may choose the criteria which they intend to apply, but their choice may relate only to criteria designed to identify the most economically advantageous tender'.

80. If the contracting authority is free to choose the award criteria, I think it is also free to choose the weighting between them, provided that the weighting aims to identify the most economically advantageous tender.

7. Conclusion relating to the first question

81. Taking account of the foregoing, I propose that the reply to the first question from the Bundesvergabeamt should be that the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36, prohibit a contracting authority from laying down an award criterion in relation to the supply of electricity which is given a 45% weighting and which requires a tenderer to state, without being bound to a defined supply period, how much electricity he can supply from renewable sources to a group of consumers not more closely defined, where the maximum number of points is given to whichever tenderer states the highest amount and a supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the context of the contract to which the invitation to tender relates.

C — *The second question*

82. The second question from the Bundesvergabeamt is whether the provisions of Community law relating to the award of public contracts, in particular Article 2(1)(b) of Directive 89/665, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665 dependent on proof that the unlawful decision was material to the outcome of the procurement procedure.

83. With regard to this question, the Bundesvergabeamt observes that the national provision which it must apply in the review proceedings 'does not permit the Bundesvergabeamt to set aside a decision by the authority merely on the ground that it regards it as unlawful. Instead, the relevant provision, Paragraph 117(1)(2) of the BVergG, requires that the decision contested in review proceedings must also have been of material influence for the outcome of the procurement procedure'. The Bundesvergabeamt is uncertain whether such a condition is consistent with Community law.

84. On this point it must be observed, as the Austrian Government points out, that the national provision concerned relates to the question of under what conditions a decision by the contracting authority may be set aside, and not the question, governed by Article 1(3) of Directive 89/665, of the conditions under which a tenderer may seek a review.

85. Secondly, as the Austrian Government rightly notes, Directive 89/665, and in

particular Article 2(1)(b),[20] does not lay down such conditions for setting aside a decision. Specifically, the directive does not state whether the setting aside of an unlawful decision in the context of review proceedings under Article 1 of the same directive may be subject to a requirement of proof that the unlawful decision materially affected the outcome of the award procedure.

86. It is clear from the judgments in Case C-92/00 *Hospital Ingenieure*[21] and Case C-470/99 *Universale-Bau and Others*[22] that Community law does not in principle prevent national law from regulating aspects of the review procedure which are not provided for by the directive, 'provided that the relevant national rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not make it practically impossible or excessively difficult to exercise rights conferred by Community law (principle of effectiveness) (see, by analogy, Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 121; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29)'.[23]

87. Consequently the national court must ascertain whether, taking account of the circumstances of the case, the abovementioned condition is less favourable than that concerning similar domestic actions and whether it makes it practically impossible or excessively difficult to exercise rights conferred by the Community legal order.

88. I therefore propose that the reply to the second question should be that the provisions of Community law relating to the award of public contracts, in particular Article 2(1)(b) of Directive 89/665, do not prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665 dependent on proof that the unlawful decision was material to the outcome of the procurement procedure, provided that such condition is not less favourable than that applying to similar domestic actions (principle of equivalence) and that it does not make it practically impossible or excessively difficult to exercise rights conferred by Community law (principle of effectiveness).

D — *The third question*

89. The third question from the Bundesvergabeamt is whether the provisions of Community law relating to the award of public

20 — '1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure.'

21 — [2002] ECR I-5553.

22 — Case C-470/99 ECR I-11617.

23 — *Hospital Ingenieure* judgment, cited above, paragraph 67.

contracts, in particular Article 26 of Directive 93/36, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665 dependent on proof that the unlawful decision was material to the outcome of the procurement procedure, where that proof has to be achieved by the review body examining whether the ranking of the tenders actually submitted would have been different had they been re-evaluated disregarding the unlawful award criterion.

1. Comments of the Bundesvergabeamt

90. Regarding this question, the Bundesvergabeamt observes that 'the legislative materials required to be taken account under the national approach to interpretation indicate that the question as to whether a contested decision of an authority was material for the outcome of the award procedure is to be examined by the review body by determining whether the award would have been made to a different tenderer had the authority proceeded lawfully'.

91. According to the Bundesvergabeamt, this means that 'the review body ought to have ignored the award criterion held to be unlawful and examined the tenders actually submitted by reference to the remaining award criteria and decided whether this results in a different ranking from that following the examination carried out by the authority'.

92. However, the Bundesvergabeamt is uncertain as to whether that approach is compatible with Community law. It observes that 'on the approach evidently required by domestic law, the award decision would be made in the review proceedings, and in that case the tenders would be evaluated on the basis of a weighting of criteria which had not been notified to the tenderers and which they accordingly could not take into account in drawing up their tenders. This result... appears to be incompatible with Article 26(2) of Directive 93/36, especially as a tenderer could legitimately argue that, if he had known that a different weighting of the criteria would be applied (in the present case 100% price instead of 55% price), he would accordingly have drawn up his tender in a different way'.

93. If this reasoning must be accepted, the only alternative, according to the Bundesvergabeamt, seems to be 'cancellation of the invitation to tender, since otherwise the invitation to tender would be conducted on the basis of a weighting of criteria which was neither laid down by the authority nor notified to the tenderers'.

2. The parties' submissions

94. In their written observations, the defendant in the main proceedings and the Austrian Government do not share the doubts of the Bundesvergabeamt as to whether the approach described by it is compatible with Community law.

95. The defendant in the main proceedings maintains that a breach of the rules concerning the award of public contracts which does not result in a different ranking of tenders in no way affects the choice of the best tender. However, according to the Austrian Government, if the choice of the best tender is not affected, a tenderer who seeks a judicial review will obtain neither the contract nor compensation.

96. The same Government adds that disregarding the criterion in question would not have altered the award procedure in any way. The reason was that KELAG had also offered by far the lowest price.

97. The Austrian Government contends that it is impossible to see why review proceedings should take place at the request of a tenderer whose ranking gave no grounds for hope and where the alleged irregularity in the award procedure did not mean in any case that he or any other third parties concerned would have been given a higher ranking even if the award procedure had been properly conducted.

98. At the hearing, however, the Austrian Government asserted that the Bundesvergabeamt had raised the third question on the basis of an Austrian provision which had been repealed several years previously and that, in substance, the Government agreed with the view expressed by the Commission.

99. The Commission and the applicants in the main proceedings consider that the approach described by the Bundesvergabeamt is contrary to Community law.

100. The applicants contend that to ignore a prescribed award criterion, even if it is unlawful, is to disregard the central principles of Community law on the award of public contracts, such as publicity and transparency.

101. The Commission observes that the third question should not arise because neither the contracting authority nor the

review body could change the award criteria after they had been notified.

102. The Swedish and the Netherlands Governments did not comment on this question.

3. Assessment

103. Let me begin by noting that the Austrian Government's remark that the Bundesvergabeamt had raised the third question on the basis of an Austrian provision which had been repealed several years previously should not prevent the Court from replying to the question.

104. It has consistently been held that it is solely for the national court to determine the relevance of the questions which it submits to the Court. [24]

24 — See, in particular, the judgments in Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-66/00 *Bigi* [2002] ECR I-5917, paragraph 18, and Case C-153/00 *Der Weduwe*, [2000] ECR I-11319.

105. Secondly, taking account of the Bundesvergabeamt's observations and my proposed reply to the second question, I consider that the third question must be understood as asking, in substance, whether a rule of domestic law, such as Paragraph 117 of the BVergG, which, in order for an unlawful decision in review proceedings to be set aside, requires proof that the decision materially affected the outcome of the award procedure, conflicts with the principle of effectiveness in so far as that rule requires the national court to ascertain whether the ranking of the tenders actually submitted would be different if they were re-evaluated without regard to the unlawful award criterion.

106. I think the reply to this question must be in the affirmative.

107. As the Commission rightly points out, the Court made the following observations in the *SIAC Construction* judgment cited above:

'41 ... [T]he principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified (see, by analogy, Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31).

42 More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.

43 This obligation of transparency also means that the adjudicating authority must *interpret the award criteria in the same way throughout the entire procedure* (see, along these lines, Case C-87/94 *Commission* v *Belgium*, cited above, paragraphs 88 and 89)'. [25]

108. It follows that, with all the more reason, *the award criteria must be interpreted in the same way throughout the entire procedure* in order to uphold the principle of equal treatment.

109. In so far as it is based on the principle of equal treatment, this reasoning cannot be called into question by the Austrian Government's reference, in its written observations, to the French and English versions of Article 26(2) of Directive 93/36, [26] from which it is said to follow that alteration of the award criteria in the course of the procedure cannot in principle be ruled out.

110. The provision that the award criteria are not to be altered in the course of the procedure will not be fulfilled if the review body which is required to establish whether the conditions for setting aside a decision are fulfilled, carries out a re-evaluation of the tenders without regard to one of the award criteria.

111. In reality, this approach amounts to altering the criteria as laid down by the adjudicating authority, and this cannot be presumed to have no effect on the situation of the different tenderers.

112. On this point, as the Bundesvergabeamt and the applicants in the main proceedings correctly observe, if the award criteria formulated in the invitation to tender had been other than those actually

25 — Emphasis added.

26 — 'Dans le cas visé au paragraphe 1 point (b), le pouvoir adjudicateur mentionne, dans le cahier des charges ou dans l'avis de marché, tous les critères d'attribution *dont il prévoit l'utilisation*, si possible dans l'ordre décroissant de l'importance qui leur est attribuée' and 'In the case referred to in point (b) of paragraph 1, the contracting authority shall state in the contract documents or in the contract notice all the criteria *they intend to apply* to the award, where possible in descending order of importance'. Emphasis added.

shown in it, a tenderer who requested a review and the other tenderers as well could have submitted a different tender. In the present case, as the Bundesvergabeamt rightly points out, it was entirely conceivable that a tenderer who wanted to score points on the basis of the renewable source criterion would have tendered a lower price if he had known that ultimately the price criterion alone would be applied.

113. I therefore propose that the reply to the third question should be that the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665 dependent on proof that the unlawful decision was material to the outcome of the procurement procedure, where that proof has to be achieved by the review body examining whether the ranking of the tenders actually submitted would have been different had they been re-evaluated disregarding the unlawful award criterion.

E — *The fourth question*

114. The fourth question from the Bundesvergabeamt is whether the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36, require the contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that one of the award criteria it laid down is unlawful.

115. It is clear from the Bundesvergabeamt's observations concerning the third question that the third and the fourth questions are closely connected in that, in the Bundesvergabeamt's opinion, if the third question receives a reply in the affirmative, that would automatically lead to the same reply to the fourth.

116. The interveners who have commented on this question have also proposed that the reply be the same as that to the third question.

117. For my part, I think the fourth question must be reworded if it is to receive a helpful reply.

118. The mere fact that, in review proceedings under Article 1 of Directive 89/665, one of the award criteria is found to be unlawful cannot lead to the conclusion that the contracting authority must withdraw the invitation to tender.

119. As the defendant in the main proceedings and the Austrian Government correctly observed at the hearing, if a review is requested after the conclusion of the contract and if a Member State exercises its power under the second subparagraph of Article 2(6) of Directive 89/665,[27] a finding, in the course of the review proceedings, that an award criterion is unlawful will not lead to the withdrawal of the invitation to tender, but only to compensation for the rejected tenderer.

120. The question which arises is therefore whether the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36, require the contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that one of the award criteria it laid down is unlawful *and is therefore set aside by the review body.*

121. If worded in this way, I think the question must be answered in the affirmative.

122. As is clear from the discussion of the third question, the award criteria must remain the same throughout the entire tendering procedure. Therefore a contracting authority cannot continue the procedure if an award criterion is set aside by a review body.

123. Consequently I propose that the reply to the fourth question should be that the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36, require a contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that one of the award criteria it laid down is unlawful and is therefore set aside by the review body.

27 — 'A Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

## V — Conclusion

124. Having regard to the foregoing observations, I propose that the following replies be given to the questions from the national court:

— First question

The provisions of Community law relating to the award of public contracts, in particular Article 26 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, prohibit a contracting authority from laying down an award criterion in relation to the supply of electricity which is given a 45% weighting and which requires a tenderer to state, without being bound to a defined supply period, how much electricity he can supply from renewable sources to a group of consumers not more closely defined, where the maximum number of points is given to whichever tenderer states the highest amount and a supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the context of the contract to which the invitation to tender relates.

— Second question

The provisions of Community law relating to the award of public contracts, in particular Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts do not prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665/EEC

dependent on proof that the unlawful decision was material to the outcome of the procurement procedure, provided that such condition is not less favourable than that applying to similar domestic actions (principle of equivalence) and that it does not make it practically impossible or excessively difficult to exercise rights conferred by Community law (principle of effectiveness).

— Third question

The provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665/EEC dependent on proof that the unlawful decision was material to the outcome of the procurement procedure, where that proof has to be achieved by the review body examining whether the ranking of the tenders actually submitted would have been different had they been re-evaluated disregarding the unlawful award criterion.

— Fourth question

The provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, require a contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665/EEC that one of the award criteria it laid down is unlawful and is therefore set aside by the review body.