JUDGMENT OF THE COURT (Sixth Chamber)
16 October 2003 *

In Case C-421/01,

REFERENCE to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that tribunal between

Traunfellner GmbH

and

Österreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag),

on the interpretation of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, V. Skouris (Rapporteur), F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: S. Alber,
Registrar: M.F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Traunfellner GmbH, by M. Oppitz, Rechtsanwalt,

— Österreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag), by O. Sturm and F. Lückler, acting as Agents,

— the Austrian Government, by M. Fruhmann, acting as Agent,

— the French Government, by G. de Bergues and S. Pailler, acting as Agents,

— the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by R. Roniger, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of the Austrian Government and the Commission at the hearing on 6 March 2003,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2003,

gives the following

Judgment

1 By order of 25 September 2001, received at the Court on 21 October 2001, the Bundesvergabeamt (Federal Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of the first and second paragraphs of Article 19 and Article 30(1) and (2) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) ('the Directive').

2 Those questions have been raised in proceedings between the companies Traunfellner GmbH and Österreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG ('Asfinag') concerning the rejection of a tender submitted by Traunfellner for a public works contract.

Legal framework

Community legislation

3 Article 19 of the Directive provides:

'Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may take account of variants which are submitted by a tenderer and meet the minimum specifications required by the contracting authorities.

The contracting authorities shall state in the contract documents the minimum specifications to be respected by the variants and any specific requirements for their presentation. They shall indicate in the tender notice if variants are not permitted.

Contracting authorities may not reject the submission of a variant on the sole grounds that it has been drawn up with technical specifications defined by reference to national standards transposing European standards, to European technical approvals or to common technical specifications referred to in Article 10(2) or again by reference to national technical specifications referred to in Article 10(5)(a) and (b).'

4 Article 30 of the Directive provides:

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

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

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

National legislation

5 The Directive was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (Federal Procurement Law 1997, BGBl. I, 1997/56, 'the BVergG').

6 Paragraph 42 of the BVergG states:

'1. In procedures other than the negotiated procedure, tenderers must ensure that their tenders meet the requirements of the tender notice. The wording prescribed by the contract documents may not be amended or supplemented.

...

4. An alternative tender is admissible only if it ensures the performance of qualitatively equivalent work. It shall be for the tenderer to prove equivalence. An alternative tender may relate to the work as a whole, to parts of the work or to the legal conditions underlying the performance of the work. Alternative tenders shall be designated as such and shall be submitted separately.

...'

The main proceedings and the questions referred

7 Acting for and on behalf of Asfinag, the Federal Road Construction Division of the Government of the *Land* of Niederösterreich, which comes under the authority of the First Minister of that *Land*, published throughout the EU, on 27 November 1997, a call for tenders for the repair of the Neumarkt to Vienna

section of the A 1 Westautobahn between kilometre 100.2 and kilometre 108.6. The contract concerned bridge and road construction works.

8 As regards performance of the road resurfacing work outside the areas covered by the motorway bridges, the tender notice stated, under the heading 'Official Project', that concrete surfacing consisting of a two-layer high-grade concrete overlay should be laid without expressly making this a minimum specification.

9 The tender notice stated that alternative tenders were permissible but did not expressly set out the minimum technical requirements to be satisfied by such alternative tenders. It was merely stipulated that alternative tenders would be accepted only if accompanied by a full list of works as required by the tender notice (main tender).

10 No contract award criteria for assessing the economic and technical quality of tenders were defined for either tenders conforming to the tender notice or alternative tenders. Nor did the tender notice stipulate that alternative tenders had to ensure performance of work equivalent to that required by the official project and it was not explained what was meant by 'performance of equivalent work'. The contract documents merely referred to Paragraph 42 of the BVergG.

11 Traunfellner submitted an alternative tender quoting a total price of ATS 78 327 748.53, which was the lowest of all the tenders. However, the lowest tender conforming to the tender notice, that is to say, to the official project, was submitted by the tenderers' consortium Ilbau — LSH Fischer — Heilit & Woerner, which quoted a total price of ATS 87 750 304.30.

12 In its alternative tender, Traunfellner proposed laying asphalt surfacing made from bitumen-based material rather than the concrete resurfacing provided for in the tender notice.

13 On 17 February 1998, the Federal Road Construction Division asked Traunfellner for information on the technical quality of its alternative tender. After Traunfellner had provided the requested documents and explanations, the Federal Road Construction Division of the Government of the *Land* of Niederösterreich drew up a technical test report in which it was stated that experience gathered from previous contracts had shown that, despite careful execution of an asphalt design of this kind in compliance with the contract, grooves of some considerable depth had appeared after a short time, which had called for additional repair work.

14 According to that test report, preference had to be given to the general repair of the carriageway in concrete in accordance with the tender notice, particularly in view of the long life (30 years as opposed to 20 years in the case of an asphalt overlay) and deformation resistance of concrete. In particular, a concrete surface would have a 50% longer life and yet cost only 8.5% more. Consequently, Traunfellner's alternative tender had to be deemed not to meet the specifications of the official project and therefore had to be rejected.

15 On the basis of that report, the commission responsible for the award of contracts within the Federal Road Construction Division decided, on 17 March 1998, to propose that the contract should be awarded to the Ilbau — LSH Fischer — Heilit & Woerner consortium.

16 On 17 April 1998, Traunfellner applied to the Bundesvergabeamt for a declaration that the contracting authority's decision to reject its alternative tender was null and void.

17 On 21 April 1998, the Bundesvergabeamt dismissed Traunfellner's application, its basic reasoning being that the question of the possible technical equivalence of Traunfellner's alternative tender was irrelevant. According to the Bundesvergabeamt, that 'alternative tender' departed from the specifications of the tender notice to such an extent that it was no longer an admissible alternative tender and had to be rejected in any event. Moreover, even if it were an admissible alternative tender, it would not be technically equivalent and should not therefore be taken into consideration.

18 On 3 June 1998, Traunfellner brought an appeal against the Bundesvergabeamt's decision of 21 April 1998 before the Verfassungsgerichtshof (Constitutional Court) (Austria). By judgment of 27 November 2000, the Verfassungsgerichtshof granted Traunfellner's appeal and annulled that decision on the ground that the constitutionally guaranteed right to equality before the law had been infringed. It held that that right is infringed, in particular, where an authority bases its decision on statements which have no value as supporting reasons. That was true of the present case since the Bundesvergabeamt had failed to set out the reasons on which it had based its finding that there was no 'alternative tender'.

19 Under Austrian law, the Bundesvergabeamt is required to reconsider Traunfellner's application of 17 April 1998. However, as is explained in the order for reference, 'the contracting authority's disputed decision may no longer be declared void' since the contract has already been awarded and, under the BVergG, the Bundesvergabeamt is merely required to determine whether a right has been infringed and thus whether the contracting authority's decision to exclude Traunfellner's alternative tender from consideration was lawful.

20 It was in the course of that re-examination that the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is an alternative tender that consists in proposing an asphalt surface instead of overlaying the carriageway with concrete as specified in the tender notice a "variant" within the meaning of the first paragraph of Article 19 of Directive 93/37/EEC?

2. Can a criterion established in national legislation to determine the admissibility of the acceptance of a "variant" within the meaning of the first paragraph of Article 19 of Directive 93/37/EEC, whereby "the performance of qualitatively equivalent work is ensured" by the variant, properly be regarded as a "minimum specification", required and stated by the contracting authority in accordance with the first and second paragraphs of Article 19 of Directive 93/37/EEC, if the contract documents refer only to the national provision and do not specify the comparative parameters to be used to assess "equivalence"?

3. Does Article 30(1) and (2) of Directive 93/37/EEC in conjunction with the principles of transparency and equal treatment prohibit a contracting authority from making the acceptance of an alternative tender which differs from a tender conforming to the tender document in that it proposes a different technical quality conditional on a positive assessment based on a criterion in national legislation requiring that "the performance of qualitatively equivalent work is ensured" if the contract documents refer only to the national provision and do not specify the comparative parameters to be used to assess "equivalence"?

4. (a) If the answer to Question 3 is in the affirmative, may a contracting authority conclude a tendering procedure like that described in Question 3 by awarding the contract?

(b) If the answers to Questions 3 and 4(a) are in the affirmative, must a contracting authority conducting a tendering procedure as described in Question 3 reject variants proposed by tenderers without examining their contents, at any rate if it has not defined contract award criteria for assessing the technical differences between the variant and the tender notice?

5. If the answers to Questions 3 and 4(a) are in the affirmative and the answer to Question 4(b) is in the negative, must a contracting authority conducting a tendering procedure as described in Question 3 accept a variant whose technical differences from the tender document it is unable to assess on the basis of contract award criteria owing to the absence of appropriate statements in the tender document if this variant is the lowest tender and contract award criteria have not otherwise been defined?'

The first question

21 Under Article 234 EC, which is based on a clear separation of functions between national courts and tribunals and the Court of Justice, the latter is empowered to rule on the interpretation or validity of Community provisions only on the basis of the facts which the national court or tribunal puts before it. However, it is for the national court or tribunal to apply the rules of Community law to a specific case. No such application is possible without a comprehensive appraisal of the facts of the case (Case C-107/98 *Teckal* [1999] ECR I-8121, paragraphs 29 and

31). The Court therefore has no jurisdiction to give a ruling on the facts in the main proceedings or to apply the rules of Community law which it has interpreted to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court or tribunal (see Case C-318/98 *Fornasar and Others* [2000] ECR I-4785, paragraph 32).

22 In the present case, the Bundesvergabeamt is not, by its first question, seeking to obtain from the Court an interpretation of Article 19 of the Directive to enable it then to assess whether Traunfellner's tender is a variant within the meaning of that article but is asking the Court to make that assessment itself.

23 Such an assessment would, however, lead the Court to apply itself the aforementioned Community provision to the dispute brought before the Bundesvergabeamt, a task which, in accordance with the case-law cited in paragraph 21 of this judgment, does not fall within the jurisdiction conferred on the Court by Article 234 EC.

24 It follows that the Court has no jurisdiction to answer the first question.

The second question

25 By this question, the national tribunal is essentially asking whether Article 19 of the Directive is to be interpreted as meaning that the obligation to set out the

minimum specifications required by the contracting authority in order to consider variants is satisfied where the contract documents refer only to a provision of national legislation requiring that the alternative tender ensure the performance of work which is qualitatively equivalent to that for which tenders have been invited, without further specifying the comparative parameters on the basis of which such equivalence is to be assessed.

26 It is apparent from the case-file that the provision of national legislation referred to in the second question is Paragraph 42(4) of the BVergG and that the term 'alternative tender' used in that provision corresponds to the term 'variant' used in Article 19 of the Directive.

27 This being so, it is clear from the very wording of the second paragraph of Article 19 of the Directive that, where the contracting authority has not excluded the submission of variants, it is under an obligation to set out in the contract documents the minimum specifications with which those variants must comply.

28 Consequently, the reference made in the contract documents to a provision of national legislation cannot satisfy the requirement laid down in the second paragraph of Article 19 of the Directive (see, by analogy, with respect to the reference made to a provision of national legislation with a view to defining the criteria for the award of a public works contract to the most economically advantageous tender, Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 35, and Case C-225/98 *Commission* v *France* [2000] ECR I-7445, paragraph 73).

29 Tenderers may be deemed to be informed in the same way of the minimum specifications with which their variants must comply in order to be considered by the contracting authority only where those specifications are set out in the

contract documents. This involves an obligation of transparency designed to ensure compliance with the principle of equal treatment of tenderers, which must be complied with in any procurement procedure governed by the Directive (see, to that effect, with respect to award criteria, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraphs 41 and 42).

30 In light of the above findings, the answer to the second question must be that Article 19 of the Directive is to be interpreted as meaning that the obligation to set out the minimum specifications required by a contracting authority in order to take variants into consideration is not satisfied where the contract documents merely refer to a provision of national legislation requiring an alternative tender to ensure the performance of work which is qualitatively equivalent to that for which tenders are invited.

The third question

31 In order to answer this question, a distinction must be drawn between the minimum specifications referred to in Article 19 of the Directive and the award criteria referred to in Article 30 thereof. Article 19 deals with the circumstances in which contracting authorities may take variants into consideration whereas Article 30, which lists the permissible criteria for the award of contracts, is concerned with a later stage in the procurement procedure. Accordingly, Article 30 can apply only to variants which have been properly taken into consideration in accordance with Article 19.

32 It is clear from paragraphs 27 and 30 of the present judgment that consideration of variants within the meaning of Article 19 of the Directive is subject to fulfilment of the requirement that the minimum specifications with which those

variants must comply be set out in the contract documents and that a mere reference in those documents to a provision of national legislation is insufficient to satisfy that requirement.

33 It follows that variants may not be taken into consideration where the contracting authority has failed to comply with the requirements laid down in Article 19 of the Directive with respect to the statement of the minimum specifications, even if they have not been declared inadmissible in the tender notice as provided for in the second paragraph of Article 19 of the Directive.

34 The answer to the third question must therefore be that Article 30 of the Directive can apply only to variants which have been properly taken into consideration by the contracting authority in accordance with Article 19 of the Directive.

The fourth and fifth questions

35 By these questions, which are referred only in the event that the third question is answered in the affirmative, the national tribunal seeks clarification as to the effect which irregularities in the assessment of variants may have on the subsequent conduct of the procurement procedure. In particular, the national tribunal is uncertain whether, in the event of such irregularities, the contracting authority may conclude the procurement procedure in question by awarding the contract (Question 4(a)) and, if so, whether the contracting authority must reject the variants proposed without examining their contents in view of the failure to define the award criteria for assessing the technical differences between the variant and the work for which tenders have been invited (Question 4(b)) or whether it must accept the variant where it is the lowest tender (Question 5).

36 The defendant in the main proceedings takes the view that Question 4(a) must be declared inadmissible as it bears no relation to the actual facts of the case in the main proceedings. On the same ground, the Austrian Government, which also points out that, under the BVergG, the national tribunal's competence is limited once the contract has been awarded (see paragraph 19 of this judgment), takes the view that the Court should declare Questions 4(a), 4(b) and 5 to be inadmissible.

37 It is settled case-law that, in the context of the cooperation between the Court of Justice and national courts and tribunals provided for in Article 234 EC, it is solely for the national court or tribunal before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver its decision and the relevance of the questions which it submits to the Court. The Court may refuse to rule on a question referred for a preliminary ruling by a national court or tribunal only where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main proceedings or to their purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted (see, in particular, Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 41).

38 In the present case, it is clear from the case-file that the procurement procedure in question has already been concluded, that the contract has already been awarded and that the proceedings before the national tribunal are concerned not with the legality of the decision on the award but rather with the legality of the decision by which the contracting authority rejected Traunfellner's alternative tender. The question whether that procedure was properly conducted after the latter decision is therefore not the subject of the dispute brought before the national tribunal. The fourth and fifth questions, however, relate precisely to that stage in the procurement procedure.

39 It follows that those questions must be regarded as hypothetical and must therefore be declared inadmissible.

Costs

40 The costs incurred by the French and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 25 September 2001, hereby rules:

1. **Article 19 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts is to be**

interpreted as meaning that the obligation to set out the minimum specifications required by a contracting authority in order to take variants into consideration is not satisfied where the contract documents merely refer to a provision of national legislation requiring an alternative tender to ensure the performance of work which is qualitatively equivalent to that for which tenders are invited.

2. **Article 30 of Directive 93/37 can apply only to variants which have been properly taken into consideration by the contracting authority in accordance with Article 19 of that directive.**

Puissochet Schintgen Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 16 October 2003.

R. Grass V. Skouris

Registrar President