

JUDGMENT OF THE COURT (Second Chamber)

24 November 2005^{*}

In Case C-331/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by decision of 6 April 2004, received at the Court on 29 July 2004, in the proceedings

ATI EAC Srl e Viaggi di Maio Snc,

EAC Srl,

Viaggi di Maio Snc

v

ACTV Venezia SpA,

Provincia di Venezia,

Comune di Venezia,

^{*} Language of the case: Italian.

intervening parties:

ATI La Linea SpA-CSSA,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of Chamber, C. Gulmann (Rapporteur), R. Schintgen, G. Arestis and J. Klučka, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 July 2005,

after considering the observations submitted on behalf of:

- ATI EAC Srl e Viaggi di Maio Snc, EAC Srl and Viaggi di Maio Snc, by L. Visone, avvocato,

- ACTV Venezia SpA, by A. Bianchini and E. Romanelli, avvocati,

- ATI La Linea SpA-CSSA, by P. Zanardi and G. Fiore, avvocati,
- the Netherlands Government, by H.G. Sevenster and C.M. Wissels, and D.J.M. de Grave, acting as Agents,
- the Austrian Government, by M. Fruhmenn, acting as Agent,
- the Commission of the European Communities, by D. Recchia and X. Lewis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2005,

gives the following

Judgment

- 1 The reference for a preliminary ruling concerns the interpretation of Article 36 of 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) and Article 34 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

- 2 The reference was made in the course of proceedings brought by ATI EAC Srl e Viaggi di Maio Snc and those two companies individually against ACTV Venezia SpA ('ACTV'), the Province di Venezia and the Commune di Venezia over the award of a contract for public passenger transport services.

Legal context

- 3 Article 36 of Directive 92/50, headed 'Criteria for the award of contracts', reads as follows:

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

(a) where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price; or

(b) ...

2. Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance.'

4 Under Article 34 of Directive 93/38:

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

(a) the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or

(b) ...

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

The main proceedings and the questions referred for a preliminary ruling

5 On 6 April 2002 ACTV published in the *Official Journal of the European Communities* a notice concerning a public contract for passenger transport in three

lots. The dispute in the main proceedings concerns Lot No 1 relating to the urban transport service for the town of Mestre for the period from 16 June 2002 to 31 December 2003.

6 In that tender notice it was stated, under the heading 'Award Criteria', that ACTV had decided to award the contract to the bidder submitting the economically most advantageous tender.

7 The applicants in the main proceedings applied to participate in the award procedure. By letter of 7 May 2002, ACTV invited them to submit a bid for Lot No 1. The conditions of participation ('disciplinare di gara', hereinafter the 'contract documents') attached to that letter laid down the following four award criteria on the basis of which the economically most advantageous tender was to be determined:

'1. cost per kilometre for the services mentioned in Annexes A, B and C to the contract documents:

— max. 60 points allocated on the basis of the ratio: ...

2. cost per kilometre for services in addition to those mentioned in Annexes A, B and C to the contract documents:

— max. 10 points allocated on the basis of the ratio: ...

3. organisational procedures and support structures used in carrying out the service, as they appear in the document referred to in paragraph 3(10)(6) of the terms and conditions:

— max. 25 points allocated by ACTV at its absolute discretion.

4. possession of a certificate of conformity ...: 5 points.'

8 As regards the third and fourth criteria for the award of the contract, the contract documents provided in paragraph 3(10)(6) that the tender papers must contain a descriptive account of the organisation and of the logistical and support structures to be used in the management of the services which are the subject-matter of the contract, if it is awarded; that account had to include at least the following information:

— 'depots and/or areas where buses can be parked, owned by or available to the undertaking, within the territory of the Provincia di Venezia ...;

— procedures for supervising the service supplied and number of employees supervising the service itself;

— number of drivers on the route and kind of licence held;

— number of places of business owned by or available to the undertaking (other than depots) within the territory of the Provincia di Venezia ...;

— number of employees engaged in organising drivers' shifts'.

9 Subsequently, on 29 May 2002, that is to say, after expiry of the period prescribed for the submission of tenders and before the envelopes were opened, when it already had a list of the names of the undertakings which had put in a tender for the lot at issue in the main proceedings, the jury, in its report No 1, weighted the 25 points available to be awarded for the third criterion by dividing them into five subheadings corresponding to each of the indications to be given in the report included in the tender submitted by the bidders. The number of points to be awarded for each of the subheadings was broken down as follows: eight, seven and six points for the first, second and third subheadings respectively and two points for each of the fourth and fifth subheadings.

10 On 30 May 2002, having rejected one of the tenders submitted, the jury proceeded to examine those from the applicants in the main proceedings and from ATI La Linea SpA-CSSA ('La Linea'). The latter, with 86.53 points, was awarded the contract, the applicants in the main proceedings having obtained 83.5 points.

11 Taking the view that La Linea was awarded the contract solely as a result of the weighting ex post facto of the number of points liable to be awarded for the third criterion, the applicants in the main proceedings contested the measures and

decisions taken by the jury before the Tribunale amministrativo regionale on the basis, *inter alia*, of a plea of breach of Article 36(2) of Directive 92/50.

12 The Tribunale amministrativo regionale dismissed the action, finding, *inter alia*, that the award criteria and the matters to be taken into account for the purposes of awarding the contract at issue in the main proceedings were indicated in the contract documents.

13 The applicants in the main proceedings appealed against that judgment to the Consiglio di Stato, which decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

- '1. Is it lawful to interpret [Article 36 of Directive 92/50 and Article 34 of Directive 93/38] as a flexible rule allowing the contracting authority, where the award is to be made on the basis of the economically most advantageous tender, to fix the criteria in a general way in the tender notice or the contract documents, leaving it to the jury to specify or supplement those criteria, if need be, provided always that such specifying or supplementing is carried out before the packets containing the tenders have been opened and that such action introduces nothing new in relation to the criteria fixed in the tender notice or, on the contrary, must that provision be interpreted as a rigid rule requiring the contracting authority to determine, analytically, the criteria for the award of the contract in the tender notice or the contract documents, before the prequalification stage or the invitation to tender, and as meaning that the jury may not subsequently in any way do anything to specify or supplement those criteria or to create subheadings or sub-marking, since for reasons of transparency every piece of information concerning the criteria for the award must appear in the notice or contract documents?

In consequence is the traditional line of interpretation followed in the past in the Consiglio di Stato's case-law, which permits the jury to take action to supplement those criteria before the packets containing the tenders are opened, lawful in the light of Community law?

2. Is it lawful, in the light of that provision loosely interpreted having regard to the adverbial phrase "where possible", for the contracting authority to adopt terms and conditions for the tender that provide, with regard to one of the criteria for the award (in this instance, the organisational and support procedures), with reference to a complex series of criteria for which the tender notice did not allocate individual points, so that they were in that sense in part indeterminate, that the points should be allocated at the absolute discretion of the contracting authority, or does not that provision in any case require that the criteria should as a general rule be formulated absolutely definitively, which is not compatible with the fact that those criteria were not allocated separate points in the notice; if it is lawful, because the provision is considered to be flexible and because it is not essential to give points to every item, is it permissible, where the tender notice does not give express power to the jury, for the latter to specify or supplement the criteria (simply by allocating individual importance and relative weight to every single item that the notice intended to be assessed by the overall allocation of a maximum of 25 points), or is it not on the contrary necessary to apply the conditions of the tender literally, allocating the points on an overall assessment of the various and complex matters taken into consideration by the *lex specialis*?

3. In any case, is it lawful, in the light of that provision, to give the jury which is to assess the tenders, regardless of the manner in which criteria have been formulated in the tender notice, in a procedure for an award on the basis of the economically most advantageous tender, the power, but only in respect of the complexity of the matters to be assessed, to restrict its own actions in a general way, by specifying the parameters for the application of the criteria previously determined in the tender notice, and may such power held by the jury be

exercised by creating subheadings, sub-points, or simply by setting more specific criteria for the application of the criteria laid down generally in the notice or the contract documents, before of course the envelopes have been opened?’

The application for reopening of the oral procedure

- 14 By a document lodged at the Registry of the Court of Justice on 19 September 2005, ACTV requested the Court of Justice to order the reopening of the oral procedure under Article 61 of the Rules of Procedure.
- 15 In support of its application, ACTV essentially argued that, in his Opinion, the Advocate General did not answer the main questions asked by the referring court. For that reason and to aid understanding of the questions referred in the light of the specific nature of the dispute in the main proceedings, it wished to submit further observations.
- 16 In that regard, it should be recalled that the Court may of its own motion, on a proposal from the Advocate General or at the request of the parties, order that the oral procedure be reopened, in accordance with Article 61 of the Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see order of 4 February 2000 in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 18, and Case C-147/02 *Alabaster* [2004] ECR I-3101, paragraph 35).

- 17 In the present case, the Court, having heard the Advocate General, takes the view that it had all the information necessary to answer the questions referred and that that information had been debated before it. Consequently, the application to reopen the oral procedure must be rejected.

The questions

- 18 As a preliminary point, it must be observed, as the referring court pointed out, that, by the decision at issue in the main proceedings, the jury simply decided how the 25 points allocated for the third award criterion had to be distributed among the five subheadings in the contract documents.
- 19 Accordingly, the questions referred should be understood to relate essentially to the question whether Article 36 of Directive 92/50 and Article 34 of Directive 93/38 must be interpreted as meaning that Community law precludes a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those subheadings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared.
- 20 First, as the Austrian Government rightly observed, the provisions of Article 36 of Directive 92/50 and Article 34 of Directive 93/38 cannot be applied simultaneously

to the same set of facts. However, the provisions cited in the questions referred for a preliminary ruling have substantially the same wording (see Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 91). Therefore, the Court can give a proper answer to the question as reformulated without there being any need for it to rule as to which of the two directives is applicable in the case in the main proceedings.

- 21 Next, it must be observed that the award criteria defined by a contracting authority must be linked to the subject-matter of the contract, may not confer an unrestricted freedom of choice on the authority, must be expressly mentioned in the contract documents or the tender notice, and must comply with the fundamental principles of equal treatment, non-discrimination and transparency (see *Concordia Bus*, cited above, paragraph 64).
- 22 In the present case, it must be observed, in particular, that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives (see *Concordia Bus Finland*, paragraph 81) and that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed (see Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 34).
- 23 It must also be observed that, in accordance with Article 36 of Directive 92/50 and Article 34 of Directive 93/38, all such criteria must be expressly mentioned in the contract documents or the tender notice, where possible in descending order of importance, so that operators are in a position to be aware of their existence and scope (see *Concordia Bus Finland*, paragraph 62).

- 24 Similarly, in order to ensure respect for the principles of equal treatment and transparency, it is important that potential tenderers are aware of all the features to be taken into account by the contracting authority in identifying the economically most advantageous offer, and, if possible, their relative importance, when they prepare their tenders (see, to that effect, Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, paragraph 88, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 98).
- 25 Finally, it is for the national court to assess, in the light of these rules and principles, whether, in the case in the main proceedings, the jury infringed Community law by applying a weighting to the various subheadings of the third criterion for the award of the contract.
- 26 In that regard, it must be determined first whether, in the light of all the relevant facts of the case in the main proceedings, the decision applying such weighting altered the criteria for the award of the contract set out in the contract documents or the contract notice.
- 27 If it did the decision would be contrary to Community law.
- 28 Second, it must be determined whether the decision contains elements which, if they had been known at the time the tenders were prepared, could have affected that preparation.

29 If it did the decision would be contrary to Community law.

30 Third, it must be determined whether the jury adopted the decision to apply weighting on the basis of matters likely to give rise to discrimination against one of the tenderers.

31 If it did the decision would be contrary to Community law

32 Accordingly, the answer to the questions referred must be that Article 36 of Directive 92/50 and Article 34 of Directive 93/38 must be interpreted as meaning that Community law does not preclude a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those headings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared, provided that that decision:

- does not alter the criteria for the award of the contract set out in the contract documents or the contract notice;

- does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation;

- was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

Costs

- 33 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 36 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and Article 34 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors must be interpreted as meaning that Community law does not preclude a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those headings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared, provided that that decision:

- **does not alter the criteria for the award of the contract set out in the contract documents or the contract notice;**

- **does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation;**

- **was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.**

[Signatures]