

JUDGMENT OF THE COURT (Second Chamber)

3 April 2008*

In Case C-444/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 26 October 2006,

Commission of the European Communities, represented by X. Lewis, acting as Agent, assisted by C. Fernandez Vicién and I. Moreno-Tapia Rivas, abogados, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by F. Díez Moreno, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, J. Makarczyk (Rapporteur) and P. Kūris, Judges,

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities asks the Court of Justice to declare that, by failing to provide for a mandatory period for the contracting authority to notify the decision on the award of a contract to all the tenderers, by failing to provide for a mandatory waiting period between the award of the contract and its conclusion and by allowing an annulled contract to continue to have legal effects, the Kingdom of Spain failed to fulfil its obligations under Article 2(1)(a) and

(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 (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1, 'the review directive').

Legal context

Community legislation

² Article 1 of the review directive is worded as follows:

'The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

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.’

3 Article 2(1) of that directive states:

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

- (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
- (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;
- (c) award damages to persons harmed by an infringement.’

4 Article 2(6) of the review directive states:

‘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.

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.’

National legislation

Law on public procurement

5 Article 41(1) of the Law on public procurement (Ley de Contratos de las Administraciones Públicas), approved by Royal Legislative Decree 2/2000 (Real Decreto Legislativo 2/2000) of 16 June 2000 (BOE No 148 of 21 June 2000, p. 21775), as amended by Law No 62/2003 on Fiscal, Administrative and Social Measures (ley 62/2003, de medidas fiscales, administrativas y del orden social) of 30 December 2003 (BOE No 313 of 31 December 2003, p. 46874, ‘the Law on public procurement’), provides that the contractor must demonstrate the provision of a definitive guarantee within a period of 15 days from notification to him of the award of the contract.

6 Article 53 of the Law on public procurement states:

‘Contracts shall be formed by award of the competent contracting authority, irrespective of the procedure or form of award used.’

7 Article 54 of that law states:

‘1. Public contracts shall be finalised by an administrative document within a period of 30 days from the day following the notification of the award ...’

2. Subject to the exceptions provided for by this Law, their finalisation shall be conditional upon the provision by the undertaking of the guarantees provided for in this law for the protection of the public interest.

3. Where, for reasons for which the contractor is responsible, the contract cannot be finalised within the period laid down, the authority may decide to terminate that contract, subject to the contractor being heard and, where the latter lodges an objection, to a report from the Council of State or an equivalent advisory body in the autonomous region concerned. In such circumstances, the provisional guarantee shall be forfeited and the loss sustained shall be made good.

Where the public authority is responsible for the failure to finalise [the public contract], the contractor shall receive damages for the harm caused by the delay, regardless of whether he is entitled to claim the annulment of the public contract pursuant to Article 111(d).

4. The contract cannot be performed until it has been finalised, save in the cases provided for in Articles 71 and 72.’

- 8 According to Article 60a of the Law on public procurement, the persons interested in participating in a call for tenders and, in any event, the tenderers, may request the adoption of interim measures with the aim of correcting the alleged infringement of the applicable law or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract.
- 9 According to Article 65(1) of the Law on public procurement, once definitive, an administrative declaration to the effect that the acts preparatory to the contract or the award of the contract are invalid is to give rise, in all cases, to the invalidity of the contract itself, which is accordingly to be set aside.
- 10 According to Article 65(3) of that law, if the administrative declaration of invalidity of a contract seriously disrupts public services, provision may be made for the effects of the contract to continue on the same conditions, until urgent measures have been taken to avoid any harm.
- 11 It follows from Article 93(1) of the Law on public procurement that, once the contracting authority has awarded a public contract, regardless of the procedure followed, the award is to be notified to the participants in the call for tenders and, after the finalisation of the contract, is communicated to the competent authority responsible for keeping the public register of contracts referred to in Article 118 of that law for the purposes provided for in Article 58 thereof.

12 Pursuant to Article 93(5) of that law, the contracting authority is to communicate to any unsuccessful candidate or tenderer who so requests, within a period of 15 days of receipt of that request, the reasons for the rejection of its candidature or its offer, as well as the features of the successful contractor's offer which were decisive in the decision to award the contract to the latter.

13 Article 83(4) of the implementing rules for the Law on public procurement (Reglamento general de la Ley de Contratos de las Administraciones Públicas), approved by Royal Decree 1098/2001 (Real Decreto 1098/2001) of 12 October 2001 (BOE No 257, of 26 October 2001, p. 39252) provides that the result of the assessment of the tenders submitted is to be notified, indicating the successful bids, the unsuccessful bids and the reasons for rejection.

Law No 30/1992

14 Law No 30/1992 on the rules governing the public authorities and the common administrative procedure (ley 30/1992 de Regimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo común) of 26 November 1992 (BOE No 285 of 27 November 1992, p. 40300), as amended by Law No 4/1999 of 13 January 1999, ('Law on the common administrative procedure'), provides in Article 58:

'1. Decisions and administrative acts affecting their rights and interests shall be notified to the persons concerned, in accordance with the rules provided for in the following article.

2. All notification shall be made in the 10 days following the date on which the act was adopted. It shall contain the full text of the decision and shall state whether

or not it is a final administrative decision. It shall give details of the possibilities of review and the body before which any review must be applied for, without prejudice to fact that the persons concerned may bring, where appropriate, any other action which they consider necessary.'

- 15 According to Article 107(1) of that law, review may be sought of decisions and administrative acts which decide, directly or indirectly, the substance of the case, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests.
- 16 Article 111 of that law sets out the interim measures which may be applied for in the context of administrative review proceedings, in particular the suspension of the contested acts.

Background to the dispute and the pre-litigation procedure

- 17 By letter of 30 November 2001, the Commission requested the Kingdom of Spain to submit its observations on the compatibility of the Law on public procurement with the review directive in the light of the impact of Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671.
- 18 Since it did not consider the responses given by the Kingdom of Spain, by letter of 27 February 2002, to be satisfactory, the Commission gave it formal notice on 16 October 2002. On 7 July 2004, the Commission, having considered the observations submitted in response to that formal notice by the Kingdom of Spain, issued a reasoned opinion inviting that Member State to take the measures necessary to comply with the opinion within a period of two months from the date of its receipt.

19 In those circumstances, having found that the legislation at issue had not been amended by the end of that period, the Commission decided to bring the present action.

The action

20 The Commission claims that the Spanish legislation infringes Article 2(1)(a) and (b) of the review directive and puts forward three pleas in law, the first two of which should be dealt with together.

The first and second pleas

21 By those pleas, the Commission claims that the national legislation at issue does not comply with the review directive in that certain provisions of that legislation in combination prevent unsuccessful tenderers from effectively instituting review proceedings against a decision to award a contract before the conclusion as such of the contract resulting from it.

Arguments of the parties

22 According to the Commission, the breach of obligations is established, regardless of the scope of the concept of 'finalisation' of a contract which appears in the Spanish legislation, that is to say, whether such finalisation is considered to be equivalent to the conclusion as such of the contract or merely to constitute an administrative formality, in which case the conclusion takes place at the same time as the award of the contract.

- 23 As regards the first view, that is to say that the finalisation of the contract — which, in the Commission's submission, is the moment when the contract fulfils all the legal requirements and when its performance can begin — is equivalent to its conclusion within the meaning of the review directive, the Commission claims that the obligations imposed by that directive have not been fulfilled in that the unsuccessful tenderers do not have the necessary guarantees in order to challenge an unlawful decision to award a contract before the finalisation of the contract resulting from it.
- 24 According to the Commission, in the absence of an obligation to notify the decision to all the persons concerned at the same time and a waiting period during which the contract cannot be finalised, thereby denying the unsuccessful tenderers the possibility of a reasonable period in which to instigate, before the conclusion of the contract, appropriate review proceedings, the Spanish legislation does not comply with the requirements of the review directive.
- 25 As regards the second view, according to which the conclusion of the contract takes place at the same time as the award of the contract, finalisation being a mere administrative formality, the Commission claims that the legal problem identified in the assessment of the first view is actually more serious, in that there is no act of awarding the contract in question capable of giving rise to review proceedings independent of the act of concluding the contract relating to that tendering procedure.
- 26 Since no review proceedings are possible against the act of awarding at a stage earlier than the conclusion of the contract where any infringement of the applicable law may still be corrected and where the tenderer who brings the review proceedings may still hope to become the contractor, the Spanish legislation does not provide complete legal protection before the conclusion of the contract, contrary to the requirements of Article 2(1) of the review directive.

27 At the outset, the Kingdom of Spain defines the scope which should be given, respectively, to the act of awarding the contract and the finalisation of the contract which follows it.

28 That Member State contends that the act of awarding the contract leads, by itself, to the conclusion of the contract awarded, and that contract is treated as existing from the adoption of that act. The act is subject to the formal requirement of notification, which has to be carried out before the contract can produce its effects in respect of the persons concerned.

29 It states that the finalisation of the contract, a mere administrative formality, is of only secondary importance to the act of awarding the contract. That finalisation is, however, a necessary condition for the performance of the contract concerned.

30 According to the Kingdom of Spain, the question whether the Law on public procurement complies with the review directive must be assessed with regard to the review proceedings which can be brought, first, prior to the act of awarding the contract and, second, against that act of awarding the contract itself. That is, moreover, the conclusion of the judgment in *Alcatel Austria and Others*, which draws a distinction between the stage prior to the conclusion of the contract, in other words the stage before the award of the contract, to which Article 2(1) of the directive applies, and the stage subsequent to its conclusion, in other words the stage which follows the act of awarding the contract, to which the second subparagraph of Article 2(6) of the directive applies.

31 Spanish law is consistent, according to the Kingdom of Spain, with that distinction. Concerning, first, the measures which precede the award of the contract, the Kingdom of Spain states that a number of review proceedings are possible. Concerning, second, that award itself, it states that the administrative decision prior

to that award is notified to all the participants in the tendering procedure in the 10 days following its adoption and that that decision, like any administrative act, may be the subject of review proceedings, pursuant to the law governing the common administrative procedure. That Member State further adds that the suspension of the contested act may be ordered as an interim measure.

- 32 Lastly, the Kingdom of Spain contends that the definitive conclusion of an act, and thus of a contract, does not preclude the possibility of bringing revocation proceedings against that act itself.

Findings of the Court

- 33 It should, at the outset, be stated that, in examining this action, it is necessary to take into consideration the explanations of the law provided by the Kingdom of Spain which are not disputed by the Commission. Those explanations are based on the interpretations in the case-law of the national courts as to the effects which follow from the act of awarding the contract and the finalisation of the contract respectively, since those legal concepts are matters of national law.

- 34 Thus, the arguments put forward by the Commission in support of the first and second pleas must be analysed in the light of the finding that, according to the law of the Member State in question, first, the act of awarding the contract leads automatically to the formation of the contract to which it relates and, accordingly, determines, of itself, the rights and duties of the parties and, second, the finalisation of that contract is a formality required exclusively so that the contract awarded can be performed, and cannot alter the contract or add to it.

35 According to recitals (1) and (2) in the preamble to the review directive, it seeks to reinforce existing arrangements, at both national and Community levels, for ensuring the effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified.

36 In that regard, Article 1(1) of the review directive requires Member States to put in place review procedures which are effective and as rapid as possible against the decisions taken by the contracting authorities which infringe Community law in the field of public procurement or national rules implementing that law.

37 It follows from the case-law of the Court that the combined provisions of Article 2(1)(a) and (b) and the second subparagraph of Article 2(6) of the directive are to be interpreted as meaning that the Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages (see *Alcatel Austria and Others*, paragraph 43).

38 Moreover, the complete legal protection which must accordingly be ensured before the conclusion of the contract pursuant to Article 2(1) of the review directive presupposes, in particular, the duty to inform the tenderers of the award decision before the conclusion of the contract so that they may have a real possibility of initiating review proceedings.

39 That same protection requires provision to be made for the unsuccessful tenderer to examine in sufficient time the question of whether the decision to award is valid. In the light of the need to guarantee the effectiveness of the review directive, it follows that a reasonable period must pass between the moment when the award decision is communicated to the unsuccessful tenderers and the conclusion of the contract in order to allow them, *inter alia*, to bring an application for interim measures until the conclusion of the contract.

40 In this case, it must be pointed out that, first, it is not disputed that the Spanish legislation authorises review proceedings against acts of contracting authorities prior to the award of the public contract. Further, in accordance with Article 107(1) of the Law on the common administrative procedure, the persons concerned are able to initiate review proceedings against the procedural acts where they decide, directly or indirectly, the substance of the case, make it impossible to continue the procedure or to put up a defence, or cause irremediable harm to legitimate rights or interests. In the context of those review proceedings, interim measures can be taken, in particular the suspension of the contested acts.

41 Second, the act of awarding the contract is notified to all the tenderers, in accordance with Articles 58(1) and (2) of the Law on the common administrative procedure and Article 93(1) of the Law on public procurement. That notification must be made according to the rules of general law applicable to administrative acts, namely within the 10 days following the adoption of that act awarding the contract, and must give details of the possibilities of review.

42 However, inasmuch as the act of awarding the contract leads *de jure* to the conclusion of the contract, it follows that the decision of the contracting authority, by which it chooses the contractor from amongst the tenderers cannot be the subject of specific review proceedings prior to the conclusion as such of that contract.

43 Third, it must be pointed out that the finalisation of the contract may be concurrent with the award of the contract concerned, or follow it within a very short period. The finalisation as, moreover, the Kingdom of Spain acknowledges, is not subject to any minimum period and may occur from the moment that the contractor demonstrates the provision of a definitive guarantee, since the legislation only requires that it be provided at the latest within 15 days of notification of the award of the contract. Therefore, the performance of the contract may commence before the award has been the subject of all the notifications required.

44 It follows that, in certain cases, no effective review proceedings can be brought against the act of awarding the contract before the performance as such of the contract although the objective of the review directive is to ensure that unlawful decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible (see, to that effect, Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 74).

45 Fourth, the fact that there is the option of bringing proceedings for the annulment of the contract itself is not such as to compensate for the impossibility of challenging the mere act of awarding the contract concerned, before the contract is concluded.

46 Consequently, the legislation at issue does not allow unsuccessful tenderers to bring review proceedings in accordance with the requirements of the review directive against the decision to award a public contract resulting from it.

47 The first two pleas are, accordingly, well founded.

The third plea

Arguments of the parties

- 48 According to the Commission, the review directive is infringed by the exception which seeks to protect public services provided for in Article 65(3) of the Law on public procurement, according to which, if the administrative declaration of invalidity of a contract seriously disrupts public services, provision may be made for the effects of that contract to continue, on the same conditions, until urgent measures have been taken to avoid any harm.
- 49 The Commission claims that those provisions confer on the contracting authority too wide a discretion in respect of the implementation of the administrative decision annulling the award of a contract and, accordingly, the contract resulting from it.
- 50 It also claims that the provisions at issue may, in a not insignificant number of cases, render ineffective the review proceedings of the unsuccessful tenderers leading to the annulment of the unlawful decisions of the contracting authorities, which is contrary to the Member States' duty to ensure that the review procedures provided for pursuant to Article 1 of the review directive make it possible to annul or to have annulled the unlawful decisions taken by those authorities. The effectiveness of that directive would thus be compromised, inasmuch as the invalidity or the annulment of those decisions would be deprived of any effect.
- 51 The Kingdom of Spain contends for its part that the contested provisions envisage proceedings only by way of exception against contracts which are declared invalid for reasons of public interest, subject to review by the courts.

52 According to that Member State, the Commission has not established that proceedings against the continuation of contracts annulled in this way constitute a normal situation as regards the application of the legislation at issue.

Findings of the Court

53 In this case, it is not disputed that the preservation of the effects of a contract subject to an administrative declaration of invalidity such as that provided for in the contested national legislation can only occur in the case of a serious disruption to public services.

54 Consequently, as is clear from the wording of Article 65(3) of the Law on public procurement, such preservation is only intended to apply in exceptional cases and pending the adoption of urgent measures. In addition, that preservation applies, as the Kingdom of Spain has stated without being contradicted by the Commission, subject to review by the courts.

55 Thus, it appears that the aim of the provision is not to prevent the enforcement of the declaration of invalidity of a specific contract, but to avoid, where the public interest is at stake, excessive and potentially prejudicial consequences of the immediate enforcement of the declaration, pending the adoption of urgent measures, in order to ensure the continuity of public services.

56 In those circumstances, the Commission has not demonstrated that the contested legislation undermines the requirements of the review directive.

57 Consequently, the third plea must be dismissed as unfounded.

58 Having regard to the foregoing, it must be declared that, by failing to lay down a mandatory period for the contracting authority to notify the decision on the award of the contract to all the tenderers and by failing to provide for a mandatory waiting period between the award of the contract and its conclusion, the Kingdom of Spain has failed to fulfil its obligations under Article 2(1)(a) and (b) of the review directive.

Costs

59 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Under Article 69(3) of those Rules, where each of the parties succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs.

60 In this dispute account is to be taken of the fact that the Court has not upheld the Commission's action for a declaration of failure to fulfil obligations in its entirety.

61 The Kingdom of Spain must therefore be ordered to pay two thirds of all the costs. The Commission is ordered to pay the other third.

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

- 1. By failing to lay down a mandatory period for the contracting authority to notify the decision on the award of the contract to all the tenderers and by**

failing to provide for a mandatory waiting period between the award of the contract and its conclusion, the Kingdom of Spain has failed to fulfil its obligations under Article 2(1)(a) and (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 (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992;

- 2. Dismisses the action as to the remainder;**

- 3. Orders the Kingdom of Spain to pay two thirds of all the costs. The Commission of the European Communities is ordered to pay the other third.**

[Signatures]