

Reference for a preliminary ruling by the Consiglio di Stato, in sede giurisdizionale (Sesta Sezione), by order of that court of 6 April 2004 in the case of A.T.I. E.A.C. srl and VIAGGI DI MAIO SNC against A.C.T.V. Venezia spa

(Case C-331/04)

(2004/C 239/08)

Reference has been made to the Court of Justice of the European Communities by order of the Consiglio di Stato, in sede giurisdizionale, Sesta Sezione (Council of State, Judicial Division, Sixth Chamber), of 6 April 2004, received at the Court Registry on 29 August 2004, for a preliminary ruling in the case of A.T.I. E.A.C. srl and VIAGGI DI MAIO SNC against A.C.T.V. Venezia spa on the following questions:

‘Is it lawful to interpret those provisions as flexible rules 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, and in any case 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 creating 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 short, 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 the criteria, lawful in the light of Community law?

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 conditions for participation 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*?

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?

Action brought on 15 June 2004 by the Commission of the European Communities against the Hellenic Republic

(Case C-256/04)

(2004/C 239/09)

An action against the Hellenic Republic was brought before the Court of Justice of the European Communities on 15 June 2004 by the Commission of the European Communities, represented by Arnaud Bordes and Minas Konstantinidis, of its Legal Service.

The Commission claims that the Court should:

- 1) declare that, by failing to adopt, and in any event to notify to the Commission, the laws, regulations and administrative provisions necessary to comply with Council Directive 2001/89/EC⁽¹⁾ of 23 October 2001 on Community measures for the control of classical swine fever, the Hellenic Republic has failed to fulfil its obligations under that directive;
- 2) order the Hellenic Republic to pay the costs.