

JUDGMENT OF THE COURT (Fourth Chamber)

16 September 1999 \*

In Case C-27/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesvergabeamt, Austria, for a preliminary ruling in the proceedings pending before that court between

**Metalmeccanica Fracasso SpA,**

**Leitschutz Handels- und Montage GmbH**

and

**Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten,**

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), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1),

\* Language of the case: German.

THE COURT (Fourth Chamber),

composed of: P.J.G. Kapteyn (Rapporteur), President of the Chamber, J.L. Murray and H. Ragnemalm, Judges,

Advocate General: A. Saggio,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Metalmeccanica Fracasso SpA and Leitschutz Handels- und Montage GmbH, by Andreas Schmid, Rechtsanwalt, Vienna,
- Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten, by Kurt Klima, adviser to Finanzprokuratur Wien, acting as Agent,
- the Austrian Government, by Wolf Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,
- the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, acting as Agent, assisted by Bertrand Wägenbaur, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten, represented by Kurt Klima; of the Austrian Government, represented by Michael Fruhmann, of the

Federal Chancellor's Office, acting as Agent; of the French Government, represented by Anne Bréville-Viéville, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; and of the Commission, represented by Hendrik van Lier, assisted by Bertrand Wägenbaur, at the hearing on 28 January 1999,

after hearing the Opinion of the Advocate General at the sitting on 25 March 1999,

gives the following

### Judgment

- 1 By order of 27 January 1998, the Bundesvergabeamt referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 18(1) of 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), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1).
- 2 This question was raised in proceedings between Metalmeccanica Fracasso SpA and Leitschutz Handels- und Montage GmbH (hereinafter 'Fracasso and Leitschutz') and Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten (hereinafter 'the Amt') concerning the latter's cancellation of an invitation to tender for a public works contract for which Fracasso and Leitschutz had submitted a tender.

## Legal background

- 3 Directive 93/37 codified Council Directive 71/305/EEC of 26 July 1971 concerning coordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5). Under Article 18(1) of Directive 93/37, as amended by Directive 97/52 (hereinafter ‘Directive 93/37’):

‘Contracts shall be awarded on the basis of the criteria laid down in Chapter 3 of this Title, taking into account Article 19, after the suitability of the contractors not excluded under Article 24 has been checked by contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 26 to 29.’

- 4 Under Paragraph 56(1) of the Bundesvergabegesetz (Federal law on the acceptance of tenders — ‘the BVergG’) the procedure for the award of a contract is terminated by the conclusion of a contract (the acceptance of a tender) or with the cancellation of the invitation to tender. The BVergG does not provide for another way of terminating the tendering procedure.

- 5 Paragraph 52(1) of the BVergG provides:

‘(1) Before selecting the tender on the basis of which the contract is to be awarded, the contracting authority, in the light of the results of its examination, shall forthwith eliminate the following tenders:

1. tenders by bidders who do not have the necessary authorisation or economic and financial standing and technical knowledge or ability, or credibility;

2. tenders by bidders who are excluded from the procedure under Paragraph 16(3) or 16(4);

3. tenders the total price of which is not plausibly established;

...'

6 Paragraph 55(2) of the BVergG provides:

'The invitation to tender may be cancelled if, following the elimination of tenders in accordance with Paragraph 52, only one tender remains.'

7 Paragraph 16(5) of the BVergG provides:

'Tendering procedures shall be carried out only where it is intended actually to award a contract in respect of the obligations to be performed.'

## The dispute in the main proceedings

- 8 In the spring of 1996 the Amt issued an invitation to tender for surface works, including the erection of concrete barriers for the central reservation on a stretch of the A1 *Westautobahn*. The contract was awarded to ARGE Betondecke-Salzburg West.
- 9 In November 1996 the Amt decided, for technical reasons, that the central reservation on the stretch of motorway in question was to be fitted with protective barriers made of steel rather than concrete as stipulated in the invitation to tender. It then issued a further invitation to tender under an open procedure for the erection of steel safety rails for the central reservation. The tendering procedure began in April 1997.
- 10 Four undertakings, or groupings of undertakings, submitted tenders, including the grouping comprising Fracasso and Leitschutz.
- 11 After the Amt had examined all the tenders and eliminated those of the other three tenderers on the basis of Paragraph 52(1) of the BVergG, only the tender submitted by Fracasso and Leitschutz remained.
- 12 In the end the Amt decided to use concrete instead of steel for the construction of the central reservation barrier and to cancel the relevant invitation to tender pursuant to Paragraph 55(2) of the BVergG. It informed Fracasso and Leitschutz of those two decisions by letter.
- 13 Those companies then asked the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission) to conduct a conciliation procedure pursuant to Paragraph 109(1)(1) of the BVergG concerning the question whether the

decision by the Amt to cancel the invitation to tender and its intention to issue a fresh invitation to tender for safety rails were in conformity with the provisions of the BVergG.

- 14 On 19 August 1997 the parties reached an amicable agreement on the new invitation to tender proposed by the conciliator, concerning the construction of steel safety rails for the sides of the motorway. This contract was to be awarded under a restricted procedure admitting in principle all the tenderers who had taken part in the cancelled tendering procedure.
- 15 Fracasso and Leitschutz then asked the Bundes-Vergabekontrollkommission to complete the conciliation procedure, arguing that the dispute concerning the legality of the cancellation of the invitation to tender for safety rails for the central reservation had not been settled.
- 16 As the Bundes-Vergabekontrollkommission declared that it had no authority in that regard, Fracasso and Leitschutz submitted to the Bundesvergabeamt an application for annulment of the decision by the Amt to cancel the invitation to tender.
- 17 Being in some doubt as to whether Paragraph 55(2) of the BVergG was compatible with Article 18(1) of Directive 93/37, the Bundesvergabeamt decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 18(1) of Directive 93/37/EEC, according to which contracts are to be awarded on the basis of the criteria laid down in Chapter 3 of Title IV, taking into account Article 19, after the suitability of the contractors not excluded under Article 24 has been checked by contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability

referred to in Articles 26 to 29, to be interpreted as requiring contracting authorities to accept a tender even if it is the only tender still remaining in the tendering procedure? Is Article 18(1) sufficiently specific and precise for it to be relied on by individuals in proceedings under national law and, as part of Community law, to be used to oppose provisions of national law?’

### The first part of the question

- 18 By the first part of the question the national court is asking whether Directive 93/37 must be interpreted as meaning that the contracting authority which has called for tenders is required to award the contract to the only tenderer judged to be suitable.
- 19 According to Fracasso and Leitschutz, the effect of Articles 7, 8, 18 and 30 of Directive 93/37, as interpreted by the Court, is that the contracting authority’s option to refuse to award a public works contract or to reopen the procedure must be limited to exceptional cases and may be exercised only on serious grounds.
- 20 On the other hand, the Amt, the Austrian and French Governments and the Commission argue, essentially, that Directive 93/37 does not prohibit a contracting authority from taking no further action in a tendering procedure.
- 21 It is common ground that Directive 93/37 contains no provision expressly requiring a contracting authority which has put out an invitation to tender to award the contract to the only tenderer judged to be suitable.



- 22 Despite the fact that there is no such provision, it must be considered whether, under Directive 93/37, the contracting authority is required to complete a procedure for the award of a public works contract.
- 23 In the first place, as regards the provisions of Directive 93/37 cited by Fracasso and Leitschutz, it must be observed that Article 8(2) of Directive 93/37, which requires a contracting authority to inform candidates or tenderers as soon as possible of the grounds on which it decided not to award a contract in respect of which a prior call for competition was made, or to recommence the procedure, does not provide that such a decision is to be limited to exceptional cases or has necessarily to be based on serious grounds.
- 24 Similarly, as regards Articles 7, 18 and 30 of Directive 93/37, governing the procedures to be followed for the award of public works contracts and determining the applicable criteria for awarding them, it need merely be observed that no obligation to award the contract in the event that only one undertaking proves to be suitable can be inferred from those provisions.
- 25 It follows that the contracting authority's option, implicitly recognised by Directive 93/37, to decide not to award a contract put out to tender or to recommence the tendering procedure is not made subject by that directive to the requirement that there must be serious or exceptional circumstances.
- 26 Second, it should be observed that, according to the 10th recital in the preamble to Directive 93/37, the aim of that directive is to ensure the development of effective competition in the award of public works contracts (see also, on the subject of Directive 71/305, Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 21).
- 27 In that connection, as the Commission has rightly pointed out, Article 22(2) of Directive 93/37 expressly pursues that objective in providing that, where the

contracting authorities award a contract by restricted procedure, the number of candidates invited to tender must in any event be sufficient to ensure genuine competition.

- 28 Furthermore, Article 22(3) of Directive 93/37 provides that where the contracting authorities award a contract by negotiated procedure as referred to in Article 7(2), the number of candidates admitted to negotiate may not be less than three provided that there is a sufficient number of suitable candidates.
- 29 It must also be observed that Article 18(1) of Directive 93/37 provides that contracts are to be awarded on the basis of the criteria laid down in Chapter 3 of Title IV thereof.
- 30 The provisions in Chapter 3 include Article 30, paragraph 1 of which lays down the criteria on which the contracting authorities are to base the award of contracts, that is to say, either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability or technical merit.
- 31 It follows that, to meet the objective of developing effective competition in the area of public contracts, Directive 93/37 seeks to organise the award of contracts in such a way that the contracting authority is able to compare the different tenders and to accept the most advantageous on the basis of objective criteria such as those listed by way of example in Article 30(1) (see, to that effect, on the subject of Directive 71/305, *Beentjes*, cited above, paragraph 27).

- 32 Where, on conclusion of one of the procedures for the award of public works contracts laid down by Directive 93/37, there is only one tender remaining, the contracting authority is not in a position to compare prices or other characteristics of various tenders in order to award the contract in accordance with the criteria set out in Chapter 3 of Title IV of Directive 93/37.
- 33 It follows from the foregoing that the contracting authority is not required to award the contract to the only tenderer judged to be suitable.
- 34 The answer to the first part of the question is, therefore, that Article 18(1) of Directive 93/37 must be interpreted as meaning that the contracting authority is not required to award the contract to the only tenderer judged to be suitable.

### The second part of the question

- 35 By the second part of the question, the national court is asking whether Article 18(1) of Directive 93/37 can be relied on before the national courts.
- 36 In that connection, it need merely be observed that, since no specific implementing measure is necessary for compliance with the requirements listed in Article 18(1) of Directive 93/37, the resulting obligations for the Member States are therefore unconditional and sufficiently precise (see, to that effect, on the subject of Article 20 of Directive 71/305, essentially reproduced in Article 18(1) of Directive 93/37, *Beentjes*, cited above, paragraph 43).

- 37 The answer to the second part of the question is, therefore, that Article 18(1) of Directive 93/37 can be relied on by an individual before the national courts.

## Costs

- 38 The costs incurred by the Austrian and French 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 proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the question referred to it by the Bundesvergabeamt by order of 27 January 1998, hereby rules:

1. Article 18(1) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts

respectively must be interpreted as meaning that the contracting authority is not required to award the contract to the only tenderer judged to be suitable.

2. Article 18(1) of Directive 93/37, as amended by Directive 97/52, can be relied on by an individual before the national courts.

Kapteyn

Murray

Ragnemalm

Delivered in open court in Luxembourg on 16 September 1999.

R. Grass

P.J.G. Kapteyn

Registrar

President of the Fourth Chamber