JUDGMENT OF THE COURT (Fourth Chamber)

15 May 2008 *

In Joined Cases C-147/06 and C-148/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by decision of 25 October 2005, received at the Court on 20 March 2006, in the proceedings

SECAP SpA (C-147/06),

v

Comune di Torino,

intervening parties:

Tecnoimprese Srl,

Gambarana Impianti Snc,

ICA Srl,

Cosmat Srl,

Consorzio Ravennate,

* Language of the case: Italian.

ARCAS SpA,

Regione Piemonte,

and

Santorso Soc. coop. arl (C-148/06)

v

Comune di Torino,

intervening parties:

Bresciani Bruno Srl,

Azienda Agricola Tekno Green Srl,

Borio Giacomo Srl,

Costrade Srl,

THE COURT (Fourth Chamber),

composed of G. Arestis, President of the Eighth Chamber, acting as President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 October 2007,

after considering the observations submitted on behalf of:

— SECAP SpA, by F. Videtta, avvocato,

— Santorso Soc. coop. arl, by B. Amadio, L. Fumarola and S. Bonatti, avvocati,

— the Comune di Torino, by M. Caldo, A. Arnone and M. Colarizi, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, and D. Del Gaizo and F. Arena, avvocati dello Stato,

— the German Government, by M. Lumma, acting as Agent,

— the French Government, by G. de Bergues and J.-C. Gracia, acting as Agents,

— the Lithuanian Government, by D. Kriaučiūnas, acting as Agent,

— the Netherlands Government, by H.G. Sevenster and P. van Ginneken, acting as Agents,

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

— the Slovak Government, by R. Procházka, acting as Agent,

— the Commission of the European Communities, by X. Lewis and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 November 2007,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 30(4) 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 (OJ 1997 L 328, p. 1) ('Directive 93/97'), and fundamental principles of Community law concerning the award of public contracts.

2 The references were made in proceedings between, first, SECAP SpA ('SECAP') and, secondly, Santorso Soc. coop arl ('Santorso') and the Comune di Torino concerning the compatibility with Community law of a requirement laid down in Italian legislation concerning public works contracts having a value lower than the threshold laid down in Directive 93/37 that tenders considered to be abnormally low are to be automatically excluded.

Legal context

Community legislation

3 Pursuant to Article 6(1)(a) thereof, Directive 93/37 applies to '… public works contracts whose estimated value net of value added tax (VAT) is not less than the equivalent in [euros] of 5 000 000 special drawing rights (SDRs)'.

4 Article 30 of Directive 93/37, which forms part of Title IV of the directive entitled 'Common Rules on Participation', Chapter 3 of which is concerned with the criteria for the award of contracts, provides as follows:

‘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.

…

4. If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

If the documents relating to the contract provide for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it considers to be too low.

…’

5 The content of Article 30(4) of Directive 93/37 is reiterated and developed in Article 55, entitled ‘Abnormally low tenders’, of Directive 2004/18//EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). The purpose of that directive, as set out in recital 1 of its preamble, was a recasting within a single measure of the directives which applied to the procedures for the award of public works contracts, public supply contracts and public service contracts and, under Article 80(1), the date for transposition of that directive into the legal systems of the Member States was to be no later than 31 January 2006.

6 The reason for which tenders which appear to be abnormally low in relation to the goods, works or services are not automatically excluded is apparent from the first paragraph of recital 46 in the preamble to Directive 2004/18, which states that ‘[c]ontracts should be awarded on the basis of objective criteria … which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: “the lowest price” and “the most economically advantageous tender”’. Those two award criteria are referred to in Article 30(1)(a) and (b) of Directive 93/37 and Article 53(1)(a) and (b) of Directive 2004/18.

National legislation

7 Directive 93/37 was transposed into Italian law by Law No 109, Framework Law on public works (Legge Quadro in materia di lavori pubblici) of 11 February 1994 (GURI No 41 of 19 February 1994, ordinary supplement).

8 Article 21(1)(a) of that law, in the version applicable to the disputes in the main proceedings ('Law No 109/94'), is worded as follows:

'In cases of awards of contracts for works to a value equivalent in euros to 5 000 000 SDRs or above on the basis of the lowest-bid criterion mentioned in paragraph 1, the authority concerned must assess the irregular nature of the tenders referred to in Article 30 of … Directive 93/37 … in relation to all tenders undercutting the indicative price to an extent equal to or greater than the arithmetical mean of the percentage discounts of all the tenders admitted, excluding 10%, rounded up to the nearest digit, of those offering the highest and lowest discounts respectively, increased by the arithmetical mean of the difference in the percentage discounts which are in excess of the said mean.

Tenders must be accompanied, when submitted, by explanations concerning the most significant price components, indicated in the tender notices or the letters of invitation, which together add up to not less than 75% of the basic contract value. The tender notice or letter of invitation must specify the manner in which explanations are to be submitted but must also state which explanations may be necessary in order for tenders to be admitted. Explanations are not required for elements for which minimum values may be ascertained from official data. If, upon examination, the explanations requested and provided are insufficient for the possibility that the tender contains inconsistencies to be excluded, the tenderer shall be requested to supplement the supporting documentation and the decision whether to exclude the tender may be taken only after further verification, it being possible for arguments to be exchanged.

For public works contracts with a value below the Community threshold only, the authority concerned shall automatically exclude tenders having a percentage discount equal to or greater than the percentage referred to in the first subparagraph. The automatic exclusion procedure shall not apply if the number of valid tenders is lower than five.'

The actions in the main proceedings and the questions referred for a preliminary ruling

9 SECAP took part in a competitive tender procedure announced by the Comune di Torino in December 2002 for a public works contract with an estimated value of EUR 4 699 999. At the time of that call for tenders, the threshold for the application of Directive 93/37 was set, in accordance with Article 6(1)(a) thereof, at EUR 6 242 028. Santorso took part in a similar tender procedure, announced in September 2004, for a contract with an estimated value of EUR 5 172 579. At that time, the threshold for the application of Directive 93/37 was EUR 5 923 624. Consequently, in both cases the estimated value of the contracts in question was below the relevant thresholds for the application of Directive 93/37.

10 The notices by which the Comune di Torino announced those tendering procedures stated that the contract was to be awarded on the basis of the lowest price criterion and abnormally low tenders were to be verified and not automatically excluded. Those notices were based on a decision of the Giunta Comunale (the Municipal Council) that the criterion of awarding the contracts at the lowest price entailed verification of 'anomalous' tenders in accordance with Directive 93/37, even in the case of tenders for contracts with a value below the Community threshold, and Article 21(1)(a) of Law No 109/94 was not to apply in so far as it provided for the automatic exclusion of abnormally low tenders.

11 At the end of the evaluation process, the bids of SECAP and Santorso emerged as the first of the tenders that were not considered to be 'anomalous'. After verifying abnormally low tenders, the Comune di Torino finally rejected SECAP's and Santorso's bids in favour of tenders submitted by other companies.

12 SECAP and Santorso challenged that decision before the Tribunale Amministrativo Regionale di Piemonte (Regional Administrative Court, Piedmont), arguing that Law No 109/94 obliges the contracting authority automatically to exclude abnormally low tenders, allowing no discretion for the application of an inter partes verification procedure.

13 By decisions of 11 October 2004 and 30 April 2005, that court rejected the actions brought by SECAP and Santorso respectively on the ground that the contracting authorities are not under any obligation automatically to exclude abnormally low tenders but have the option to call for the verification of any anomalies arising from the fact that such tenders are low, which extends to contracts below the Community threshold.

14 SECAP and Santorso appealed against those judgments before the Consiglio di Stato (Council of State). The latter concurred with the view of those companies that the rule requiring the automatic exclusion of abnormally low tenders is mandatory but, nevertheless, did not totally dismiss the arguments put forward by the Comune di Torino, which, relying on statistical data, stated that, due to its extreme inflexibility, that rule encouraged undertakings to collude in agreeing on prices in order to influence the outcome of the tendering procedure, thus adversely affecting both the contracting authority and the other tenderers, the vast majority of whom are undertakings established in another Member State.

15 The Consiglio di Stato refers to the case-law of the Court according to which, with regard to contracts falling outside the scope of directives on public contracts on account of their subject-matter, the contracting authorities are bound to comply with the fundamental rules of the EC Treaty, in particular the principle of non-discrimination on the ground of nationality (see, in particular, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60), and to the case-law which prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts above the Community threshold of certain tenders determined according to a mathematical

criterion, instead of obliging the awarding authority to apply the examination procedure laid down in Community rules (see, in particular, Case 103/88 *Costanzo* [1989] ECR 1839, paragraph 19).

16 Having regard to those considerations and since it has doubts concerning the answer to be given to the question whether the rule on the verification of abnormally low tenders may be classified as a fundamental principle of Community law capable of setting aside any conflicting provisions of national law, the Consiglio di Stato decided to stay the proceedings and refer the following questions, which are worded in exactly the same manner in both Case C-147/06 and Case C-148/06, to the Court for a preliminary ruling:

'(1) Does the rule laid down in Article 30(4) of Directive 93/37 … or the similar rule contained in Article 55(1) and (2) of Directive 2004/18 … (in cases where that is the relevant provision), that, where tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received, constitute a fundamental principle of Community law?

(2) If the answer to the preceding question is in the negative: Is the rule established by Article 30(4) of Directive 93/37 … or the similar rule contained in Article 55(1) and (2) of Directive 2004/18 … (in cases where that is the relevant provision), according to which, if tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received, while not presenting the characteristics of a fundamental principle of Community law, nevertheless an implied consequence of or a "principle

deriving from" the principle of competition, considered in conjunction with the principles of administrative transparency and non-discrimination on grounds of nationality and is it therefore, as such, directly binding, taking precedence over possibly incompatible national provisions adopted by the Member States to regulate public works contracts to which Community law is not directly applicable?'

17 By order of the President of the Court of 10 May 2006, Cases C-147/06 and C-148/06 were joined for the purposes of the written and oral procedure and of the judgment.

The questions

18 By its questions, which it is appropriate to consider together, the Consiglio di Stato asks, in essence, whether the fundamental principles of Community law governing the award of public contracts, to which Article 30(4) of Directive 93/37 gives specific expression, preclude national legislation which, with regard to contracts with a value below the threshold set in Article 6(1)(a) of that directive, obliges contracting authorities, where the number of valid tenders is greater than five, automatically to exclude tenders considered to be abnormally low in relation to the goods, works or services according to a mathematical criterion laid down by that legislation, without allowing those contracting authorities any possibility of verifying the constituent elements of those tenders by requesting the tenderers concerned to provide details of those elements.

19 The strict special procedures prescribed by the Community directives coordinating public procurement procedures apply only to contracts whose value exceeds a threshold expressly laid down in each of those directives (order in Case C-59/00

Vestergaard [2001] ECR I-9505, paragraph 19). Accordingly, the rules in those directives do not apply to contracts with a value below the threshold set by those directives (see, to that effect, Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraph 65).

20 That does not mean, however, that contracts below the threshold are excluded from the scope of Community law (order in *Vestergaard*, paragraph 19). According to the established case-law of the Court concerning the award of contracts which, on account of their value, are not subject to the procedures laid down by Community rules, the contracting authorities are nonetheless bound to comply with the fundamental rules of the Treaty and the principle of non-discrimination on the ground of nationality in particular (*Telaustria and Telefonadress*, paragraph 60; the order in *Vestergaard*, paragraphs 20 and 21; Case C-264/03 *Commission* v *France* [2005] ECR I-8831, paragraph 32; and Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, paragraph 33).

21 However, according to the case-law of the Court, the application of the fundamental rules and general principles of the Treaty to procedures for the award of contracts below the threshold for the application of Community directives is based on the premiss that the contracts in question are of certain cross-border interest (see, to that effect, Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 29, and *Commission* v *Italy*, paragraphs 66 and 67).

22 It is in the light of those considerations that national legislation such as that at issue in the main proceedings must be examined.

23 It is apparent from the documents submitted to the Court that that legislation obliges the contracting authority concerned, when awarding contracts with a value below the threshold laid down in Article 6(1)(a) of Directive 93/37, automatically to exclude tenders which, according to a mathematical criterion laid down by that legislation, are considered to be abnormally low in relation to the goods, works or services, the only exception to that rule of automatic exclusion being that it does not apply if the number of valid tenders is lower than five.

24 Consequently, that rule, which is formulated in clear, imperative and absolute terms, deprives tenderers who have submitted abnormally low bids of the opportunity to demonstrate that those bids are viable and genuine. That aspect of the legislation at issue in the main proceedings could have consequences incompatible with Community law if, in view of its particular characteristics, a given contract is likely to be of certain cross-border interest and therefore attract operators from other Member States. A works contract could, for example, be of such cross-border interest because of its estimated value in conjunction with its technical complexity or the fact that the works are to be located in a place which is likely to attract the interest of foreign operators.

25 As the Advocate General pointed out at points 45 and 46 of his Opinion, although objective and not in itself discriminatory, such legislation could undermine the general principle of non-discrimination in procurement procedures which are of cross-border interest.

26 Indeed, the application of the rule requiring the automatic exclusion of tenders considered to be abnormally low to contracts of certain cross-border interest may constitute indirect discrimination since, in practice, it places at a disadvantage operators from other Member States which, as they have different cost structures, may benefit from significant economies of scale or, intending to cut their profit margins

in order to enter the market in question more effectively, would be in a position to make a bid that was competitive and at the same time genuine and viable but which the contracting authority would not be able to consider as a result of that legislation.

27 In addition, as stated by the Comune di Torino and the Advocate General at points 43, 46 and 47 of his Opinion, such legislation could give rise to anti-competitive conduct and agreements, namely collusion between national or local undertakings intended to secure public works contracts for themselves.

28 Accordingly, the application of the rule requiring the automatic exclusion of abnormally low tenders to contracts of certain cross-border interest could deprive economic operators from other Member States of the opportunity of competing more effectively with operators located in the Member State in question and thereby affect their access to the market in that State, thus impeding the exercise of freedom of establishment and freedom to provide services, which constitutes a restriction on those freedoms (see, to that effect, Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 26; Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraphs 12 and 13; and Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 46).

29 By applying such legislation to contracts of certain cross-border interest, the contracting authorities, lacking any power to assess the soundness and viability of abnormally low tenders, cannot comply with their obligation to observe the fundamental rules of the Treaty on freedom of movement or the general principle of non-discrimination, as required by the case-law of the Court cited at paragraph 20 above. It is also contrary to the contracting authorities' own interests for them to be deprived of such power, since they are not able to assess tenders which are submitted to them under conditions of effective competition and therefore to award the contract by applying the criteria, which are also laid down in the public interest, of the lowest price or the most economically advantageous tender.

30 It is in principle for the contracting authority concerned to assess whether there may be cross-border interest in a contract whose estimated value is below the threshold laid down by the Community rules, it being understood that that assessment may be subject to judicial review.

31 It is permissible, however, for legislation to lay down objective criteria, at national or local level, indicating that there is certain cross-border interest. Such criteria could be, inter alia, the fact that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out. The possibility of such an interest may also be excluded in a case, for example, where the economic interest at stake in the contract in question is very modest (see, to that effect, Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 20). However, in certain cases, account must be taken of the fact that the borders straddle conurbations which are situated in the territory of different Member States and that, in those circumstances, even low-value contracts may be of certain cross-border interest.

32 Even where there is certain cross-border interest, it may be acceptable automatically to exclude some tenders on account of their being abnormally low if recourse to that rule is justified by the unduly large number of tenders, a fact which might oblige the contracting authority concerned to examine on an inter partes basis such a high number of bids that it would exceed the administrative capacity of those authorities or might, due to the delay which such an examination would entail, jeopardise the implementation of the project.

33 In such circumstances, national or local legislation or even the contracting authorities themselves would be entitled to set a reasonable threshold for the automatic exclusion of abnormally low tenders. However, the threshold of five valid tenders set by the third paragraph of Article 21(1)(a) of Law No 109/94 cannot be regarded as reasonable.

34 As regards the actions in the main proceedings, it is for the referring court to carry out a detailed assessment of all the relevant facts concerning both the contracts in question in order to determine whether, in each case, there is certain cross-border interest.

35 The answer to the questions referred must therefore be that the fundamental rules of the Treaty on freedom of establishment and freedom to provide services and the general principle of non-discrimination preclude national legislation which, with regard to contracts with a value below the threshold set by Article 6(1)(a) of Directive 93/97 which are of certain cross-border interest, imposes an absolute duty on the contracting authorities, where the number of valid tenders is greater than five, automatically to exclude tenders considered to be abnormally low in relation to the goods, works or services according to a mathematical criterion laid down by that legislation without allowing those contracting authorities any possibility of verifying the constituent elements of those tenders by requesting the tenderers concerned to provide details of those elements. That would not be the case if national or local legislation or even the contracting authorities concerned were to set a reasonable threshold above which abnormally low tenders were automatically excluded on account of there being an unduly large number of tenders, which might oblige those contracting authorities to examine on an inter partes basis such a high number of bids that it would exceed their administrative capacity or might, due to the delay which such an examination would entail, jeopardise the implementation of the project.

Costs

36 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 (Fourth Chamber) hereby rules:

The fundamental rules of the EC Treaty on freedom of establishment and freedom to provide services and the general principle of non-discrimination preclude national legislation which, with regard to contracts with a value below the threshold set by Article 6(1)(a) 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, which are of certain cross-border interest, imposes an absolute duty on the contracting authorities, where the number of valid tenders is greater than five, automatically to exclude tenders considered to be abnormally low in relation to the goods, works or services according to a mathematical criterion laid down by that legislation without allowing those contracting authorities any possibility of verifying the constituent elements of those tenders by requesting the tenderers concerned to provide details of those elements. That would not be the case if national or local legislation or even the contracting authorities concerned were to set a reasonable threshold above which abnormally low tenders were automatically excluded on account of there being an unduly large number of tenders, which might oblige the contracting authorities to examine on an inter partes basis such a high number of bids that it would exceed their administrative capacity or might, due to the delay which such an examination would entail, jeopardise the implementation of the project.

[Signatures]