

JUDGMENT OF THE COURT (Fourth Chamber)

15 October 2009*

In Case C-138/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Fővárosi Ítéltábla (Hungary), made by decision of 13 February 2008, received at the Court on 7 April 2008, in the proceedings

Hochtief AG,

Linde-Kca-Dresden GmbH

v

Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság,

* Language of the case: Hungarian.

intervening parties:

Budapest Főváros Önkormányzata,

THE COURT (Fourth Chamber),

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

Advocate General: P. Mengozzi,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 12 March 2009,

after considering the observations submitted on behalf of:

— Hochtief AG and Linde-Kca-Dresden GmbH, by A. László and E. Kiss, ügyvédek,

- the Budapest Főváros Önkormányzata, by J. Molnár and G. Birkás, ügyvédek,

- the Hungarian Government, by J. Fazekas, R. Somssich, K. Borvölgyi and K. Mocsári-Gál, acting as Agents,

- the Czech Government, by M. Smolek, acting as Agent,

- the Italian Government, by I. Bruni, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

- the Commission of the European Communities, by D. Kukovec, A. Sipos, B. Simon and M. Konstantinidis, acting as Agents,

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

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Article 22 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 Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1) ('Directive 93/37'), and the transitional legal relationship between that directive and 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).
- ² The reference was made in the course of proceedings brought by Hochtief AG and Linde-Kca-Dresden GmbH against the Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság (Arbitration Committee of the Public Procurement Council, 'the KTKD') relating to a negotiated procedure with publication of a contract notice.

Legal framework

Community law

3 Article 1 of Directive 93/37 provides:

‘For the purposes of this Directive:

...

(g) “negotiated procedures” are those national procedures whereby contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them;

(h) a contractor who submits a tender shall be designated by the term “tenderer” and one who has sought an invitation to take part in a restricted or negotiated procedure by the term “candidate”.

4 Article 7(2) of Directive 93/37 states:

‘The contracting authorities may award their public works contracts by negotiated procedure, with prior publication of a contract notice and after having selected the candidates according to publicly known qualitative criteria, in the following cases:

- (a) in the event of irregular tenders in response to an open or restricted procedure or in the case of tenders which are unacceptable under national provisions that are in accordance with the provisions of Title IV, in so far as the original terms of the contract are not substantially altered. The contracting authorities shall not, in these cases, publish a contract notice where they include in such negotiated procedure all the enterprises satisfying the criteria of Articles 24 to 29 which, during the prior open or restricted procedure, have submitted tenders in accordance with the formal requirements of the tendering procedure;

- (b) when the works involved are carried out purely for the purpose of research, experiment or development, and not to establish commercial viability or to recover research and development costs;

- (c) in exceptional cases, when the nature of the works or the risks attaching thereto do not permit prior overall pricing.’

5 Article 18(1) of Directive 93/37 states:

‘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.’

6 Article 22 of that directive provides:

‘1. In restricted and negotiated procedures the contracting authorities shall, on the basis of information given relating to the contractor’s personal position as well as to the information and formalities necessary for the evaluation of the minimum conditions of an economic and technical nature to be fulfilled by him, select from among the candidates with the qualifications required by Articles 24 to 29 those whom they will invite to submit a tender or to negotiate.

2. Where the contracting authorities award a contract by restricted procedure, they may prescribe the range within which the number of undertakings which they intend to invite will fall. In this case the range shall be indicated in the contract notice. ... The range shall be determined in the light of the natur[e] of the work to be carried out. The range must number at least 5 undertakings and may be up to 20.

In any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition.

3. 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.

4. Each Member State shall ensure that contracting authorities issue invitations without discriminations to those nationals of other Member States who satisfy the necessary requirements and under the same conditions as to its own nationals.'

7 Article 80(1) of Directive 2004/18 provides:

'1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 January 2006. They shall forthwith inform the Commission thereof.

...'

8 Article 82 of that directive, under the heading '[r]epeals' states:

'Directive 92/50/EEC, except for Article 41 thereof, and Directives 93/36/EEC and 93/37 ... shall be repealed with effect from the date shown in Article 80, without prejudice to the obligations of the Member States concerning the deadlines for transposition and application set out in Annex XI.

References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex XII.'

- 9 Directive 2004/18 entered into force on 30 April 2004.

National law

- 10 Directive 93/37 was transposed into Hungarian law by Law CXXIX of 2003 on the award of public contracts (a közbeszerzésekről szóló 2003 évi CXXIX. törvény, *Magyar Közlöny* 2003/157, 'the Kbt').
- 11 Article 130(1), (2) and (7) of the Kbt, which applies to negotiated procedures with publication of a contract notice, provides:

'(1) The contracting authority shall, in that procedure, prescribe either the number of tenderers, or a range for the number of tenderers, so as to produce invitations to tender from a number of suitable candidates; a number which, if those candidates have submitted valid applications, may reach the upper limit of the range provided or, at the very least, a sufficient number of those candidates.

(2) The minimum number of participants or the lower limit of the range shall not be lower than three. That number or that range must be adapted to the nature of the contract and must, in any event, ensure genuine competition.

...

(7) The contracting authority shall, individually, directly and in writing, invite the selected candidates, the number of whom will tally with the prescribed number or come within the prescribed range — on the basis of their financial and economic capacity and their fulfilment of the technical and professional requirements — to submit their tenders, provided that there is a suitable number of candidates. If the contracting authority did not specify that number or range, it shall invite all suitable candidates to submit tenders. Candidates invited to submit a tender cannot submit a collective tender.’

- 12 At the date of the facts in the main proceedings, Directive 2004/18 had not yet been transposed into Hungarian law.

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

- 13 The dispute in the main proceedings relates to a negotiated procedure for the award of a public works contract for an amount in excess of the Community threshold. The dispute is between two commercial undertakings established in Germany, Hochtief AG and Linde-Kca-Dresden GmbH, and the KTKD. The contracting authority for that contract, namely the Budapest Főváros Önkormányzata (Local Government for Budapest), intervened in the dispute in support of the KTKD.
- 14 On 5 February 2005, the Budapest Főváros Önkormányzata published, in the *Official Journal of the European Union*, a contract notice for the tender procedure at issue in the main proceedings. The prescribed range for the number of candidates who could be invited to submit a tender was three to five.

15 At the expiry of the period for the submission of applications, five candidates, including the consortium set up by the applicants in the main proceedings, had come forward. In the light of the applications submitted, the Budapest Főváros Önkormányzata, first, excluded the application of that consortium as inadmissible on the grounds of ‘incompatibility’ and, second, decided to continue with the procedure with the two candidates regarded as ‘suitable’, by issuing to them invitations to submit a tender.

16 The applicants in the main proceedings challenged the decision of the Budapest Főváros Önkormányzata before the KTKD, claiming, inter alia, that, under Article 130 of the Kbt, since the number of suitable candidates was below the prescribed minimum, the procedure could not continue. The KTKD rejected that challenge.

17 Thereafter, the applicants in the main proceedings brought legal proceedings against the KTKD’s decision, relying, inter alia, on Article 22(2) and (3) of Directive 93/37. As the court seised of the matter at first instance also dismissed the action, the applicants in the main proceedings lodged an appeal before the referring court.

18 It is in those circumstances that the Fővárosi Ítéltábla decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is the procedure laid down in Article 44(3) of Directive 2004/18 ..., which replaced Article 22 of ... Directive 93/37 ... applicable where the procurement procedure was initiated at a time when Directive 2004/18 ... had already entered into force, but the time-limit granted to Member States for implementing that directive had not yet expired, so that the directive had not been incorporated into national law?

2. If the answer to the first question is in the affirmative, this court further asks whether in the case of negotiated procedures with publication of a contract

notice — having regard to the fact that Article 44(3) of Directive 2004/18 ... provides that “[i]n any event the number of candidates invited shall be sufficient to ensure genuine competition” — the limitation of the number of suitable candidates should be interpreted as meaning that in the second stage — that of awarding the contract — there must invariably be a minimum number of candidates (three)?

3. If the answer to the first question is in the negative, this court further asks ... whether the requirement that “there be a sufficient number of suitable candidates”, under Article 22(3) of Council Directive 93/37 ..., should be interpreted as meaning that where the minimum number of suitable candidates invited to take part is not reached (three), the procedure cannot continue to the stage of invitation to tender?

4. If the Court ... replies to the third question in the negative, this court further asks whether the second [sub]paragraph of Article 22(2) of Directive 93/37 — in the rules on restricted procedures, according to which “[i]n any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition” — is applicable to two-stage negotiated procedures, governed by Article 22(3)?

The questions referred

Preliminary observations

- ¹⁹ According to the applicants in the main proceedings, the referring court ought to have referred another question in addition to those referred, concerning the Hungarian legislation’s failure to respect the principles of equal treatment, non-discrimination and proportionality, in that that legislation automatically excludes persons or entities which have taken part in the preparatory work for a public contract from the procedures for the awards of public contracts, without giving them the opportunity to prove that there

is no threat to competition. According to the applicants, analogous measures contained in the national law of other Member States have been held to be incompatible with Community law in Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, and in Case C-213/07 *Michaniki* [2008] ECR I-9999.

- 20 In that regard, the Court notes that, in the context of the cooperation between the Court and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, Case C-306/99 *BIAO* [2003] ECR I-1, paragraph 88; Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 16; and Case C-260/07 *Pedro IV Servicios* [2009] ECR I-2437, paragraph 28).
- 21 The right to determine the questions to be put to the Court thus devolves upon the national court alone and the parties may not change their tenor (see, inter alia, Case 44/65 *Singer* [1965] ECR 1191, 1198; Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] ECR I-5141, paragraph 23; and Case C-402/98 *ATB and Others* [2000] ECR I-5501, paragraph 29).
- 22 In addition, to alter the substance of the questions referred for a preliminary ruling, or to answer the additional questions mentioned by the applicants in the main proceedings in their observations, would be incompatible with the Court's function under Article 234 EC and with its duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations under Article 23 of the Statute of the Court of Justice, bearing in mind that under that provision only the order of the referring court is notified to the interested parties (see, to that effect, inter alia, Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6; Case C-178/95 *Wiljo* [1997] ECR I-585, paragraph 30; Case C-352/95 *Phytheron International* [1997] ECR I-1729, paragraph 14; and *Kainuun Liikenne and Pohjolan Liikenne*, paragraph 24).

23 In the present case, since the referring court has accepted neither the need nor the relevance of a question concerning the grounds for, or the circumstances of, the exclusion of the applicants in the main proceedings from the procedure for the award of the public contract in question, the Court cannot carry out an analysis in that regard.

The first question

24 By its first question, the referring court asks, in essence, whether Directive 2004/18 is applicable to a procedure for the award of a public contract initiated after the entry into force of that directive, but before the expiry of the period for transposition of it, and as a result that directive had not yet been incorporated into the national law.

25 At the outset, it should be borne in mind that, before the period for transposition of a directive has expired, Member States cannot be reproached for not having yet adopted measures implementing it in national law (see Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 43 and Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 114).

26 Thus, in the case in the main proceedings, at the time of the initiation of the procedure for the award of the contract at issue, Directive 2004/18 had not been transposed into Hungarian national law, as the deadline for transposition had not yet passed, so that Directive 93/37 remained applicable at that stage of the procedure.

27 To the extent that the procedure at issue in the main proceedings was still on-going at the date on which the period for transposition of Directive 2004/18 expired, the question also arises whether that directive may be applicable in the main proceedings.

28 In that regard, it is apparent from the information provided by the Hungarian government at the hearing that the contracting authority's decision — to exclude the bid from the consortium set up by the applicants in the main proceedings and to continue the procedure with the two candidates who were considered to be suitable — was taken before the date on which the period for transposition of Directive 2004/18 expired.

29 It would, in those circumstances, be contrary to the principle of legal certainty to determine the law applicable to the case in the main proceedings by reference to the date of the award of the contract, when the decision which in the present case is alleged to have infringed Community law was taken before the date referred to in the previous paragraph of this judgment (see, by analogy, Case C-337/98 *Commission v France* [2000] ECR I-8377, paragraph 40).

30 Therefore, the answer to the first question is that Directive 2004/18 is not applicable to a decision taken by a contracting authority when awarding a public works contract before the period for transposition of that directive has expired.

The second question

31 In the light of the answer given to the first question, it is not necessary to reply to the second question.

The third question

- 32 By its third question, the referring court asks, in essence, whether Article 22(3) of Directive 93/37 must be interpreted as meaning that a negotiated procedure for the award of a public contract cannot be continued in the absence of a sufficient number of candidates to reach the lower limit of three candidates laid down by that provision.
- 33 In that regard, it should be recalled that Directive 93/37 contains, among its provisions, rules on the procedure to be followed.
- 34 Thus, as regards the procedure for the award of a public works contract, at least two different stages are provided for in Article 18 of Directive 93/37, that is to say, first, the possible exclusion of tenderers or candidates under Article 24 of that directive, and the verification of the suitability of the tenderers or candidates who were not excluded, in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 26 to 29 of that directive and prescribed for the procedure in question, and, second, the award of the contract on the basis of the criteria prescribed for that procedure as laid down in Title IV, Chapter 3 of Directive 93/37 and taking into account Article 19 of that directive.
- 35 In the negotiated procedure, negotiations between the contracting authority and the candidates admitted to negotiate take place between the first stage referred to and the stage of awarding the contract.
- 36 Pursuant to Article 22(3) of Directive 93/37, where a contract is to be awarded by negotiated procedure, the number of candidates admitted to negotiate may not be less than three provided that there is a sufficient number of suitable candidates.

37 It is, therefore, apparent from the wording of that provision that the contracting authorities are, at the very least, bound — as regards the number of candidates admitted to negotiations — to respect the lower limit laid down in that provision, in so far as the number of suitable candidates so allows.

38 In that regard, any contractor who has sought an invitation to take part in the procedure in question and who, among those with the qualifications required under Articles 24 to 29 of that directive, meets the conditions of an economic and technical nature prescribed for the procedure in question, must be considered to be a ‘suitable candidate’ within the meaning of Article 22(3) of Directive 93/37.

39 On the one hand, a ‘candidate’ is defined in Article 1(h) of Directive 93/37 as a contractor who has sought an invitation to take part in a restricted or negotiated procedure.

40 On the other hand, in accordance with Article 22(1) of Directive 93/37, in negotiated procedures, the contracting authorities are — on the basis of information given relating to the contractor’s personal position as well as to the information and formalities necessary for the evaluation of the minimum conditions of an economic and technical nature to be fulfilled by him — to select from among the candidates with the qualifications required under Articles 24 to 29 those whom they will invite to negotiate.

41 It follows that Article 22(3) of Directive 93/37 must be interpreted as meaning that, where a contract is to be awarded by negotiated procedure, the number of candidates invited to negotiate may not be lower than three, provided that a sufficient number of contractors have sought an invitation to take part in the procedure in question and they, among the candidates with the qualifications required under Articles 24 to 29 of that directive, meet the conditions of an economic and technical nature prescribed for the procedure in question.

42 Thus, where a contract is awarded by a negotiated procedure and the number of suitable candidates is below the lower limit prescribed for the procedure in question, a limit which cannot be less than three, the contracting authority may, nevertheless, continue with the procedure by inviting the suitable candidate or candidates to negotiate the terms of the contract.

43 As the Commission has correctly pointed out, if it were otherwise, the social need which the contracting authority has stated and defined and intended to meet by awarding the contract in question could not be satisfied, not because of a lack of suitable candidates, but on account of the fact that the number of suitable candidates was below that lower limit.

44 In the light of the foregoing, the answer to the third question is that Article 22(3) of Directive 93/37 must be interpreted as meaning that where a contract is awarded by a negotiated procedure and the number of suitable candidates is below the lower limit prescribed for the procedure in question, the contracting authority may, nevertheless, continue with the procedure by inviting the suitable candidate or candidates to negotiate the terms of that contract.

The fourth question

45 By its fourth question, the referring court asks whether the second subparagraph of Article 22(2) of Directive 93/37 is applicable to the negotiated procedure for the award of public works contracts.

46 In that regard, it should be noted that, as is apparent from the broad logic of Article 22 of Directive 93/37, the second subparagraph Article 22(2) of that provision refers only to contracts awarded by restricted procedure.

- 47 However, it should be observed, as is apparent from the 10th recital in the preamble to Directive 93/37, that the purpose of that directive is to develop effective competition in the field of public works contracts (see Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697, paragraph 26; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 34; Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 89; and Case C-247/02 *Sintesi* [2004] ECR I-9215, paragraph 35).
- 48 Thus, in order to meet the objective of developing effective competition, 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 (*Fracasso and Leitschutz*, paragraph 31 and *Sintesi*, paragraph 37).
- 49 Accordingly, although the second subparagraph of Article 22(2) of Directive 93/37 provides that, where the contracting authorities award a contract by restricted procedure, the number of candidates invited to tender is in any event to be sufficient to ensure genuine competition, that provision merely refers specifically to one of the general objectives of that directive (see, to that effect, *Sinesti*, paragraph 36).
- 50 It follows that, even though Directive 93/37 does not contain a provision analogous to the second subparagraph of Article 22(2) in relation to negotiated procedures, a contracting authority which has recourse to such procedures, in the cases referred to in Article 7(2) of that directive, must none the less take care to ensure there is genuine competition.
- 51 In that regard, it should, first, be pointed out that, in those cases, recourse to the negotiated procedure requires the prior publication of a contract notice, intended to encourage applications. Therefore, as was stated in paragraph 14 of this judgment, that measure has been complied with in the case in the main proceedings.

52 Next, as regards the stage of negotiating for the contract, Article 22(3) of Directive 93/37 requires the contracting authority to invite a sufficient number of candidates to that stage. Whether the number is sufficient to ensure genuine competition must be assessed on the basis of the characteristics and the nature of the contract in question.

53 Lastly, if, in such a procedure, the number of suitable candidates is below the lower limit prescribed for the procedure in question — a limit which, in accordance with Directive 93/37, cannot be less than three — it must be accepted that, in so far as the conditions of an economic and technical nature for that procedure have been correctly prescribed and applied, the contracting authority has, nevertheless, ensured that there is genuine competition.

54 It follows from all of the foregoing that the answer to the fourth question is that Directive 93/37 must be interpreted as meaning that the obligation to ensure that there is genuine competition is satisfied where the contracting authority has recourse to the negotiated procedure under the conditions referred to in Article 7(2) of that directive.

Costs

55 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:

1. **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 is not applicable to a decision taken by a contracting authority when awarding a public works contract before the period for transposition of that directive has expired.**

2. **Article 22(3) 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 Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997, must be interpreted as meaning that where a contract is awarded by a negotiated procedure and the number of suitable candidates is below the lower limit prescribed for the procedure in question, the contracting authority may, nevertheless, continue with the procedure by inviting the suitable candidate or candidates to negotiate the terms of that contract.**

3. **Council Directive 93/37, as amended by Directive 97/52, must be interpreted as meaning that the obligation to ensure that there is genuine competition is satisfied where the contracting authority has recourse to the negotiated procedure under the conditions referred to in Article 7(2) of that directive.**

[Signatures]