

JUDGMENT OF THE COURT (First Chamber)

24 January 2008\*

In Case C-532/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Simvoulio tis Epikratias (Greece), made by decision of 28 November 2006, received at the Court on 29 December 2006, in the proceedings

**Emm. G. Lianakis AE,**

**Sima Anonimi Techniki Eteria Meleton ke Epivlepseon,**

**Nikolaos Vlachopoulos**

v

**Dimos Alexandroupolis,**

**Planitiki AE,**

\* Language of the case: Greek.

**Ekaterini Georgoula,**

**Dimitrios Vasios,**

**N. Loukatos ke Synergates AE Meleton,**

**Eratosthenis Meletitiki AE,**

**A. Pantazis — Pan. Kyriopoulos ke syn/tes OS Filon OE,**

**Nikolaos Sideris,**

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of Chamber, A. Tizzano, A. Borg Barthet, M. Ilešič and E. Levits, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,  
Registrar: R. Grass,

after considering the observations submitted on behalf of:

- N. Loukatos ke Synergates AE Meleton, Eratosthenis Meletitiki AE, A. Pantazis — Pan. Kyriopoulos ke syn/tes OS Filon OE and Nikolaos Sideris, by E. Konstantopoulou and P.E. Bitsaxis, dikigori,
  
- the Commission of the European Communities, by M. Patakia and D. Kukovec, acting as Agents,

gives the following

### **Judgment**

- <sup>1</sup> This reference for a preliminary ruling concerns, in essence, the interpretation of Articles 23(1), 32 and 36 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) ('Directive 92/50').

- 2 The reference has been made in the context of two sets of proceedings brought by (1) the consortium of consultancy firms and experts comprising Emm. G. Lianakis AE (universal successor in title to Emm. Lianakis EPE), Sima Anonimi Techniki Eteria Meleton ke Epivlepseon and Nikolaos Vlachopoulos ('the Lianakis consortium') and (2) the consortium of Planitiki AE, Ekaterini Georgoula and Dimitrios Vasios ('the Planitiki consortium'), against Dimos Alexandroupolis (Municipality of Alexandroupolis) and the consortium of N. Loukatos ke Synergates AE Meleton, Eratosthenis Meletitiki AE, A. Pantazis — Pan. Kyriopoulos ke syn/tes (Filon OE) — Nikolaos Sideris ('the Loukatos consortium'), concerning the award of a contract to carry out a project in respect of the cadastre, town plan and implementing measure for part of the Municipality of Alexandroupolis.

### **Legal context**

- 3 Directive 92/50 coordinates the procedures for the award of public service contracts.
- 4 To that end, the Directive determines which contracts must be subject to an award procedure and the procedural rules to be followed, including, in particular, the principle of equal treatment of economic operators, the criteria for the qualitative selection for operators ('qualitative selection criteria') and the criteria for the award of contracts ('award criteria').
- 5 Thus, Article 3(2) of Directive 92/50 provides that '[c]ontracting authorities shall ensure that there is no discrimination between different service providers'.

6 Article 23(1) of the Directive provides that '[c]ontracts shall be awarded on the basis of the criteria laid down in Chapter 3 [namely Articles 36 and 37], taking into account Article 24, after the suitability of the service providers not excluded under Article 29 has been checked by the contracting authorities in accordance with the criteria referred to in Articles 31 and 32'.

7 According to Article 32 of the Directive:

'1. The ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

2. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided:

(a) the service provider's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services;

(b) a list of the principal services provided in the past three years, with the sums, dates and recipients, public or private, of the services provided:

...

- (c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;
- (d) a statement of the service provider's average annual manpower and the number of managerial staff for the last three years;
- (e) a statement of the tool, plant or technical equipment available to the service provider for carrying out the services;
- (f) a description of the service provider's measures for ensuring quality and his study and research facilities;

...'

8 Article 36 of Directive 92/50 provides:

'1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting authority shall base the award of contracts may be:

- (a) where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic

and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price; or

(b) the lowest price only.

2. Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the contract notice the award criteria which it intends to apply, where possible in descending order of importance.'

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

- 9 In 2004, the Municipal Council of Alexandroupolis issued a call for tenders for a contract to carry out a project in respect of the cadastre, town plan and implementing measure for the Palagia area, a part of Alexandroupolis with fewer than 2 000 inhabitants. The budget for the project was EUR 461 737.
- 10 The contract notice referred to the award criteria in order of priority: (1) the proven experience of the expert on projects carried out over the last three years; (2) the firm's manpower and equipment; and (3) the ability to complete the project by the anticipated deadline, together with the firm's commitments and its professional potential.

- 11 Thirteen consultancies responded to the call for tenders, including in particular the Lianakis and Planitiki consortia, and the Loukatos consortium.
- 12 During the evaluation procedure, in order to evaluate the tenderers' bids, the project award committee of the Municipality of Alexandroupolis ('the Project Award Committee') defined the weighting factors and sub-criteria in respect of the award criteria referred to in the contract notice.
- 13 Accordingly, it set weightings of 60%, 20% and 20% for each of the three award criteria referred to in the contract notice.
- 14 In addition, it stipulated that experience (first award criterion) should be evaluated by reference to the value of completed projects. Thus, for experience on projects worth up to EUR 500 000, a tenderer would be awarded 0 points; between EUR 500 000 and EUR 1 000 000, 6 points; between EUR 1 000 000 and EUR 1 500 000, 12 points; and so on up to a maximum score of 60 points for experience on projects worth over EUR 12 000 000.
- 15 A firm's manpower and equipment (second award criterion) were to be assessed by reference to the size of the project team. A tenderer would therefore be awarded 2 points for a team of 1 to 5 persons, 4 points for a team of 6 to 10 persons, and so on up to a maximum score of 20 points for a team of more than 45 persons.
- 16 Finally, the Project Award Committee decided that the ability to complete the project by the anticipated deadline (third award criterion) should be assessed by reference



to the value of the firm's commitments. Accordingly, a tenderer would be awarded the maximum score of 20 points for work worth less than EUR 15 000; 18 points for work worth between EUR 15 000 and EUR 60 000; 16 points for work worth between EUR 60 000 and EUR 100 000; and so on down to a minimum score of 0 points for work worth more than EUR 1 500 000.

17 In application of those rules, the Project Award Committee allocated first place to the Loukatos consortium (78 points), second place to the Planitiki consortium (72 points) and third place to the Lianakis consortium (70 points). Consequently, in its report of 27 April 2005, it proposed that the project be awarded to the Loukatos consortium.

18 By decision of 10 May 2005, the Municipal Council of Alexandroupolis approved the Project Award Committee's report and awarded the project to the Loukatos consortium.

19 The Lianakis and Planitiki consortia took the view that the Loukatos consortium could only have been awarded the project as a result of the Project Award Committee's subsequent stipulation of the weighting factors and sub-criteria in respect of the award criteria referred to in the contract notice, and challenged the decision taken by the Municipal Council of Alexandroupolis, initially before the Council itself and subsequently before the Simvoulio tis Epikratias (Greek Council of State; 'Simvoulio tis Epikratias') on the basis, in particular, of allegations of infringement of Article 36(2) of Directive 92/50.

20 In those circumstances, the Simvoulio tis Epikratias decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'If the contract notice for the award of a contract for services makes provision only for the order of priority of the award criteria, without stipulating the weighting factors

for each criterion, does Article 36 of Directive 92/50 allow criteria to be weighted by the evaluation committee at a later date and, if so, under what conditions?’

### **The question referred for a preliminary ruling**

- 21 By its question, the referring court asks in essence whether, in a tendering procedure, Article 36(2) of Directive 92/50 precludes the contracting authority from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice.
- 22 The Commission submitted in its written observations that, before replying to the question referred, it is necessary to consider whether, in a tendering procedure, Directive 92/50 precludes the contracting authority from taking into account as ‘award criteria’ rather than as ‘qualitative selection criteria’ the tenderers’ experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline.
- 23 In that regard, even if — formally — the national court has limited its question to the interpretation of Article 36(2) of Directive 92/50 in relation to a possible later change to the award criteria, that does not prevent the Court from providing the national court with all the elements of interpretation of Community law which may enable it to rule on the case before it, whether or not reference is made thereto in the question referred (see Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 64 and the case-law cited).

24 Accordingly, it is necessary, first of all, to establish the lawfulness of the criteria chosen as ‘award criteria’, before considering whether it is possible for the weighting factors and sub-criteria in respect of the award criteria referred to in the contract documents or contract notice to be set at a later date.

*Criteria chosen as ‘award criteria’ (Articles 23 and 36(1) of Directive 92/50)*

25 It must be borne in mind that Article 23(1) of Directive 92/50 provides that a contract is to be awarded on the basis of the criteria laid down in Articles 36 and 37 of the Directive, taking into account Article 24, after the suitability of the service providers not excluded under Article 29 has been checked by the contracting authorities in accordance with the criteria referred to in Articles 31 and 32.

26 The case-law shows that, while Directive 92/50 does not in theory preclude the examination of the tenderers’ suitability and the award of the contract from taking place simultaneously, the two procedures are nevertheless distinct and are governed by different rules (see, to that effect, in relation to works contracts, Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 15 and 16).

27 The suitability of tenderers is to be checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical capability (the ‘qualitative selection criteria’) referred to in Articles 31 and 32 of Directive 92/50 (see, as regards works contracts, *Beentjes*, paragraph 17).

28 By contrast, the award of contracts is based on the criteria set out in Article 36(1) of Directive 92/50, namely, the lowest price or the economically most advantageous tender (see, to that effect, in relation to works contracts, *Beentjes*, paragraph 18).

29 However, although in the latter case Article 36(1) of Directive 92/50 does not set out an exhaustive list of the criteria which may be chosen by the contracting authorities, and therefore leaves it open to the authorities awarding contracts to select the criteria on which they propose to base their award of the contract, their choice is nevertheless limited to criteria aimed at identifying the tender which is economically the most advantageous (see, to that effect, in relation to public works contracts, *Beentjes*, paragraph 19; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraphs 35 and 36; and, in relation to public service contracts, Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraphs 54 and 59, and Case C-315/01 *GAT* [2003] ECR I-6351, paragraphs 63 and 64).

30 Therefore, ‘award criteria’ do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers’ ability to perform the contract in question.

31 In the case in the main proceedings, however, the criteria selected as ‘award criteria’ by the contracting authority relate principally to the experience, qualifications and means of ensuring proper performance of the contract in question. Those are criteria which concern the tenderers’ suitability to perform the contract and which therefore do not have the status of ‘award criteria’ pursuant to Article 36(1) of Directive 92/50.

32 Consequently, it must be held that, in a tendering procedure, a contracting authority is precluded by Articles 23(1), 32 and 36(1) of Directive 92/50 from taking into account as ‘award criteria’ rather than as ‘qualitative selection criteria’ the tenderers’ experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline.

*Subsequent stipulation of weighting factors and sub-criteria in respect of the award criteria referred to in the contract documents or contract notice*

33 It must be borne in mind that Article 3(2) of Directive 92/50 requires contracting authorities to ensure that there is no discrimination between different service providers.

34 The principle of equal treatment thus laid down also entails an obligation of transparency (see, to that effect, in relation to public supply contracts, Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31, and, in relation to public works contracts, *SIAC Construction*, paragraph 41).

35 Furthermore, it follows from Article 36(2) of Directive 92/50 that where the contract has to be awarded to the economically most advantageous tender, the contracting authority must state in the contract documents or in the contract notice the award criteria which it intends to apply, where possible in descending order of importance.

- 36 According to the case-law, Article 36(2), read in the light of the principle of equal treatment of economic operators set out in Article 3(2) of Directive 92/50 and of the ensuing obligation of transparency, requires that potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer, and their relative importance, when they prepare their tenders (see, to that effect, in relation to public contracts in the water, energy, transport and telecommunications industries, Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, paragraph 88; in relation to public works contracts, Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 98; and, in relation to public service contracts, Case C-331/04 *ATI EAC and Others* [2005] ECR I-10109, paragraph 24).
- 37 Potential tenderers must be in a position to ascertain the existence and scope of those elements when preparing their tenders (see, to that effect, in relation to public service contracts, *Concordia Bus Finland*, paragraph 62, and *ATI EAC and Others*, paragraph 23).
- 38 Therefore, a contracting authority cannot apply weighting rules or sub-criteria in respect of the award criteria which it has not previously brought to the tenderers' attention (see, by analogy, in relation to public works contracts, *Universale-Bau and Others*, paragraph 99).
- 39 That interpretation is supported by the purpose of Directive 92/50 which aims to eliminate barriers to the freedom to provide services and therefore to protect the interests of economic operators established in a Member State who wish to offer services to contracting authorities established in another Member State (see, in particular, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16).

40 To that end, tenderers must be placed on an equal footing throughout the procedure, which means that the criteria and conditions governing each contract must be adequately publicised by the contracting authorities (see, to that effect, in relation to public works contracts, *Beentjes*, paragraph 21, and *SIAC Construction*, paragraphs 32 and 34; also, in relation to public service contracts, *ATI EAC and Others*, paragraph 22).

41 Contrary to the doubts expressed by the referring court, those findings do not conflict with the interpretation by the Court of Justice of Article 36(2) of Directive 92/50 in *ATI EAC and Others*.

42 In the case that gave rise to that judgment, the award criteria and their weighting factors, together with the sub-criteria of those award criteria had in fact been established beforehand and published in the contract documents. The contracting authority concerned had merely stipulated subsequently, shortly before the opening of the envelopes, the weighting factors to be applied to the sub-criteria.

43 In that judgment, the Court held that Article 36(2) of Directive 92/50 does not preclude proceeding in that way, provided that three very specific conditions apply, namely that the decision to do so:

- does not alter the criteria for the award of the contract set out in the contract documents;

- does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; and

— was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers (see, to that effect, *ATI EAC and Others*, paragraph 32).

<sup>44</sup> It must be noted that in the case in the main proceedings, by contrast, the Project Award Committee referred only to the award criteria themselves in the contract notice, and later, after the submission of tenders and the opening of applications expressing interest, stipulated both the weighting factors and the sub-criteria to be applied to those award criteria. Clearly that does not comply with the requirement laid down in Article 36(2) of Directive 92/50 to publicise such criteria, read in the light of the principle of equal treatment of economic operators and the obligation of transparency.

<sup>45</sup> Having regard to the foregoing, the answer to the question referred must therefore be that, read in the light of the principle of equal treatment of economic operators and the ensuing obligation of transparency, Article 36(2) of Directive 92/50 precludes the contracting authority in a tendering procedure from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice.

## Costs

<sup>46</sup> 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 (First Chamber) hereby rules:

**Read in the light of the principle of equal treatment of economic operators and the ensuing obligation of transparency, Article 36(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, precludes the contracting authority in a tendering procedure from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice.**

[Signatures]