JUDGMENT OF THE COURT (First Chamber)

18 January 2007 *

In Case C-220/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal administratif de Lyon (France), made by decision of 7 April 2005, received at the Court on 19 May 2005, in the proceedings

Jean Auroux and Others

v

Commune de Roanne,

intervening party:

Société d'équipement du département de la Loire (SEDL),

* Language of the case: French.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts, E. Juhász (Rapporteur), J.N. Cunha Rodrigues and M. Ilešič, Judges,

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 April 2006,

after considering the observations submitted on behalf of:

— Mr Auroux and Others, by J. Antoine, avocat,

— the Commune de Roanne, by P. Petit and C. Xavier, avocats,

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

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

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

— the Polish Government, by T. Nowakowski, acting as Agent,

— the Commission of the European Communities, by X. Lewis, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns 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 (OJ 1997 L 328, p. 1) ('the Directive').

2 The reference was made in the course of an action for annulment brought by Mr Auroux and eight other applicants ('the applicants in the main proceedings') against the resolution of the Municipal Council of the Commune de Roanne (municipality of Roanne), of 28 October 2002, authorising its mayor to sign a contract with the Société d'équipement du département de la Loire ('SEDL') for the construction of a leisure centre in Roanne.

Legal background

Community law

3 According to the second recital in the preamble to the Directive, 'the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts'.

4 It is clear from the sixth recital in the preamble to the Directive that works contracts of less than EUR 5 000 000 may be exempted from competition as provided for under the Directive, and should be exempted from coordination measures.

5 According to the 10th recital in the preamble to the Directive, 'to ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community'. It goes on to state that 'the information contained in these notices must enable contractors established in the Community to determine whether the proposed contracts are of interest to them'.

6 Article 1(a) to (d) of the Directive provides:

'For the purpose of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b),

which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

...

(c) a "work" means the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic and technical function;

(d) "public works concession" is a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment'.

7 The 'activities referred to in Annex II' mentioned in Article 1(a) of the Directive are the building and civil engineering works in Class 50 of the general industrial classification of economic activities within the European Communities. The construction of buildings is expressly listed among those activities.

8 Article 6 of the Directive provides:

'1. This Directive shall apply to:

(a) 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);

(b) public works contracts referred to in Article 2(1) whose estimated value net of VAT is not less than [EUR] 5 000 000.

...

3. Where a work is subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amounts referred to in paragraph 1. Where the aggregate value of the lots is not less than the amount referred to in paragraph 1, the provisions of that paragraph shall apply to all lots. Contracting authorities shall be permitted to depart from this provision for lots whose estimated value net of VAT is less than [EUR] 1 000 000, provided that the total estimated value of all the lots exempted does not, in consequence, exceed 20% of the total estimated value of all lots.

4. No work or contract may be split up with the intention of avoiding the application of this Directive.

5. When calculating the amounts referred to in paragraph 1 and in Article 7, account shall be taken not only of the amount of the public works contracts but also of the estimated value of the supplies needed to carry out the works [and] made available to the contractor by the contracting authorities.

6. Contracting authorities shall ensure that there is no discrimination between the various contractors.'

National law

9 At the material time, Article L. 300-4 of the Code de l'urbanisme (Town Planning Code), as amended by Article 8 of Law No 2000-1208 of 13 December 2000 (JORF of 14 December 2000, p. 19777), provides:

'The State, the local authorities or public bodies established by them may entrust the planning and implementation of development projects provided for in this Title to any suitably qualified public or private person.

Where the contract is concluded with a public body, a local semi-public company defined by Law No 83-597 of 7 July 1983, or a semi-public company more than half of whose capital is held by one or more of the following public persons: State, regions, *départements*, municipalities or groupings thereof, it may take the form of a public development agreement. In that case, the contracting partner may be entrusted with acquisitions by way of expropriation or pre-emption and carrying out any operation or measure relating to development and installation which contributes to the overall project forming the subject of the public development agreement.

The bodies referred to in the preceding paragraph may be entrusted with conducting preliminary studies necessary for the definition of the characteristics of the project under an agency contract requiring them to conclude study contracts for and on behalf of the authority or grouping of authorities.

The provisions of Chapter IV of Title II of Law No 93-122 of 29 January 1993 relating to the prevention of corruption and transparency in economic life and public procedures are not applicable to public development agreements drawn up in accordance with this article.

A public development agreement may lay down the conditions under which the contracting partner is involved with the studies concerning the operation and, in particular, the revision or amendment of a local development plan.'

10 Following the initiation of proceedings by the Commission of the European Communities against the French Republic for failure to fulfil obligations, Article L. 300-4 of the Town Planning Code was amended by Law No 2005-809 of 20 July 2005 on development concessions (JORF of 21 July 2005, p. 11833) as follows:

'The State and local authorities and public bodies established by them may grant concessions for carrying out the development projects provided for in this Title to any suitably qualified person.

The grant of development concessions shall be made subject by the awarding body to a notice procedure enabling a number of competing tenders to be submitted, in accordance with conditions laid down by decree in the Conseil d'État.

The concession holder shall oversee the works and installations forming part of the project which are provided for in the concession and carry out the relevant studies and any tasks necessary for their execution. It may be entrusted by the awarding body with acquiring the assets necessary for implementation of the project, including, where appropriate, by way of expropriation or pre-emption. It shall sell, lease or assign by concession the immovable property located within the area covered by the concession.'

11 Article 11 of Law No 2005-809 provides:

'Subject to judicial decisions which have acquired the force of *res judicata*, the following are declared valid, in so far as their lawfulness is contested on the ground that the appointment of the developer was not preceded by a notice procedure enabling a number of competitive tenders to be submitted:

1. Development concessions, public development agreements and development agreements signed before the publication of this Law'.

The main proceedings and the questions referred for a preliminary ruling

12 By resolution of 28 October 2002, the Municipal Council of the municipality of Roanne authorised its mayor to sign an agreement with SEDL for the construction of a leisure centre ('the agreement').

13 The agreement, concluded on 25 November 2002, provides for the development of a leisure centre in successive phases. The first phase consists of the construction of a multiplex cinema and commercial premises intended to be transferred to third parties and works intended to be transferred to the contracting authority, that is to say a car park as well as access roads and public spaces. The later phases, which require the signature of an addendum to the agreement, principally concern the construction of other commercial or service premises and a hotel.

14 According to the preamble to the agreement, the municipality of Roanne seeks, by means of that project, to regenerate a run-down urban area and promote the development of leisure and tourism.

15 Pursuant to Article 2 of the agreement, SEDL is entrusted, inter alia, with acquiring land, organising an architecture and/or engineering competition, having studies carried out, undertaking construction works, drawing up and keeping up to date certain accounting and management documents, procuring funding, putting in place effective measures for the sale of the works, and the overall management and coordination of the project and keeping the municipality of Roanne informed.

16 It is clear from the second paragraph of Article 10 of the agreement that the award of any contracts by SEDL to third parties is subject to the principles of advertising and calling for competition laid down by the Code des marchés publics (Public Procurement Code), pursuant to Article 48.1 of Law No 93-122 of 29 January 1993 (JORF of 30 January 1993).

17 According to the forecast balance sheet annexed to the agreement, the total amount of receipts is estimated at EUR 10 227 103 for the first phase of the project, and at EUR 14 268 341 for the execution of the project in its entirety. Of that total, the sum of EUR 2 925 000 will come from the municipality as consideration for the transfer

of the car park. Furthermore, it is estimated that SEDL will receive EUR 8 099 000 as consideration for the transfer of works intended for third parties. Finally, it is stipulated that the municipality of Roanne is to contribute to the financing of all the works to be executed in an amount of EUR 2 443 103 for the first phase and of EUR 3 034 341 for the works as a whole.

18 It is clear from Articles 22 to 25 of the agreement that, on its expiry, SEDL is to draw up a closing balance sheet which is to be approved by the municipality of Roanne. Any excess on that balance sheet is to be paid to the municipality. Furthermore, the municipality automatically becomes owner of all the land and works to be transferred to third parties not yet sold. The municipality of Roanne is also to guarantee the execution of contracts still ongoing, except employment contracts, and will take over the debts contracted by SEDL.

19 By application lodged at the Tribunal administratif de Lyon (Administrative Court, Lyon) on 11 December 2002, the applicants in the main proceedings brought an action for annulment against the resolution of the Municipal Council of 28 October 2002. In that action, they contest the validity of that resolution with respect to both national and Community law. As regards the latter, they argue that the conclusion of the agreement should have been preceded by advertising and a call for competition in accordance with the obligations arising from the Directive.

20 In those circumstances, the Tribunal administratif de Lyon decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does an agreement under which one contracting authority engages a second contracting authority to carry out a development project for a purpose of

general interest, pursuant to which agreement that second contracting authority is to deliver works to the first which are intended to meet its needs, and at the end of which such of the other land and works as have not been disposed of to third parties vest automatically in the first contracting authority, constitute a public works contract within the meaning of Article 1 of [the Directive]?

(2) If the answer to Question 1 is in the affirmative, is it necessary, in assessing the threshold of 5 000 000 [SDRs] imposed by Article 6 of the same directive, to take into account only the price paid in return for the delivery of the works to the contracting authority, or the sum of that price and the contributions paid, even if the latter are only partly allocated to the execution of those works, or the total value of the works, with assets not disposed of at the end of the agreement vesting automatically in the first contracting authority and the latter then pursuing the execution of ongoing contracts and assuming the debts incurred by the second contracting authority?

(3) If the answer to both Questions 1 and 2 is in the affirmative, is the first contracting authority, when entering into such an agreement, not required to follow the procurement procedures laid down in that directive, on the grounds that that agreement can be concluded only with certain legal persons and that those procedures will be applied by the second contracting authority when awarding its public works contracts?'

The admissibility of the questions

21 The municipality of Roanne and the French Government submit, as a preliminary point, that the reference for a preliminary ruling is inadmissible.

22 The municipality of Roanne submits that, by enacting Law No 2005-809, the French legislature retroactively validated public development agreements which were concluded without having been preceded by an advertising procedure and a call for competition. As the national court is obliged to apply French law, and to find that the agreement has been validated by that law, the interpretation of Community law requested is no longer necessary in order to resolve the dispute in the main proceedings.

23 The French Government asserts that the reference for a preliminary ruling wrongly treats the agreement at issue as a development agreement within the meaning of Article L. 300-4 of the Town Planning Code, in the version in force at the material time. It submits that it concerns, in reality, merely the construction of buildings. It follows that the question whether an agreement for the implementation of a development project constitutes a public works contract within the meaning of the Directive is inadmissible, since it bears no relation to the purpose and the actual facts of the dispute.

24 It is common ground that both the municipality of Roanne and the French Government plead that the reference for a preliminary ruling is inadmissible based on considerations relating to the interpretation of French law and the classification of the facts forming the basis of the dispute in the main proceedings in the light of that law.

25 The Court has consistently held that the procedure laid down in Article 234 EC is based on a clear separation of functions between national courts and tribunals and the Court of Justice, and the latter is empowered to rule only on the interpretation or the validity of the Community acts referred to in that article. In that context, it is not for the Court to rule on the interpretation of national laws or regulations or to decide whether the referring court's interpretation of them is correct (see, to that effect, Case 27/74 *Demag* [1974] ECR 1037, paragraph 8; Case C-347/89 *Eurim-Pharm* [1991] ECR I-1747, paragraph 16; and Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I-589, paragraph 20).

26 Similarly, 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 Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 74, and Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33). Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling.

27 It follows that the pleas of inadmissibility raised by the municipality of Roanne and the French Government must be rejected and the reference for a preliminary ruling be declared admissible.

The first question

28 By its first question, the national court asks essentially whether the agreement constitutes a public works contract within the meaning of Article 1(a) of the Directive.

29 The definition in Article 1(a) of the Directive provides that public works contracts are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority within the meaning of Article 1(b), which have as their object either the execution, or both the execution and design, of works or work defined by the Directive, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

30 In their written submissions, the municipality of Roanne and the French and Polish Governments argue that the agreement does not correspond to that definition and, therefore, does not constitute a public works contract within the meaning of the Directive.

31 The municipality of Roanne submits that, in the light of its purpose, the agreement does not constitute a public works contract, since, as a public development agreement, its purpose goes beyond that of the execution of works. In accordance with French law, public development agreements concern the overall implementation of all aspects of a town planning project or of certain town planning policies, in particular, the planning of the project, management of the legal and administrative aspects, the acquisition of land by way of expropriation and putting in place procedures for the award of contracts.

32 Similarly, the Polish Government observes that, according to the agreement, SEDL undertakes to implement an investment project which consists of various tasks. It submits, in that regard, that SEDL is not the contractor which will execute the works provided for in the contract, but merely undertakes to prepare and manage a public works contract. Taking the view that the most important aspect of the contract consists in commissioning works and supervising their execution, the Polish Government argues that the agreement should be classified as a 'public service contract' within the meaning of Article 1 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).

33 The French Government submits that the part of the leisure centre which concerns the execution of works which are intended to be sold to third parties does not constitute a public works contract within the meaning of the Directive. It takes the view that precisely because that part is intended for third parties it cannot be regarded as corresponding to the municipality's requirements. It adds that only the construction of the car park on behalf of the municipality of Roanne could, in principle, constitute a public works contract. However, the car park does not fall within the scope of the Directive either, as it will be transferred to the municipality only after it has been constructed in accordance with a special procedure laid down by French law called 'vente en l'état future d'achèvement', so that it is essentially a simple purchase of real property, the subject-matter of which is not so much the works as the sale of works to be constructed.

34 The Lithuanian and Austrian Governments and the Commission take the view that the agreement is a public works contract within the meaning of Article 1 of the Directive. In particular, the Commission submits that, even if the agreement contains a number of tasks which are supplies of services, its main purpose is the execution of a work which corresponds to the requirements specified by the contracting authority within the meaning of Article 1(a) and (c) of the Directive.

35 The arguments put forward by the municipality of Roanne and the French and Polish Governments cannot be accepted.

36 It is true that, in addition to the execution of works, the agreement entrusts SEDL with further tasks which have, as several parties have observed, the character of a

supply of services. However, contrary to the municipality of Roanne's submissions, it does not follow from the mere fact the agreement contains elements which go beyond the execution of works that it falls outside the scope of the Directive.

37 It is clear from the case-law of the Court that, where a contract contains elements relating both to a public works contract and another type of public contract, it is the main purpose of the contract which determines which Community directive on public contracts is to be applied in principle (see Case C-331/92 *Gestión Hotelera Internacional* [1994] ECR I-1329, paragraph 29).

38 As regards the application of that case-law to these proceedings, it should be stated, contrary to the Polish Government's arguments in its written observations, that under the agreement SEDL's commitment is not limited to the administration and organisation of works, but also extends to the execution of the works set out therein. Furthermore, according to settled case-law, in order to be classed as a contractor under a public works contract within the meaning of Article 1(a) of the Directive, it is not necessary that a person who enters into a contract with a contracting authority is capable of direct performance using his own resources (see, to that effect, Case C-389/92 *Ballast Nedam Groep* [1994] ECR I-1289, paragraph 13, and Case C-176/98 *Holst Italia* [1999] ECR I-8607, paragraph 26). It follows that in order to ascertain whether the main purpose of the agreement is the execution of works it is irrelevant that SEDL does not execute the works itself and that it has them carried out by subcontractors.

39 The argument of the French Government that, by reason of the considerations set out in paragraph 33, the purpose of the agreement cannot be regarded as the execution of a work corresponding to the requirements specified by the contracting authority within the meaning of Article 1(a) of the Directive must be dismissed.

40 As regards the legal classification by the French Government of the car park, it must be observed that the definition of a public works contract is a matter of Community law. Since Article 1(a) of the Directive makes no express reference to the law of the Member States for the purpose of determining its meaning and scope, the legal classification of the contract in French law is irrelevant for the purpose of determining whether the contract falls within the scope of the Directive (see, by analogy, Case C-264/03 *Commission* v *France* [2005] ECR I-8831, paragraph 36).

41 It is clear from Article 1(c) of the Directive that the existence of a work must be determined in relation to the economic or technical function of the result of the works undertaken (see Joined Cases C-187/04 and C-188/04 *Commission* v *Italy*, not published in the ECR, paragraph 26). As is apparent from a number of clauses in the agreement, the construction of the leisure centre is intended to accommodate commercial and service activities, so that the agreement must be regarded as fulfilling an economic function.

42 Furthermore, the construction of the leisure centre must be regarded as corresponding to the requirements specified by the municipality of Roanne in the agreement. It must be observed, in that regard, that the work referred to by the agreement is the leisure centre as a whole, including the construction of a multiplex cinema, service premises for leisure activities, a car park and, possibly, a hotel. It is clear from a number of clauses in the agreement that, by the construction of the leisure centre as a whole, the municipality of Roanne seeks to reposition and regenerate the area around the railway station.

43 As regards the other elements covered by the definition of 'public works contract' laid down in Article 1(a) of the Directive, it must be observed, first, that it is not disputed that the municipality of Roanne, being a local authority, has the capacity of 'contracting authority' within the meaning of Article 1(b) of the Directive and that a written contract exists.

44 Second, it is common ground that SEDL, as an economic operator active on the market which undertakes to execute works provided for in the agreement, is to be regarded as a contractor within the meaning of the Directive. As was stated in paragraph 38 of this judgment, it is irrelevant in that respect that SEDL uses subcontractors for the design and execution of the works (see, to that effect, Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 90).

45 Finally, it is clear that the agreement was concluded for pecuniary interest. The pecuniary interest in a contract refers to the consideration paid to the contractor on account of the execution of works intended for the contracting authority (see, to that effect, *Ordine degli Architetti and Others*, paragraph 77). Under the terms of the agreement, SEDL is to receive a sum from the municipality of Roanne as consideration for the transfer of the car park. The municipality also undertakes to contribute to the costs of all the works to be executed. Finally, under the agreement, SEDL is entitled to obtain income from third parties as consideration for the sale of the works executed.

46 It is apparent from the examination of the agreement that its main purpose, as the Commission submitted, is the performance of works which, taken as a whole, lead to the execution of a work within the meaning of Article 1(c) of the Directive, that is to say a leisure centre. The service elements provided for in the agreement, such as the acquisition of property, obtaining finances, organising an architecture and/or engineering competition and marketing the buildings, are part of the completion of that work.

47 Having regard to the foregoing, the answer to the first question must be that an agreement by which a first contracting authority entrusts a second contracting authority with the execution of a work constitutes a public works contract within the

meaning of Article 1(a) of the Directive, regardless of whether or not it is anticipated that the first contracting authority is or will become the owner of all or part of that work.

The second question

48 By its second question, the national court asks the Court about the methods for determining the value of the contract at issue, in order to establish whether the threshold laid down in Article 6 of the Directive has been reached.

49 The national court puts forward three possible bases for calculation of that threshold. First, the value of the contract is determined only on the basis of the amounts paid by the contracting authority as consideration for the works which are transferred to it. Second, the value of the contract is constituted by all the sums paid by the contracting authority, that is to say the consideration for the works transferred to it as well as the financial contribution paid in respect of all the works to be executed. Third, the determination of the value of the contract takes account of the total value of the works, including the amounts paid by the contracting authority and those received from third parties as consideration for the works executed on their behalf.

50 It must be observed first of all that, according to the wording of Article 6 of the Directive, its provisions apply to public works contracts whose value reaches the threshold laid down therein. Article 6 does not lay down any rule limiting the amounts to be taken into account in order to determine the value of the contract to the amounts received from the contracting authority.

51 Furthermore, to infer such a rule from Article 6 would be contrary to the spirit and the purpose of the Directive.

52 As is apparent from the 2nd and 10th recitals, the Directive aims to abolish restrictions on freedom of establishment and the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition (*Ordine degli Architetti and Others*, paragraph 52). As the 10th recital states, the development of such competition entails the publication at Community level of contract notices containing sufficient information to enable contractors established in the Community to determine whether the proposed contracts are of interest to them. In that regard, the threshold laid down in Article 6 of the Directive serves to ensure that public contracts with a sufficiently high value to justify intra-Community participation are notified to potential tenderers.

53 Since the aim of the procedures for the award of public works contracts laid down in the Directive is precisely to guarantee to potential tenderers established in the European Community access to public contracts of interest to them, it follows that whether the value of a contract reaches the threshold laid down in Article 6 of the Directive should be calculated from the tenderers' perspective.

54 It is clear, in that regard, that, if the value of a contract is constituted by revenue from both the contracting authority and from third parties, the interest of a potential tenderer in such a contract resides in its overall value.

55 Conversely, the argument that only the amounts paid by the contracting authority should be taken into account in the calculation of the value of a contract within the meaning of Article 6 of the Directive would undermine its purpose. The result would be that the contracting authority could award a contract with an overall value exceeding the threshold laid down in Article 6 which might interest other contractors active on the market, without applying the procedures for the award of public works contracts provided for in the Directive.

56 Finally, it must be recalled that, under Article 3 of the Directive, public works concession contracts are subject to the advertising rules laid down by the Directive where the threshold referred to in that provision is reached. Since an essential characteristic of concessions is that the consideration for the works comes either wholly or partly from third parties, it would be contrary to the purpose and scheme which underpin the Directive that, in the context of public works contracts, the amounts coming from third parties were excluded from the calculation of the value of the contract for the purposes of Article 6 of the Directive.

57 Having regard to the foregoing, the answer to the second question must be that, in order to determine the value of a contract for the purpose of Article 6 of the Directive, account must be taken of the total value of the works contract from the point of view of a potential tenderer, including not only the total amounts to be paid by the contracting authority but also all the revenue received from third parties.

The third question

58 By its third question, the national court asks, essentially, whether, in order to conclude an agreement such as that in the main proceedings, a contracting authority is exempt from using the procedures for the award of public works contracts laid

down by the Directive on the ground that, in accordance with national law, that agreement may be concluded only with certain legal persons which themselves have the capacity of contracting authority and which will be obliged in turn to apply those procedures in order to award any subsequent contracts.

59 It must be observed, as a preliminary point, that the only permitted exceptions to the application of the Directive are those which are expressly mentioned in it (see, by analogy, Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 43, and Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 45).

60 The Directive does not contain any provision comparable to that in Article 6 of Directive 92/50, which excludes from its scope public contracts awarded, under certain conditions, to contracting authorities (see, by analogy, *Teckal*, paragraph 44, and *Carbotermo and Consorzio Alisei*, paragraph 46).

61 It must be observed that Article 11 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) provides an exception as regards contracting authorities which purchase, inter alia, works from a central purchasing body, as defined in Article 1(10) of that directive. However, that provision is not applicable *ratione temporis* to the facts in the main proceedings.

62 It follows that a contracting authority is not exempt from using the procedures for the award of public works contracts provided for by the Directive, on the ground that it plans to conclude the contract concerned with a second contracting authority (see, by analogy, *Teckal*, paragraph 51; Case C-94/99 *ARGE* [2000] ECR I-11037, paragraph 40; and Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 47). Furthermore, that finding does not affect the obligation on the latter contracting authority to apply in its turn the tendering procedures laid down in the Directive (see, by analogy, *Teckal*, paragraph 45).

63 It is true that, according to the Court's case-law, a call for competition is not compulsory for contracts concluded between a local authority and a person legally distinct from it, where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities (see, *Teckal*, paragraph 50, and Case C-84/03 *Commission* v *Spain* [2005] ECR I-139, paragraphs 38 and 39).

64 However, the fact that SEDL is a semi-public company, whose capital includes private funds, prevents the municipality of Roanne from being regarded as exercising a control over it similar to that which it exercises over its own departments. The Court has held that any private capital investment in an undertaking follows considerations proper to private interests and pursues objectives of a different kind from those pursued by a public authority (see *Stadt Halle and RPL Lochau*, paragraphs 49 and 50). The reasoning adopted by the Court in *Stadt Halle and RPL Lochau* with respect to public service contracts also applies with respect to public works contracts.

65 According to the submissions of the municipality of Roanne and those of the French and Polish Governments, the effectiveness of the Directive is preserved where, as in the present case, a second contracting authority is obliged to use the procedures for the award of public works contracts laid down by the Directive for any subsequent contract. For the purposes of ensuring effective competition, it is irrelevant whether such a procedure is organised by the first or the second contracting authority.

66 It must be recalled, first of all, that the Directive does not contain any provisions which enable its application to be avoided where a public works contract is concluded between two contracting authorities, even if the second contracting authority is obliged to subcontract the total value of the contract to successive contractors and, for that purpose, to use the procedures for the award of public contracts laid down by the Directive.

67 Furthermore, in this case, it is not stipulated in the agreement that SEDL is obliged to subcontract the whole of the initial contract to successive contractors. Furthermore, as the Advocate General rightly observed in point 72 of her Opinion, where a second contracting authority has recourse to subcontractors, the subject-matter of any successive contract may often represent only part of the overall contract. It may follow that the value of any subsequent contracts awarded by a second contracting authority will be lower than that set out in Article 6(1)(a) of the Directive. Therefore, by setting up a series of successive contracts, the application of the Directive could be avoided.

68 Having regard to the foregoing, the answer to the third question must be that a contracting authority is not exempt from using the procedures for the award of public works contracts laid down in the Directive on the ground that, in accordance with national law, the agreement may be concluded only with certain legal persons, which themselves have the capacity of contracting authority and which will be obliged, in turn, to apply those procedures to the award of any subsequent contracts.

Costs

69 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:

1. **An agreement by which a first contracting authority entrusts a second contracting authority with the execution of a work constitutes a public works contract within the meaning of Article 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, regardless of whether or not it is anticipated that the first contracting authority is or will become the owner of all or part of that work.**

2. **In order to determine the value of a contract for the purpose of Article 6 of Directive 93/37, as amended by Directive 97/52, account must be taken of the total value of the works contract from the point of view of a potential tenderer, including not only the total amounts to be paid by the contracting authority but also all the revenue received from third parties.**

3. **A contracting authority is not exempt from using the procedures for the award of public works contracts laid down in Directive 93/37, as amended by Directive 97/52, on the ground that, in accordance with national law, the agreement may be concluded only with certain legal persons, which themselves have the capacity of contracting authority and which will be obliged, in turn, to apply those procedures to the award of any subsequent contracts.**

[Signatures]