JUDGMENT OF THE COURT (Sixth Chamber)
4 December 2003 *

In Case C-448/01,

REFERENCE to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that body between

EVN AG,

Wienstrom GmbH

and

Republik Österreich,

third parties:

Stadtwerke Klagenfurt AG

and

Kärntner Elektrizitäts-AG,

on the interpretation of Article 26 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and of Articles 1 and 2(1)(b) of Council Directive 89/665/EEC of

* Language of the case: German.

21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by 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),

THE COURT (Sixth Chamber),

composed of: V. Skouris (Rapporteur), acting for the President of the Sixth Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen and N. Colneric, Judges,

Advocate General: J. Mischo,
Registrar: H.A. Rühl (Principal Administrator),

after considering the written observations submitted on behalf of:

— EVN AG and Wienstrom GmbH, by M. Öhler, Rechtsanwalt,

— the Republik Österreich, by A. Gerscha, Rechtsanwalt,

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

— the Netherlands Government, by S. Terstal, acting as Agent,

— the Swedish Government, by K. Renman, acting as Agent,

— the Commission of the European Communities, by M. Nolin, acting as Agent, and T. Eilmansberger, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of EVN AG and Wienstrom GmbH, the Republik Österreich, the Austrian Government and the Commission at the hearing on 23 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2003,

gives the following

Judgment

1 By order of 13 November 2001, received at the Court Registry on 20 November 2001, the Bundesvergabeamt (Federal Procurement Office) referred to the Court of Justice for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 26 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and of Articles 1 and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by 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) ('Directive 89/665').

2 Those questions were raised in proceedings between a group of undertakings consisting of EVN AG and Wienstrom GmbH on the one hand, and the Republik Österreich in its capacity as the contracting authority on the other concerning the award of a public supply contract in respect of which the applicants in the main proceedings had submitted a tender.

The legal background

Community legislation

3 Article 26 of Directive 93/36, which appears in Chapter 3 of Title IV of the directive, entitled 'Criteria for the award of contracts', provides:

'1. The criteria on which the contracting authority shall base the award of contracts shall be:

...

(b) or, when award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

2. In the case referred to in point (b) of paragraph 1, the contracting authority shall state in the contract documents or in the contract notice all the criteria [it] intend[s] to apply to the award, where possible in descending order of importance.'

4 The sixth recital in the preamble to Directive 89/665 states that it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement.

5 Article 1 of Directive 89/665 states:

'1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC..., decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

6 Article 2 of Directive 89/665 provides:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

...

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

7 Recital 2 in the preamble to Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (OJ 2001 L 283, p. 33) states:

'The promotion of electricity produced from renewable energy sources is a high Community priority as outlined in the White Paper on Renewable Energy Sources... for reasons of security and diversification of energy supply, of environmental protection and of social and economic cohesion...'.

8 Recital 18 of Directive 2001/77 states:

'It is important to utilise the strength of the market forces and the internal market and make electricity produced from renewable energy sources competitive and attractive to European citizens.'

9 It is clear from Article 1 of Directive 2001/77 that the purpose of that directive is to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity and to create a basis for a future Community framework thereof. To that end, Article 3(1) of the directive requires the Member States to take appropriate steps to encourage greater consumption of electricity produced from renewable energy sources in conformity with the national indicative targets referred to in paragraph 2 of that article.

National legislation

10 Directives 89/665 and 93/36 were transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Public Procurement Law, BGBl. I, 1997/56; 'the BVergG').

11 Paragraph 16 (1) and (7) of the BVergG provides:

'1. Public contracts for services must be awarded, at reasonable prices, by way of a procedure provided for in this statute, in accordance with the principles of free and fair competition and of equal treatment of all applicants and tenderers, to undertakings which — at the latest at the time when the tenders are opened — are qualified, competent and reliable.

...

7. In the award procedure, due account is to be taken of the environmental impact of the services and the employment of persons on training contracts.'

12 Paragraph 53 of the BVergG provides:

'From the tenders remaining after the elimination process, the most advantageous in technical and economic terms, in accordance with the criteria laid down in the invitation to tender, is to be selected (principle of the best tender).'

13 Paragraph 115(1) of the BVergG states:

'Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.'

14 Paragraph 117 (1) and (3) of the BVergG states:

'1. The Bundesvergabeamt shall set aside, by way of administrative decision, taking into account the opinion of the Conciliation Committee..., any decision of the contracting authority in an award procedure where the decision in question:

(1) is contrary to the provisions of this Federal Law or its implementing regulations and

(2) is material to the outcome of the award procedure.

...

3. After the award of the contract, the Bundesvergabeamt shall, in accordance with the conditions of subparagraph 1, determine only whether the alleged illegality exists or not.'

The dispute in the main proceedings and the questions referred

15 The defendant in the main proceedings invited tenders by way of an open procedure for the award of a public contract for the supply of electricity. The contract to be awarded consisted of a framework contract followed by individual contracts for the supply of electricity to all the Federal Republic's administrative offices in the *Land* of Kärnten (Carinthia). The contract term ran from 1 January 2002 to 31 December 2003. The invitation to tender, which was published in the *Official Journal of the European Communities* of 27 March 2001, included the following provision under the heading 'Award criteria':

'The economically most advantageous tender according to the following criteria: impact of the services on the environment in accordance with the contract documents.'

16 The tender had to state the price in ATS per kilowatt hour (kWh). This was to apply for the whole contract term, and was not to be subject to any revision or adjustment. The electricity supplier had to undertake to supply the Federal offices

with electricity produced from renewable energy sources, subject to any technical limitations, and in any case not knowingly to supply those offices with electricity generated by nuclear fission. The supplier was not, however, required to submit proof of his electricity sources. The contracting authority was to have a right to terminate the contract and a right to punitive damages in the event of a breach of either of those obligations.

17 It was stated in the contract documents that the contracting authority was aware that for technical reasons no supplier could guarantee that the electricity supplied to a particular consumer was actually produced from renewable energy sources but that the authority had nevertheless decided to contract with tenderers who could supply at least 22.5 gigawatt hours (GWh) per annum of electricity produced from renewable energy sources, since the annual consumption of the Federal offices was estimated to be around 22.5 GWh.

18 In addition, it was specified that tenders would be eliminated if they did not contain any proof that 'in the past two years and/or in the next two years the tenderer has produced or purchased, and/or will produce or purchase, and has supplied and/or will supply to final consumers, at least 22.5 GWh electricity per annum from renewable energy sources'. The award criteria laid down were net price per kWh, with a weighting of 55%, and 'energy produced from renewable energy sources', with a weighting of 45%. It was stated in relation to the latter award criterion that 'only the amount of energy that can be supplied from renewable energy sources in excess of 22.5 GWh per annum will be taken into account'.

19 The four tenders submitted were opened on 10 May 2001. The tender submitted by the Kärntner Elektrizitäts-AG and Stadtwerke Klagenfurt AG group of tenderers ('KELAG') stated a price of 0.44 ATS/kWh and, under reference to a table showing the amounts and origin of electricity produced or supplied by those companies, affirmed that they were able to supply a total amount of renewable

electricity of 3 406.2 GWh. Energie Oberösterreich AG also submitted a tender, in which it proposed a price of 0.4191 ATS/kWh for annual consumption in excess of 1 million GWh and, in a table relating to 1999 to 2002, showed the various amounts of the electricity from renewable energy sources that it was able to supply for each of the years in that period. The highest amount stated in that connection was 5 280 GWh per annum. BEWAG also submitted a tender, which stated a price of 0.465 ATS/kWh. The table included with its offer showed the proportion of the electricity produced or supplied by BEWAG that came from renewable energy sources, on the basis of which the contracting authority deduced that the amount stated in that connection was 449.2 GWh.

20 The tender submitted by the applicants in the main proceedings stated a price of 0.52 ATS/kWh. Those applicants did not provide any concrete figures for the amount of electricity that they could supply from such sources, but instead merely stated that they had their own electricity generating plants in which they produced electricity from such sources. In addition, they had purchase options on electricity produced by hydroelectric power stations belonging to the Österreichische Elektrizitätswirtschafts-Aktiengesellschaft and other Austrian hydroelectric power stations, and other electricity purchased by them derived predominantly from long-term coordination contracts with the largest supplier of electricity certified as coming from renewable energy sources. In 1999 and 2000, they had purchased exclusively hydroelectric power from Switzerland, and this would continue to be the case. The total amount of electricity from renewable energy sources was several times the amount of electricity referred to in the invitation to tender.

21 The defendant in the main proceedings considered that, of the four tenders submitted, the best was KELAG's, and that group received the most points for each of the two award criteria. The applicants in the main proceedings received the fewest points in respect of both criteria.

22 After having informed the contracting authority as early as 9 and 30 May 2001 that they considered that various provisions in the invitation to tender, including the award criterion relating to 'electricity produced from renewable energy sources', were unlawful, the applicants in the main proceedings applied on 12 June 2001 to institute conciliation proceedings before the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission), which refused their application on the ground that such proceedings had no prospect of success.

23 The applicants in the main proceedings then instituted review proceedings before the Bundesvergabeamt, seeking, inter alia, annulment of the invitation to tender in its entirety, of a series of individual provisions in the contract documents and of a number of decisions of the contracting authority. Those decisions included, in particular, the decision to make the absence of proof of the production and purchase of electricity from renewable energy sources in a defined period or the absence of proof of future purchase of such electricity grounds for elimination, the decision to make proof of the production or purchase of a defined amount of electricity from such sources over a defined period a selection criterion, the decision to make the availability of electricity from renewable energy sources in excess of 22.5 GWh per annum an award criterion, and the decision refusing to cancel the invitation to tender. In addition, the applicants applied for an interim order prohibiting the contracting authority from awarding the contract.

24 By decision of 16 July 2001, the Bundesvergabeamt granted the applicants' application and, initially, prohibited the contract from being awarded until 10 September 2001. On a further application by the applicants, the Bundesvergabeamt made an interim order, by decision of 17 September 2001, permitting the contracting authority to award the contract on condition that the award would be cancelled and the contract rescinded in the event that even only one of the applications made to that body by the applicants in the main proceedings were granted or the decision to award the contract in question to one of the applicants' co-tenderers proved to be unlawful on the basis of any other finding of the Bundesvergabeamt.

25 On 24 October 2001, the framework contract was awarded to KELAG, subject to the conditions subsequent laid down in the decision referred to above.

26 Taking the view that the interpretation of a number of provisions of Community law was necessary in order to resolve the dispute before it, the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Do the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, prohibit a contracting authority from laying down an award criterion in relation to the supply of electricity which is given a 45% weighting and which requires a tenderer to state, without being bound to a defined supply period, how much electricity he can supply from renewable energy sources to a group of consumers not more closely defined, where the maximum number of points is given to whichever tenderer states the highest amount and a supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the context of the contract to which the invitation to tender relates?

2. Do the provisions of Community law relating to the award of public contracts, in particular Article 2(1)(b) of Directive 89/665/EEC, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665/EEC dependent on proof that the unlawful decision was material to the outcome of the procurement procedure?

3. Do the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665/EEC dependent on proof that the unlawful decision was

material to the outcome of the procurement procedure, where that proof has to be achieved by the review body examining whether the ranking of the tenders actually submitted would have been different had they been re-evaluated disregarding the unlawful award criterion?

4. Do the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, require the contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665/EEC that one of the award criteria it laid down is unlawful?'

The first question

27 It is clear from the explanations provided by the Bundesvergabeamt that the first question must be understood as having two parts. First of all, it seeks to determine whether the Community legislation on public procurement, in particular Article 26 of Directive 93/36, precludes a contracting authority from applying, in its assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources.

28 In second place, if the first part of its question is answered in the affirmative, the Bundesvergabeamt asks for clarification of the Community law requirements as regards the concrete application of such a criterion, given the specific wording of the criterion at issue in the dispute before it, and, consequently, the second part of its question can be broken down into several sub-questions.

29 More specifically, that body is unclear as to the compatibility of such a criterion with Community law given the circumstances set out in points (a) to (d) below, in other words, given that the criterion

(a) has a weighting of 45%;

(b) is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified, and does not necessarily serve to achieve the objective pursued;

(c) does not impose a defined supply period, and

(d) requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the context of the contract to which the invitation to tender relates.

The first part of the first question

30 Referring to the lack of clarity of the expression 'the most economically advantageous tender' used in Article 26 of Directive 93/36, the Bundesvergabeamt first asks as a question of principle whether Community law allows the

contracting authority to lay down criteria that pursue advantages which cannot be objectively assigned a direct economic value, such as advantages related to the protection of the environment.

31 In that regard, it should be noted that, in a judgment delivered after the lodging of the order for reference in this case, which concerned the interpretation of Article 36(1)(a) of Directive 92/50, whose wording is more or less identical to that of Article 26(1)(b) of Directive 93/36, the Court had occasion to rule on the question whether and in what circumstances a contracting authority may take ecological criteria into consideration in the assessment of the most economically advantageous tender.

32 More specifically, at paragraph 55 of the judgment in Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7123, the Court held that Article 36(1)(a) of Directive 92/50 cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the most economically advantageous tender must necessarily be of a purely economic nature.

33 The Court therefore accepted that where the contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender it may take into consideration ecological criteria, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination (*Concordia Bus Finland*, cited above, paragraph 69).

34 It follows that the Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources, provided that that criterion is linked to the subject-matter of the contract, does not confer an unrestricted freedom of choice on the authority, is expressly mentioned in the contract documents or the contract notice, and complies with all the fundamental principles of Community law, in particular the principle of non-discrimination.

The second part of the first question

Second part, point (a)

35 In its order for reference, the Bundesvergabeamt states that even if an award criterion which relates to environmental issues, such as the one applied in the case at issue in the main proceedings, had to be regarded as compatible in principle with the Community rules on the award of public contracts, the fact that it was given a weighting of 45% would create another problem since it could be objected that the contracting authority is prohibited from allowing a consideration which is not capable of being assigned a direct economic value from having such a significant influence on the award decision.

36 The defendant in the main proceedings submits in that regard that given the discretion enjoyed by the contracting authority in its identification of the most economically advantageous tender, only a weighting which resulted in an unjustified distortion would be unlawful. In the case at issue in the main proceedings there is not only an objective relationship between the criteria of

'price' and 'electricity produced from renewable energy sources' but, in addition, precedence is accorded to purely arithmetical economic considerations, since the price has a weighting 10 points higher than that given to the capacity to supply such electricity.

37 It must be recalled that according to settled case-law it is open to the contracting authority when choosing the most economically advantageous tender to choose the criteria on which it proposes to base the award of contract, provided that the purpose of those criteria is to identify the most economically advantageous tender and that they do not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer (see, to that effect, Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 19 and 26; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraphs 36 and 37; and *Concordia Bus Finland*, paragraphs 59 and 61).

38 Furthermore, such criteria must be applied in conformity with both the procedural rules and the fundamental principles laid down in Community law (see, to that effect, *Beentjes*, paragraphs 29 and 31, and *Concordia Bus Finland*, paragraphs 62 and 63).

39 It follows that, provided that they comply with the requirements of Community law, contracting authorities are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria, provided that the weighting enables an overall evaluation to be made of the criteria applied in order to identify the most economically advantageous tender.

40 As regards the award criterion at issue in the main proceedings, the Court has already held that the use of renewable energy sources for producing electricity is useful for protecting the environment in so far as it contributes to the reduction in

emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat (Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 73).

41 Moreover, as is clear, in particular from Recital 18 and Articles 1 and 3 of Directive 2001/77, it is for precisely that reason that that directive aims, by utilising the strength of market forces, to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity, an objective which, according to Recital 2 of the directive, is a high Community priority.

42 Having regard, therefore, to the importance of the objective pursued by the criterion at issue in the main proceedings, its weighting of 45% does not appear to present an obstacle to an overall evaluation of the criteria applied in order to identify the most economically advantageous tender.

43 In those circumstances, and since there is no evidence to support a finding that the requirements of Community law have been infringed, it must be held that the application of a weighting of 45% to the award criterion at issue in the main proceedings is not incompatible with the Community legislation on public procurement.

Second part, point (b)

44 The Bundesvergabeamt is also uncertain as to whether the award criterion at issue in the main proceedings is lawful under Community law, since the contracting authority itself has admitted that it does not have the technical ability

to verify whether electricity supplied to it has actually been generated from renewable energy sources and it did not require the tenderers to supply proof of their actual supply obligations or existing electricity supply contracts.

45 The referring body is therefore essentially asking whether the Community law provisions governing the award of public contracts preclude a contracting authority from applying an award criterion which is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified.

46 In that context, the Bundesvergabeamt is also uncertain as to the extent to which such an award criterion is capable of achieving the objective which it pursues. Since there are no plans to verify how far the recipient of the award in fact helps by its production structure to increase the amount of electricity produced from renewable energy sources, it is possible that the application of that criteria may have no effect on the total amount of electricity produced in that way.

47 It should be recalled that the principle of equal treatment of tenderers which, as the Court has repeatedly held, underlies the directives on procedures for the award of public contracts (see, in particular, Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 91, and Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 73) implies, first of all, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority (*SIAC Construction*, paragraph 34).

48 More specifically, that means that when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers (*SIAC Construction*, cited above, paragraph 44).

49 Second, the principle of equal treatment implies an obligation of transparency in order to enable verification that it has been complied with, which consists in ensuring, inter alia, review of the impartiality of procurement procedures (see, to that effect, *Universale-Bau and Others*, paragraphs 91 and 92).

50 Objective and transparent evaluation of the various tenders depends on the contracting authority, relying on the information and proof provided by the tenderers, being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria.

51 It is thus apparent that where a contracting authority lays down an award criterion indicating that it neither intends, nor is able, to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure.

52 Therefore, an award criterion which is not accompanied by requirements which permit the information provided by the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement.

53 As regards the Bundesvergabeamt's question as to whether the award criterion at issue in the main proceedings infringes Community law in so far as it is not necessarily capable of helping to increase the amount of electricity produced from renewable energy sources, it need only be noted that even if that is in fact the

case, such a criterion cannot be regarded as incompatible with the Community provisions in the field of public procurement simply because it does not necessarily serve to achieve the objective pursued.

Second part, point (c)

54 The Bundesvergabeamt considers that since the contracting authority omitted to determine the specific supply period in respect of which the amount that could be supplied was to be stated, the criterion applied is incompatible with the principle of comparability of tenders, which derives from the requirement of transparency. As regards the proof required for the examination of the suitability of the tenderers, it was the period covering the two years preceding the invitation to tender and the period covering the following two years which were stated to be relevant as regards the amount of electricity which would in fact be required. According to the Bundesvergabeamt, even if that provision were also applied in the context of the award criterion, there would be no definite supply period allowing for an exact calculation of the amount which in fact had to be taken into account. On the contrary, in a period of four years, it might be that different amounts of electricity could be supplied. It would even be conceivable that tenderers would state amounts which relied on assumptions as to the construction of power stations or other merely potential means of production of electricity from renewable energy sources.

55 The defendant in the main proceedings explains that in Austria the electricity market was fully liberalised on 1 October 2001, and that since that date it has been possible to set up trading companies whose object is to buy and sell on electricity. As the invitation to tender was published approximately six months before that date, it was obliged to formulate the award criterion in terms which made it possible for both companies already on the market with their own means of electricity production and electricity trading companies which were only authorised to operate from 1 October 2001 to submit tenders. It therefore sought to give undertakings the possibility of stating the amount of electricity from

renewable energy sources that they had produced or bought over the two years preceding the invitation to tender or to provide such information for the two coming years. Finally, all the undertakings provided in fact only information relating to the two years preceding the invitation to tender, and where the annual amounts were different the best tender was determined on the basis of the average.

56 It is clear from the Court's case-law that the procedure for awarding a public contract must comply, at every stage, with both the principle of the equal treatment of potential tenderers and the principle of transparency so as to afford all parties equality of opportunity in formulating the terms of their tenders (see, to that effect, *Universale-Bau*, paragraph 93).

57 More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed tenderers of normal diligence to interpret them in the same way (*SIAC Construction*, paragraph 41).

58 Consequently, in the case at issue in the main proceedings, the fact that in the invitation to tender the contracting authority omitted to determine the period in respect of which tenderers had to state in their tenders the amount of electricity from renewable energy sources which they could supply could be an infringement of the principles of equal treatment and transparency were it to transpire that that omission made it difficult or even impossible for tenderers to know the exact scope of the criterion in question and thus to be able to interpret it in the same way.

59 Inasmuch as that requires a factual assessment, it is for the national court to determine, taking account of all the circumstances of the case, whether, despite that omission, the award criterion at issue in the main proceedings was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts.

Second part, point (d)

60 The Bundesvergabeamt explains that the award criterion at issue in the main proceedings consists in the allocation of points for the amount of electricity from renewable energy sources that the tenderers will be able to supply to a non-defined group of consumers, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the invitation to tender. In so far as that criterion thus concerns exclusively the total amount which the tenderer will be able to supply in general and not the amount which the tenderer will be able to supply specifically to the contracting authority, the Bundesvergabeamt is uncertain whether it is linked to any direct economic advantages for the contracting authority.

— Observations submitted to the Court

61 The applicants in the main proceedings, the Netherlands Government and the Commission submit that in so far as the criterion in question relates to an amount of electricity exceeding the consumption expected in the context of the invitation to tender, the requirement of a direct link with the contract to be awarded is not met in the present case. In their opinion, the only relevant factor is the amount of electricity from renewable energy sources which can be supplied to the contracting authority.

62 According to the Commission, it would have been enough for the contracting authority to have required the tenderer to have access to a certain amount of electricity produced from renewable energy sources or to be able simply to prove that it was capable of delivering a certain amount of electricity in excess of the annual consumption, for example by calculating for a reserve of 10%.

63 The applicants in the main proceedings additionally submit that the award criterion in question is in fact a disguised selection criterion inasmuch as it in fact concerns the tenderers' capacity to supply as much electricity as possible from renewable energy sources and, in that way, ultimately relates to the tenderers themselves.

64 On the other hand, the defendant in the main proceedings and the Austrian Government consider that, by taking into account the amount of electricity produced from renewable energy sources that each tenderer was able to supply over and above 22.5 GWh, which had to be supplied in any case, the contracting authority gave the reliability of supply of electricity, which is a function of the total amount of electricity to which an undertaking has access, the status of an award criterion. They explain that since electricity cannot be stored, that criterion is in no way irrelevant to the service provided since the more productive a tenderer is, the smaller the risk that the contracting authority's demand for electricity will not be met and that it will have to find a costly alternative in the short term.

65 More specifically, the Austrian Government submits that although the production of electricity from renewable energy sources, such as wind and solar energy, is seasonal, the demand is greatest in the winter. The purpose of the award criterion in question is thus to ensure that the tenderer can provide a continuous supply of electricity notwithstanding the fact that supply and demand are not linear throughout the year, a consideration which also justifies the heavy weighting of 45% given to that criterion.

— Findings of the Court

66 As recalled in paragraph 33 of this judgment, ecological criteria used by a contracting authority as award criteria for determining the most economically advantageous tender must, inter alia, be linked to the subject-matter of the contract.

67 In the case at issue in the main proceedings, the award criterion applied does not relate to the service which is the subject-matter of the contract, namely the supply of an amount of electricity to the contracting authority corresponding to its expected annual consumption as laid down in the invitation to tender, but to the amount of electricity that the tenderers have supplied, or will supply, to other customers.

68 An award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, cannot be regarded as linked to the subject-matter of the contract.

69 Moreover, the fact that, in accordance with the award criterion applied, it is the amount of electricity in excess of the expected annual consumption as laid down in the invitation to tender which is decisive is liable to confer an advantage on tenderers who, owing to their larger production or supply capacities, are able to supply greater volumes of electricity than other tenderers. That criterion is thus liable to result in unjustified discrimination against tenderers whose tender is fully able to meet the requirements linked to the subject-matter of the contract. Such a limitation on the circle of economic operators in a position to submit a tender

would have the effect of thwarting the objective of opening up the market to competition pursued by the directives coordinating procedures for the award of public supply contracts.

70 Finally, even assuming that that criterion was a response to the need to ensure reliability of supplies — an assumption which it is for the national court to verify — it should be noted that while the reliability of supplies can, in principle, number amongst the award criteria used to determine the most economically advantageous tender, the capacity of tenderers to provide the largest amount of electricity possible in excess of the amount laid down in the invitation to tender cannot legitimately be given the status of an award criterion.

71 It follows that in so far as it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement, the award criterion applied in the case at issue is not compatible with the Community legislation on public procurement.

72 In the light of all the foregoing, the answer to the first question submitted to the Court must be that the Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion does not necessarily serve to achieve the objective pursued is irrelevant in that regard.

On the other hand, that legislation does preclude such a criterion where

— it is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified,

— it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement.

It is for the national court to determine whether, despite the contracting authority's failure to stipulate a specific supply period, the award criterion was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts.

The second and third questions

73 By these two questions, which can be examined together, the Bundesvergabeamt is essentially asking whether Article 2(1)(b) of Directive 89/665 precludes a provision of national law such as point 2 of Paragraph 117(1) of the BVergG, which makes the annulment in review proceedings of an unlawful decision by a contracting authority dependent on proof that the unlawful decision materially influenced the outcome of the procurement procedure and whether, having

regard to Article 26 of Directive 93/36 in particular, the answer to that question must differ if the proof of that influence derives from the examination by the review body of whether the ranking of the tenders actually submitted would have been different had they been re-evaluated disregarding the unlawful award criterion.

74 It should be noted at the outset that, according to settled case-law, in the context of the cooperation between the Court of Justice and 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 and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; *PreussenElektra*, paragraph 38; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18; Case C-153/00 *Der Weduwe* [2002] ECR I-11319, paragraph 31, and Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, paragraph 40).

75 However, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see *PreussenElektra*, paragraph 39, and *Canal Satélite Digital*, paragraph 19). The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (*Der Weduwe*, paragraph 32, and *Bacardi-Martini and Cellier des Dauphins*, paragraph 41).

76 Thus the Court must decline to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation or the

assessment of the validity of a provision of Community law sought by that court bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, *Bosman*, paragraph 61; Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 52; Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20, and *Bacardi-Martini and Cellier des Dauphins*, paragraph 42).

77 More specifically, it must be borne in mind that Article 234 EC is an instrument of judicial cooperation, by means of which the Court provides the national courts with the points of interpretation of Community law which may be helpful to them in assessing the effects of a provision of national law at issue in the disputes before them (see, in particular, Case C-300/01 *Salzmann* [2003] ECR I-4899, paragraph 28).

78 It follows that in order that the Court may perform its task in accordance with the Treaty, it is essential for national courts to explain, when the reasons are not clear beyond doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment (see, in particular, *Bacardi-Martini and Cellier des Dauphins*, paragraph 43).

79 In the present case, there is no information to that effect before the Court.

80 On the one hand, as observed in paragraph 23 of this judgment, the object of the review proceedings brought in the case at issue is, inter alia, the annulment of the invitation to tender in its entirety and the annulment of a series of individual conditions in the contract documents and of a number of decisions of the contracting authority relating to the requirements established by the award and selection criteria used in that tender procedure.

81 Therefore, in the light of the information in the order for reference, it is apparent that all the decisions whose annulment is sought in the main proceedings have a decisive effect on the outcome of the tender procedure.

82 On the other hand, the Bundesvergabeamt has not provided any explanation as to the precise reasons for which it considers that it needs an answer to the question of the compatibility with the Community legislation on public procurement of the condition laid down in subparagraph 2 of Paragraph 117(1) of the BVergG in order to give judgment in the case pending before it.

83 Therefore, since there is no information before the Court to show that an answer to the second and third questions is needed in order to resolve the dispute in the main proceedings, those questions must be regarded as hypothetical and, accordingly, inadmissible.

The fourth question

84 By its fourth question the Bundesvergabeamt is essentially asking whether the provisions of Community law governing the award of public contracts, in particular Article 26 of Directive 93/36, require the contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that a decision relating to one of the award criteria laid down by that authority is unlawful.

85 According to the Bundesvergabeamt, if it is assumed that the review of the effects of unlawful decisions relating to award criteria is contrary to Community law, the only alternative where such a decision is unlawful seems to be cancellation of

the invitation to tender, since otherwise the tender procedure would be carried out on the basis of a weighting of criteria which was neither laid down by the authority nor known by the tenderers.

Observations submitted to the Court

86 The Austrian Government submits that Community law does not recognise an express obligation to cancel invitations to tender, just as the directives on public procurement do not lay down a tendering obligation, and concludes that it is for the Member States, acting in accordance with the principles of Community law, to lay down rules determining whether, where a decision relating to an award criterion is recognised to be unlawful, the contracting authority is obliged to cancel the invitation to tender.

87 The defendant in the main proceedings states that, pursuant to Article 2(6) of Directive 89/665, the consequences of an infringement of the rules relating to the award of public contracts which is established after the contract has been awarded must be determined in accordance with national law. In its view, where the contract has been awarded the review body is confined pursuant to Paragraph 117(3) of the BVergG to making a finding as to the existence of the alleged illegality. It thus concludes that this question must be answered in the negative.

88 On the other hand, the applicants in the main proceedings and the Commission consider that if, after the tenders have been submitted or opened, the review body declares a decision relating to an award criterion unlawful, the contract cannot be awarded on the basis of the invitation to tender and the only option is to cancel the invitation to tender. Any amendment to the criteria would have an effect on the evaluation of the tenders, whereas the tenderers would no longer have the possibility of adapting their tenders, prepared at a completely different time and in different circumstances and on the basis of different criteria. The only option would therefore be to start the entire tender procedure afresh.

Findings of the Court

89 It should be noted that a finding that a decision relating to an award criterion is unlawful does not always lead to the annulment of that decision.

90 As a result of the option granted to Member States under Article 2(6) of Directive 89/665 of providing that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures are to be limited to awarding damages to any person harmed by an infringement, where the review proceedings are instituted after the conclusion of the contract and the Member State concerned has made use of the option, if the review body finds that a decision relating to an award criterion is unlawful, it may not annul that decision, but only award damages.

91 It is clear from the explanations provided by the Bundesvergabeamt that the fourth question concerns the situation where the consequence of a finding that a decision relating to an award criterion is unlawful is the annulment of that decision. It must thus be understood as asking whether the Community legislation on public procurement requires the contracting authority to cancel an invitation to tender where it transpires in review proceedings under Article 1 of Directive 89/665 that a decision relating to one of the award criteria laid down by that authority is unlawful and it is therefore annulled by the review body.

92 For the purpose of answering the question as reformulated, it should be pointed out that the Court has already held that the principles of equal treatment and transparency of tender procedures imply an obligation on the part of contracting

authorities to interpret the award criteria in the same way throughout the procedure (see, to that effect, in particular *SIAC Construction*, paragraph 43).

93 As far as the award criteria themselves are concerned, it is *a fortiori* clear that they must not be amended in any way during the tender procedure.

94 It follows that where the review body annuls a decision relating to an award criterion, the contracting authority cannot validly continue the tender procedure leaving aside that criterion, since that would be tantamount to amending the criteria applicable to the procedure in question.

95 Therefore, the answer to the fourth question must be that the Community legislation on public procurement requires the contracting authority to cancel an invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that a decision relating to one of the award criteria laid down by that authority is unlawful and it is therefore annulled by the review body.

Costs

96 The costs incurred by the Austrian, Netherlands and Swedish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 13 November 2001, hereby rules:

1. The Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion does not necessarily serve to achieve the objective pursued is irrelevant in that regard.

   On the other hand, that legislation does preclude such a criterion where

   — it is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified,

   — it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and

allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement.

It is for the national court to determine whether, despite the contracting authority's failure to stipulate a specific supply period, the award criterion was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts.

2. The Community legislation on public procurement requires the contracting authority to cancel an invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that a decision relating to one of the award criteria laid down by that authority is unlawful and it is therefore annulled by the review body.

Skouris Gulmann Puissochet

Schintgen Colneric

Delivered in open court in Luxembourg on 4 December 2003.

R. Grass V. Skouris

Registrar President