

# Case C-448/01

**EVN AG and Wienstrom GmbH**

**v**

**Republic of Austria**

(Reference for a preliminary ruling from the Bundesvergabeamt (Austria))

(Directive 93/36/EEC — Public supply contracts — Concept of the most economically advantageous tender — Award criterion giving preference to electricity produced from renewable energy sources — Directive 89/665/EEC — Public procurement review proceedings — Unlawful decisions — Possibility of annulment only in the case of material influence on the outcome of the tender procedure — Illegality of an award criterion — Obligation to cancel the invitation to tender)

Opinion of Advocate General Mischo delivered on 27 February 2003 . . . I-14530

Judgment of the Court (Sixth Chamber), 4 December 2003 . . . . . I-14558

## Summary of the Judgment

1. *Approximation of laws — Procedures for the award of public supply contracts — Directive 93/36 — Award of contracts — Most economically advantageous*

*tender — Criteria — Supply of electricity from renewable energy sources — Whether permissible — Conditions*  
(Council Directive 93/36, Art. 26)

2. *Approximation of laws — Review procedures relating to the award of public supply and public works contracts — Directive 89/665 — Finding of illegality of an award criterion by the review body — Obligation to cancel the invitation to tender*  
(Council Directive 89/665)

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.

—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.

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

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.

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

(see para. 72, operative part 1)

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 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 work contracts, as amended by Directive 92/50 relating to the coordination of procedures for the award of public service contracts, 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.

In such a case 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.

(see paras 94-95, operative part 2)