

JUDGMENT OF THE COURT (Fourth Chamber)
26 October 1995 *

In Case C-143/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunale Amministrativo Regionale del Lazio (Italy) for a preliminary ruling in the proceedings pending before that court between

Furlanis Costruzioni Generali SpA

and

Azienda Nazionale Autonoma Strade (ANAS)

Itinera Co. Ge. SpA, formerly Edilvie Srl

on the interpretation of Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682), as amended by Article 1(20) of Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1),

* Language of the case: Italian.

THE COURT (Fourth Chamber),

composed of: C. N. Kakouris (Rapporteur), President of the Chamber,
P. J. G. Kapteyn and H. Ragnemalm, Judges,

Advocate General: C. O. Lenz,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Furlanis Costruzioni Generali SpA, by A. Biagini and N. Marcone, of the Rome Bar,
- Itinera CO. GE. SpA, formerly Edilvie Srl, by V. Bigetti and G. Cignitti, of the Rome Bar
- the Italian Government, by U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Mr Fiorilli, *Avvocato dello Stato*,
- the Commission of the European Communities, by A. Aresu, of the Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing oral argument from Furlanis Costruzioni Generali SpA, Iterina CO. GE. SpA, the Italian Government and the Commission at the hearing on 11 May 1995,

after hearing the Opinion of the Advocate General at the sitting on 29 June 1995,

gives the following

Judgment

- 1 By order of 31 March 1994, received at the Court on 24 May 1994, the Tribunale Amministrativo Regionale del Lazio (Regional Administrative Court, Lazio) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682), as amended by Article 1(20) of Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1).
- 2 The question was raised in proceedings brought by Furlanis Costruzioni Generali (hereinafter 'Furlanis') against a decision adopted by Azienda Nazionale Autonomia Strade (hereinafter 'ANAS'), a contracting authority governed by public law, in connection with a restricted procedure for the award of a public works contract.
- 3 Article 29(5) of Directive 71/305, as amended by Article 1(20) of Directive 89/440, lays down the procedure to be followed in the context of the award of public works contracts in the case of tenders which appear to be abnormally low in relation to the transaction. According to the first subparagraph of that provision,

'If, for a given contract, tenders appear to be abnormally low in relation to the transaction, before it may reject those tenders the contracting authority shall request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.'

- 4 A temporary derogation from that rule is set out in the last subparagraph of the provision, according to which

'However, until the end of 1992, if current national law so permits, the contracting authority may exceptionally, without any discrimination on grounds of nationality, reject tenders which are abnormally low in relation to the transaction, without being obliged to comply with the procedure provided for in the first subparagraph if the number of such tenders for a particular contract is so high that implementation of this procedure would lead to a considerable delay and jeopardize the public interest attaching to the execution of the contract in question. Recourse to this exceptional procedure shall be mentioned in the notice referred to in Article 12(5).'

- 5 Directive 89/440 was implemented in Italian law by Presidential Decree No 406/91 of 19 December 1991. The sixth paragraph of Article 29 of that decree, which implements the aforementioned derogating provision, provides that, until 31 December 1992, '... the contracting authority may automatically exclude tenders which appear to be abnormally low ..., if the number of tenders received exceeds 30. The fact that certain tenders may be excluded and the percentage increase over the average must be mentioned in the contract notice'.

- 6 According to the documents before the Court, by a contract notice dated 28 September 1992 and published in the Italian Official Gazette of 2 October 1992, ANAS opened a restrictive procedure, pursuant to Article 29 of Presidential Decree No 406/91, for the award of a contract for works on the Ascoli Piceno-Comunanza section of the Piceno-Aprutina road, second lot, second tranche, for a maximum of LIT 36 900 000 000.
- 7 The contract notice stated that tenders whose percentage reduction (calculated by reference to the basic price fixed for the tendering procedure) exceeded the average percentage for tenders allowed, plus seven points, would be regarded as being abnormally low in relation to the transaction within the meaning of the provision in question.
- 8 Furlanis submitted a request to participate, accompanied by the requisite documents, following which it received by letter of 12 December 1992 an invitation to participate in the tendering procedure to take place on 4 February 1993. Following that invitation to tender, Furlanis put in a tender. On 4 February 1993, the contracting authority awarded the contract to the Edilvie company, which has since become Itinera CO. GE. SpA (hereinafter 'Itinera'). Furlanis was excluded on the ground that its tender had to be regarded as abnormally low on the basis of the criterion laid down in the contract notice.
- 9 Furlanis contested the decision awarding the works in question to Edilvie before the Tribunale Amministrativo Regionale del Lazio. Before that court, Furlanis argued essentially that, both under the Community rules and under the Italian implementing decree, the derogating procedure provided for for abnormally low tenders applied only to award procedures which had become definitive before 31 December 1992 and that the mere publication of the contract notice before that date was not sufficient in order for the derogation to be able to apply.

- 10 Taking the view that a question of interpretation arose with regard to the date of 31 December 1992 as the latest date for the applicability of the derogating provision in question, the national court stayed the proceedings and referred the following question to the Court for a preliminary ruling:

‘Must the provisions of Article 1(20) of Directive 89/440/EEC, amending the earlier Directive 71/305/EEC concerning procedures for the award of public works contracts, be interpreted as meaning that the exception to the procedure for the verification of tenders that appear to be abnormally low in relation to the transaction, which was available only until the end of 1992, relates (a) to tendering procedures actually completed by that date or (b) to tendering procedures commenced before that date?’

Admissibility

- 11 Itinera questions the relevance and hence the admissibility of the national court’s question on the ground that the content of the Community provision in question could not give rise to any uncertainty as regards its interpretation. In accordance with the general principle that the rules applicable to a procedure, such as that preceding the award of a public contract, are determined by the measure initiating that procedure, the date of 31 December 1992 should be regarded as referring only to the publication of the contract notice.
- 12 In that regard the Court has consistently held that it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give

judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action (see, most recently, the judgment in Case C-62/93 *Supergas* [1995] ECR I-1883, paragraph 10). But that is not the case here.

- 13 Consequently, the Court must consider the national court's question.

The question referred for a preliminary ruling

- 14 By its question the national court seeks to establish essentially whether the last subparagraph of Article 29(5) of Directive 71/305, as amended, must be interpreted as meaning that only procedures in which the definitive award was made by 31 December 1992 may qualify for the derogation provided for in that provision or whether all procedures for which a contract notice was published before that date so qualify.
- 15 Itinera and the Italian Government submit that procedures for which the contract notice was published before 31 December 1992 but in which the definitive award has not yet been made are also covered by the derogating provision in question in so far as the actual course of an award procedure is governed by the rules laid down in the contract notice, which legally has the effect of an act of self-limitation on the part of the contracting authority.

- 16 Furlanis and the Commission argue for their part that, since the provision in question constitutes a derogation, it must be interpreted strictly as covering only award procedures terminated before 31 December 1992.
- 17 According to the wording of the provision in question, until the end of 1992 the contracting authority may 'reject' tenders which are abnormally low in relation to the transaction. Consequently, the terms of the provision relate to the decision by which the contracting authority rules definitively on the tenders submitted to it and not merely to the measure by which the award procedure was initiated.
- 18 That interpretation is corroborated by the fact that the provision in question is set out in the chapter of the directive entitled 'criteria for qualitative selection', which is concerned with the final phase of the award procedure.
- 19 There are other reasons which militate in favour of its being given a strict interpretation.
- 20 The Court held in Case 199/85 *Commission v Italy* [1987] ECR 1039, paragraph 14, that provisions which authorized derogations from the rules of the directive intended to ensure the effectiveness of the rights conferred by the Treaty in the field of public works contracts must be interpreted strictly. This holds good also as regards the provision at issue, which introduces temporary, derogating arrangements constituting an exception to the procedure normally laid down by the Community rules.

- 21 A further factor favouring a strict interpretation of the provision in question is that the derogating, temporary arrangement in question was introduced, as the Commission has pointed out, at the request of one Member State alone on account of specific difficulties arising in its national system.
- 22 Accordingly, it should be stated in reply to the question from the national court that the last subparagraph of Article 29(5) of Directive 71/305, as amended by Article 1(20) of Directive 89/440, must be interpreted as meaning that only procedures in which the definitive award was made by 31 December 1992 are entitled to qualify for the derogation provided for in that provision.

Costs

- 23 The costs incurred by the Italian Government and the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the question referred to it by the Tribunale Amministrativo Regionale del Lazio by order of 31 March 1994, hereby rules:

The last subparagraph of Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, as amended by Article 1(20) of Council Directive 89/440/EEC of 18 July 1989, must be interpreted as meaning that only procedures in which the definitive award was made by 31 December 1992 are entitled to qualify for the derogation provided for in that provision.

Kakouris

Kapteyn

Ragnemalm

Delivered in open court in Luxembourg on 26 October 1995.

R. Grass

C. N. Kakouris

Registrar

President of the Fourth Chamber