

JUDGMENT OF THE COURT (Sixth Chamber)

19 April 1994 \*

In Case C-331/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Superior de Justicia de Canarias (Spain) for a preliminary ruling in the proceedings pending before that court between

**Gestión Hotelera Internacional SA**

and

**Comunidad Autónoma de Canarias**

**Ayuntamiento de Las Palmas de Gran Canaria**

**Gran Casino de Las Palmas SA**

on the interpretation of Article 1(a) of Council Directive 71/305/EEC of 26 July 1971 concerning coordination of procedures for the award of public works contracts,

\* Language of the case: Spanish.

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, M. Díez de Velasco, C. N. Kakouris, F. A. Schockweiler and P. J. G. Kapteyn, Judges,

Advocate General: C. O. Lenz,  
Registrar: J.-G. Giraud,

after considering the written observations submitted on behalf of:

- Comunidad Autónoma de Canarias, by Manuel Aznar Vallejo, Letrado del Servicio Jurídico de la Administración de la Comunidad Autónoma de Canarias, of the Bar of Las Palmas de Gran Canaria,
- Ayuntamiento de Las Palmas de Gran Canaria, by Francisco López Díaz, Procurador de los Tribunales, and Claudio Piernavieja Domínguez, of the Bar of Las Palmas de Gran Canaria,
- the Kingdom of Spain, by Alberto José Navarro González, Director General for Coordination in Matters involving Community Law and Institutions, and Miguel Bravo-Ferrer Delgado, Abogado del Estado, acting as Agents,
- the Commission of the European Communities, initially by Rafael Pellicer, a member of its Legal Service, acting as Agent, and subsequently by Hendrik van Lier, Legal Adviser, and María Blanca Rodríguez Galindo, a member of its Legal Service, acting as Agents,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 9 December 1993,

gives the following

### Judgment

- 1 By order of 10 July 1992, which was received at the Court on 31 July 1992, the Tribunal Superior de Justicia de Canarias referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682, hereinafter referred to as 'Directive 71/305').
- 2 Those questions arose in proceedings between Gestión Hotelera Internacional and the Comunidad Autónoma de Canarias (Autonomous Community of the Canary Islands, hereinafter referred to as 'the Comunidad Autónoma'), the Ayuntamiento de Las Palmas de Gran Canaria (hereinafter referred to as 'the Municipality of Las Palmas') and the company Gran Casino de Las Palmas.
- 3 By a departmental order of the Office of the Presidential Counsellor to the Government of the Canary Islands of 17 July 1989, published in the *Boletín Oficial de Canarias* of 19 July 1992, two invitations to tender were issued, one of which concerned the award of the final concession for the installation and opening of a gaming establishment on the premises of the Hotel Santa Catalina in Las Palmas and the other of which concerned the use of the hotel installations and the operation of the hotel business. Since the hotel in question was owned by the Municipality of Las Palmas, the second of the invitations to tender was issued by the Government of the Canary Islands on behalf of that municipality pursuant to a cooperation agreement between those two authorities.
- 4 The conditions of tender relating to the grant of the concession for the opening and installation of the gaming establishment are set out in Annex I to the aforesaid departmental order (hereinafter referred to as 'Annex I'). The conditions to be fulfilled by the tenderers include, in Article 2(1)(c) and (i) of that Annex, the following:

'(c) (their) sole and exclusive object shall consist in the operation of gaming establishments. However, the object of the undertaking may include the right to offer and provide the additional services referred to in Article 2(2) of these conditions of tender.

...

(i) (the tenderers shall) participate in the invitation to tender relating to the use of the hotel installations and the operation of the hotel business, the conditions of tender in respect of which are set out in Annex II to this order'.

5 Article 3(3)(g) of Annex I provides that tenders are to be accompanied by the plans and proposals for the gaming establishment indicating all technical features, including such additional works or works of adaptation as may prove to be necessary.

6 Article 4(3) of Annex I lists the matters which must be brought to the notice of the successful tenderer, such as the games to be authorized, unlimited or restricted access to the casino and the non-transferable nature of the concession. Article 5(2)(b) provides that applications for the concession for the opening and installation of the gaming establishment are to be accompanied by a copy of the municipal authorization to undertake certain works and by a certificate confirming the completion of those works.

7 The conditions of tender relating to the award of the use of the hotel installations and the operation of the hotel business are set out in Annex II to the departmental order (hereinafter referred to as 'Annex II') and state in Article 2 that only those undertakings which effectively participate in the invitation to tender for the award of the final concession for the installation and opening of the gaming establishment may tender for the award of that second contract.

8 Article 2(2)(a) of Annex II provides that the successful tenderer must invest at least 1 000 million pesetas in fitting out the hotel and must pay at least 1 000 million pesetas for the use of the entire hotel and casino complex throughout the

initial period of validity of the concession. Article 2(2)(b) provides that the successful tenderer is to carry out the necessary works for the renovation, conversion and restoration of the installations so that the hotel and its surroundings can retain their five-star status and can offer the obligatory additional services. Article 3(3) of Annex II states that tenders relating to those works must specify the basic proposals for the works, the budgets for them and the time-limits for their completion.

- 9 In the proceedings before the national court *Gestión Hotelera Internacional*, which was the lessee of the hotel at the time of the tender procedure, applied for the annulment of the invitations to tender issued by the Government of the Canary Islands and of the contract which had in the meantime been awarded, by departmental order of 10 January 1990, to the company *Gran Casino de Las Palmas*. The application for annulment is founded on the fact that, according to the conditions of tender, the successful tenderers were to carry out renovation works to the casino and the hotel and that, consequently, the departmental order containing the invitations to tender should have been published in the *Official Journal of the European Communities*, in accordance with Directive 71/305.
- 10 The Tribunal Superior de Justicia de Canarias, uncertain as to the interpretation to be given to the rules of Community law, stayed the proceedings and referred the following questions to the Court for a preliminary ruling:
- '1. Is a mixed contract for the performance of works and the assignment of property to be regarded as included in the concept of "public works contracts" set out in Article 1(a) of Council Directive 71/305/EEC of 26 July 1971?
  
  2. Are, therefore, "authorities awarding contracts" which wish to award a contract having those characteristics obliged to publish a notice of that contract in the *Official Journal of the European Communities*?

## Admissibility

- 11 The Comunidad Autónoma and the Municipality of Las Palmas do not consider that there was any need for the national court to refer the case to the Court, because Directive 71/305 has been transposed into national law, so that there is no longer any need to refer to it.
- 12 It should be noted in that regard that, as the Court has consistently held, it is solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the question which it submits to the Court (see in particular the judgment in Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 10).
- 13 Moreover, as the Court has consistently held, the interpretation of a directive may be useful to the national court for the purpose of enabling it to ensure that the statute which implements it in domestic law is interpreted and applied in accordance with the requirements of Community law (see the judgment in Case 111/75 *Mazzalai* [1976] ECR 657, paragraph 10).
- 14 It is necessary, therefore, to examine the questions put by the court making the reference.

## Substance

### *Question 1*

- 15 It should be noted, as a preliminary point, that Article 1 of Directive 71/305 defines public works contracts. Subparagraph (a) of that article states that such contracts are 'contracts for pecuniary consideration concluded in writing between

a contractor (a natural or legal person) and an authority awarding contracts ...', which is defined in subparagraph (b) as the State, regional or local authorities and the legal persons governed by public law specified in Annex I to the directive.

16 Furthermore, such contracts must have as their object one of the activities referred to in Article 2 of Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (Official Journal, English Special Edition 1971 (II), p. 678). The list of professional trade activities annexed to that directive mentions activities relating to construction.

17 In order to provide the court making the reference with the elements of interpretation which will be of use to it for the purpose of giving a decision in the main proceedings, it is necessary, next, to analyse the contract at issue, as described in the documents before the Court.

18 The procedure for the award of the contracts was initiated by the Government of the Canary Islands, which issued two invitations to tender. The first, which concerned a casino, was issued on behalf of the Autonomous Community of the Canary Islands, whilst the second, relating to the operation of a hotel, was issued on behalf of the Municipality of Las Palmas.

19 The awarding authority intended to arrange for the installation of a gaming establishment in the premises of the Hotel Santa Catalina, which was owned by the Municipality. It sought to award that contract to an undertaking which would also assume responsibility for the operation of the hotel business. To that end, Article 2 of Annex II specified that eligibility to participate was to extend only to those undertakings which also submitted tenders for the award of the final concession for the installation and opening of the gaming establishment.

20 In the first place, it is apparent from the cooperation agreement between the Municipality of Las Palmas and the Government of the Canary Islands, as described by the court making the reference, and from Article 2(2)(b) of Annex II, that the successful tenderer would be required to carry out a series of works, not

only in the outbuildings of the hotel but also in those of the casino. Those works were to be such as to make the premises suitable for the activities for which they were intended.

- 21 Secondly, Annex II, which sets out the minimum requirements to be satisfied in order to obtain the concession for the installation and opening of the casino, together with the use of the premises intended for that installation and the operation of the hotel business, required the successful tenderer to carry out the renovation, conversion and restoration works in respect of the hotel installations for a total sum amounting to not less than 1 000 million pesetas.
- 22 Lastly, the successful tenderer was, pursuant to Article 2(2)(b) of Annex II, to ensure that the hotel retained its five-star status and was able to offer the obligatory additional services. In that regard, Article 3(3)(g) of Annex I imposed on that tenderer the obligation to indicate such additional works or works of adaptation as might prove necessary for the installation of the casino.
- 23 It follows from the foregoing analysis that the main object of the award of the contracts was, first, the installation and opening of a casino and, secondly, the operation of a hotel business. It is common ground that those contracts, considered as such, do not fall within the scope of Directive 71/305.
- 24 It is next apparent, first, that the documents mentioned above did not contain any description of the subject-matter of the works to be carried out, either as regards the installation and opening of the casino or as regards the operation of the hotel, secondly, that there was no provision for remuneration for those works and thirdly, that the successful tenderer was not in a position to carry them out itself, by reason of the strict definition of its object in Article 2(1)(c) of Annex I.
- 25 The question which arises for the national court is whether a mixed contract relating both to the performance of works and to the assignment of property falls within the scope of Directive 71/305.

26 The answer must be that, where the works to be carried out in the hotel and the casino are merely incidental to the main object of the award, the award, taken in its entirety, cannot be characterized as a public works contract within the meaning of Directive 71/305.

27 Corroboration for that interpretation is to be found in Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (Official Journal 1992 L 209, p. 1). According to the sixteenth recital in the preamble to that directive, it follows from Directive 71/305 that, for a contract to be a public works contract, its object must be the achievement of a work and that, in so far as those works are incidental rather than the object of the contract, they do not justify treating the contract as a public works contract.

28 It is for the national court to determine whether the works are incidental to the main object of the award.

29 The answer to the first question must therefore be that a mixed contract relating both to the performance of works and to the assignment of property does not fall within the scope of Directive 71/305 if the performance of the works is merely incidental to the assignment of property.

### *Question 2*

30 In view of the reply given to the first question, there is no need to examine the second question.

### **Costs**

31 The costs incurred by the Spanish 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 (Sixth Chamber),

in answer to the questions referred to it by the Tribunal Superior de Justicia de Canarias, by order of 10 July 1992, hereby rules:

**A mixed contract relating both to the performance of works and to the assignment of property does not fall within the scope of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts if the performance of the works is merely incidental to the assignment of property.**

Mancini

Díez de Velasco

Kakouris

Schockweiler

Kapteyn

Delivered in open court in Luxembourg on 19 April 1994.

R. Grass

G. F. Mancini

Registrar

President of the Sixth Chamber