

ORDER OF THE COURT (Second Chamber)
16 October 2003 *

In Case C-244/02,

REFERENCE to the Court under Article 234 EC by the Korkein hallinto-oikeus (Finland) for a preliminary ruling in the proceedings pending before that court between

Kauppatalo Hansel Oy

and

Imatran kaupunki,

on the interpretation 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), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1),

* Language of the case: Finnish

THE COURT (Second Chamber),

composed of: R. Schintgen, President of the Chamber, V. Skouris (Rapporteur) and N. Colneric, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

the national court having been informed that the Court proposes to give its decision by reasoned order in accordance with Article 104(3) of the Rules of Procedure,

the persons referred to in Article 23 of the Statute of the Court of Justice having been invited to submit any observations which they might wish to make in this regard,

after hearing the Advocate General,

makes the following

Order

- 1 By order of 1 July 2002, received at the Court on 4 July 2002, the Korkein hallinto-oikeus referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation 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), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1) ('Directive 93/36').

2 Those questions arose in proceedings between the company Kauppatalo Hansel Oy ('Hansel') and Imatran Kaupunki ('City of Imatra') regarding the City of Imatra's decision not to award a public supply contract for electricity for which Hansel had put in a tender.

Legal background

Community legislation

3 Article 7(2) of Directive 93/36 provides:

'Contracting authorities shall promptly inform candidates and tenderers of the decisions taken on contract awards, including the reasons why they have decided not to award a contract for which there has been an invitation to tender or to start the procedure again, and shall do so in writing if requested. They shall also inform the Office for Official Publications of the European Communities of such decisions.'

National legislation

4 Directive 93/36 was transposed into Finnish law by the Julkisista hankinnoista annettu laki (Law on public procurement) 1505/1992, as amended by Laws 1523/1994, 725/1995, 1247/1997 and 633/1999 ('Law 1505/1992').

- 5 Under Paragraph 1 of Law 1505/1992, national and local authorities and other contracting authorities specified in the law must comply with the provisions of that law in order to create competition and ensure fair and non-discriminatory treatment of participants. Under Paragraph 2 of Law 1505/1992, contracting authorities include municipal authorities.

- 6 Paragraph 5(1) of Law 1505/1992 states that all the competition possibilities in existence are to be made use of for the award of the contract.

- 7 Paragraph 7(1) of Law 1505/1992 provides that the contract is to be awarded as advantageously as possible; the tender to be accepted is the one which is lowest in price or overall the most economically advantageous.

- 8 Procedures for the award of public contracts are regulated in more detail by the Asetus kynnysarvot ylittävistä tavara- ja palveluhankinnoista sekä rakennusurakoista (Regulation on supply, service and works contracts exceeding the threshold values) 380/1998 (Suomen säädökoelma No 378-381, p. 1210, 'Regulation 380/1998').

- 9 Subparagraph 4 of Paragraph 19 of Regulation 380/1998 provides:

'The contracting authority must inform on request, candidates or tenderers of the reasons why it has decided not to award a contract for which an invitation to tender has been published, or to start the procedure for the award of the contract again. The contracting authority must also notify its decision to the Office for Official Publications of the European Communities.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 10 It is clear from the order for reference that, as the contracting authority, the City of Imatra in Finland addressed an invitation to tender to 20 electricity companies for the award of an electricity supply contract for certain areas in that city, specified in the invitation to tender, for the period 1 July 2000 to 30 June 2001. The invitation to tender, which was published on 2 March 2000 in the Julkiset Hankinnat (the public procurement section in the Finnish Official Journal), mentioned the lowest price as the criterion for the award of the contract.

- 11 Of the tenders received by the City of Imatra within the prescribed period, that from Hansel was the lowest in price.

- 12 During a meeting on 23 May 2000, the Imatran tekninen lautakunta (City of Imatra Technical Committee, 'the Technical Committee') realised that changing the supplier would give rise to additional costs which had not been taken into consideration and decided that the tender submitted by its then supplier, Imatran Seudun Sähkö Oy, was overall the most economically advantageous tender.

- 13 The City of Imatra's Technical Office prepared a draft decision, according to which the electricity supply contract with Imatran Seudun Sähkö Oy would be extended for the period 1 July 2000 to 30 June 2001. However, that draft decision was taken off the agenda of the Technical Committee's meeting, so that the award of the contract was not made on the basis of the invitation to tender at issue.

- 14 On 31 August 2000, the City of Imatra published a new invitation to tender in which, following a more comprehensive assessment of the overall cost of the contract, the estimated amount of electricity required was now stated to be 25 GWh per year instead of the 16 GWh per year stipulated in the first invitation to tender, in order to ensure that the best tender was also overall the most economically advantageous. In the new procedure, the best tender was submitted by Lappeenranta Energia Oy, to which the contract was awarded.
- 15 Hansel lodged an appeal before the Kilpailuneuvosto (Finnish Competition Board) against the decision of the contracting authority to discontinue the procedure for the award of a contract commenced by publication of the invitation to tender of 2 March 2000, asking it to set aside that decision and to order the City of Imatra to compare the tenders submitted in accordance with the national legislation on public procurement or, in the alternative, to pay it compensation of 15% of the total value of the contract.
- 16 In support of its appeal, Hansel argued, *inter alia*, that the City of Imatra did not have any valid reason to reject a tender satisfying the required criteria and to discontinue the procedure for the award of the contract, and that the organisation of a new procedure, replacing the original criterion for the award of the contract, namely the lowest price, with the criterion of the overall most economically advantageous tender, was unlawful. Hansel further submitted that the new procedure for the award of the contract amounted to a bargaining round. In its view, the City of Imatra had sought, by way of the first invitation to tender, to obtain information on prices and had subsequently commenced a new procedure in order to negotiate the price of the tenders submitted, using the information which had become public during the first invitation to tender.
- 17 The Kilpailuneuvosto dismissed the appeal. In particular, it held that, with the exception of the obligation to publish a notice, there are no express provisions on the discontinuance of a procedure for the award of a contract which is under way. Taking the view that such discontinuance is only possible for duly justified

reasons, the Kilpailuneuvosto held that the city of Imatra had a valid reason, in accordance with Article 5 of Law 1505/1992, taking into account the public interest and the efficient use of public funds.

- 18 In that regard, the Kilpailuneuvosto held that the preparation of the invitation to tender was defective, since not all the factors influencing the costs of the project had been taken into consideration. The City of Imatra could not, however, be compelled to award a contract which would lead to an increase in its overall costs. Moreover, the Kilpailuneuvosto held that the new procedure initiated by the second invitation to tender could not be regarded as a bargaining round.
- 19 Hansel appealed against the Kilpailuneuvosto's decision to the Korkein hallinto-oikeus, seeking annulment of that decision and an order that the city of Imatra pay as compensation 15% of the total value of the contract.
- 20 In its order for reference the Korkein hallinto-oikeus states that there are no specific provisions in the Finnish legislation governing the discontinuance of a procedure for the award of a contract which is under way, apart from the provisions concerning the obligation to publish a notice. Accordingly consideration of the case requires an interpretation of the relevant provisions of Community law in order to determine whether the City of Imatra acted wrongly when it discontinued a procurement procedure which had been started and was based on the criterion of the lowest price, without awarding the contract, on the ground that the content of the invitation to tender did not enable it to accept the overall most economically advantageous tender.
- 21 In that regard, the national court assumes, first, that the contracting authority became aware only after receipt of the tenders of the fact that the total cost of the purchase of electricity is also affected by other factors, and does not depend

exclusively on the price of the electricity and, second, that discontinuing the procedure for the award of a contract on the basis of the criterion stated in the first invitation to tender was dictated by the concern to avoid accepting what was not overall the most economically advantageous tender.

- 22 Referring to Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697, the Korkein hallinto-oikeus states that that judgment does not resolve the issue of whether the contracting authority has discretion to discontinue the procedure for the award of a contract in the absence of express provisions, or whether the fact that the reason for discontinuing the procedure is an error of assessment affecting the content of the invitation to tender is relevant for assessing the justification for the discontinuance of the procedure.
- 23 In the light of those considerations, the Korkein hallinto-oikeus stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:
- ‘1. Is Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts to be interpreted as meaning that a contracting authority which has commenced a procedure for the award of a contract on the basis of the lowest price may discontinue the procedure, without awarding a contract, when it discovers after examining and comparing the tenders that, because of the content of the invitation to tender, it is not possible for it to accept the tender which is overall the most economically advantageous?’
 2. Is it of importance, as regards the acceptability of discontinuing the procedure, that the content of the invitation to tender is defective because of the incorrectness of the assessment previously made by the contracting authority?’

The questions referred for a preliminary ruling

- 24 By its two questions, which may appropriately be considered together, the national court asks, essentially, whether Directive 93/36 must be interpreted as meaning that a contracting authority which has commenced a procedure for the award of a contract on the basis of the lowest price may discontinue the procedure, without awarding a contract, when it discovers after examining and comparing the tenders that, because of errors committed by itself in its preliminary assessment, the content of the invitation to tender makes it impossible for it to accept the most economically advantageous tender.
- 25 Taking the view that the answer to the questions as thus reformulated may be clearly deduced from its existing case-law, the Court, in accordance with Article 104(3) of the Rules of Procedure, informed the national court that it intended to give its decision by reasoned order and invited the persons referred to in Article 23 of the Statute of the Court of Justice to submit any observations which they might wish to make in this regard.
- 26 None of those persons raised any objection to the Court's intention to give its decision by reasoned order referring to the existing case-law.
- 27 It must be observed that the only provision in Directive 93/36 relating specifically to the decision to discontinue a procedure for the award of a contract put out to tender is Article 7(2), which provides, *inter alia*, that where the contracting

authorities have decided not to award a contract, they must promptly inform candidates and tenderers of the reasons for their decision.

- 28 The Court of Justice has already had occasion to define the scope of the obligation to notify reasons for abandoning the award of a contract in the context 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), in the version thereof resulting from Directive 97/52 ('Directive 93/37') and in that of 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), in the version arising from Directive 97/52 ('Directive 92/50'), which contain in Articles 8(2) and 12(2) provisions with wording substantially identical to that of Article 7(2) of Directive 93/36.
- 29 In particular, in paragraphs 23 and 25 of its judgment in *Fracasso and Leitschutz*, cited above, the Court held that Article 8(2) of Directive 93/37 does not provide that the option of the contracting authority to decide not to award a public works contract put out to tender, implicitly allowed by that directive, is limited to exceptional cases or must necessarily be based on serious grounds.
- 30 Moreover, in paragraph 41 of its judgment in Case C-92/00 *HI* [2002] ECR I-5553, the Court held that on a proper interpretation of Article 12(2) of Directive 92/50, although that provision requires the contracting authority to notify candidates and tenderers of the grounds for its decision if it decides to withdraw the invitation to tender for a public service contract, there is no implied obligation on that authority to carry the award procedure to its conclusion.

- 31 In paragraph 42 of *HI*, the Court stated that even though, apart from the duty to notify the reasons for the withdrawal of the invitation to tender, Directive 92/50 contains no specific provision concerning the substantive or formal conditions for that decision, the fact remains that the latter is still subject to fundamental rules of Community law, and in particular to the principles laid down by the EC Treaty on the right of establishment and the freedom to provide services.
- 32 More particularly, in interpreting the duty to notify reasons for a decision to withdraw an invitation to tender, laid down by Article 12(2) of Directive 92/50 in the light of the two-fold objective of exposure to competition and transparency pursued by that directive, the Court held that that duty is dictated precisely by concern to ensure a minimum level of transparency in the contract-awarding procedures to which that directive applies and hence compliance with the principle of equal treatment (*HI*, cited above, paragraphs 43 to 46).
- 33 Therefore the Court held that, even though Directive 92/50 does not specifically govern the detailed procedures for withdrawing an invitation to tender for a public service contract, the contracting authorities are nevertheless required, when adopting such a decision, to comply with the fundamental rules of the Treaty in general, and the principle of non-discrimination on the ground of nationality, in particular (*HI*, paragraph 47).
- 34 Thus it is clear from the case-law of the Court that Directives 92/50, 93/36 and 93/37 which, taken as a whole, constitute the core of Community law on public

contracts, are intended to attain similar objectives in their respective fields (Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 90).

35 In those circumstances, there is no reason to give a different interpretation to provisions which fall within the same field of Community law and have substantially the same wording (*Concordia Bus Finland*, cited above, paragraph 91).

36 Therefore, the answer to the questions referred by the national court must be that Directive 93/36 is to be interpreted as meaning that a contracting authority which has commenced a procedure for the award of a contract on the basis of the lowest price may discontinue the procedure, without awarding a contract, when it discovers after examining and comparing the tenders that, because of errors committed by itself in its preliminary assessment, the content of the invitation to tender makes it impossible for it to accept the most economically advantageous tender, provided that, when it adopts such a decision, it complies with the fundamental rules of Community law on public procurement such as the principle of equal treatment.

Costs

37 The costs incurred by the Austrian and Finnish 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Korkein hallinto-oikeus by order of 1 July 2002, hereby rules:

Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by Directive 97/52/EC of the European Parliament and the Council of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, must be interpreted as meaning that a contracting authority which has commenced a procedure for the award of a contract on the basis of the lowest price may discontinue the procedure, without awarding a contract, when it discovers after examining and comparing the tenders that, because of errors committed by itself in its preliminary assessment, the content of the invitation to tender makes it impossible for it to accept the most economically advantageous tender, provided that, when it adopts such a decision, it complies with the fundamental rules of Community law on public procurement such as the principle of equal treatment.

Luxembourg, 16 October 2003.

R. Grass

Registrar

V. Skouris

President