JUDGMENT OF THE COURT (Sixth Chamber)

19 June 2003 *

In Case C-249/01,

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

Werner Hackermüller

and

Bundesimmobiliengesellschaft mbH (BIG),

Wiener Entwicklungsgesellschaft mbH für den Donauraum AG (WED),

on the interpretation of Article 1(3) 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),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen (Rapporteur), V.Skouris, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: J. Mischo,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Hackermüller, by P. Schmautzer, Rechtsanwalt,

— Bundesimmobiliengesellschaft mbH (BIG) and Wiener Entwicklungsgesellschaft mbH für den Donauraum AG (WED), by J. Olischar and M. Kratky, Rechtsanwälte,

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

— the Italian Government, by U. Leanza, acting as Agent, assisted by M. Fiorilli, avocato dello Stato,

— Commission of the European Communities, by M. Nolin, acting as Agent, assisted by R. Roniger, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Hackermüller, the Austrian Government and the Commission at the hearing on 16 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 25 February 2003,

gives the following

Judgment

1 By order of 25 June 2001, received at the Court on 28 June 2001, the Bundesvergabeamt (Federal Public Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 1(3) 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 Mr Hackermüller, architect and qualified engineer, and the companies Bundesimmobiliengesellschaft mbH (BIG) and Wiener Entwicklungsgesellschaft mbH für den Donauraum AG (WED) ('the defendants') concerning the defendants' decision not to accept the bid submitted by Mr Hackermüller for a public services contract.

Legal context

Community provisions

3 Article 1 of Directive 89/665 provides:

'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 provisions 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.'

4 Under Article 2(1) of Directive 89/665:

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

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) 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;

(c) award damages to persons harmed by infringement.'

National legislation

5 Directive 89/665 was 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').

6 Paragraph 113 of the BVergG sets out the powers of the Bundesvergabeamt. It provides:

'1. The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

2. To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

(1) to adopt interim measures and

(2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer....'

7 Paragraph 115(1) of the BVergG provides:

'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.'

The main proceedings and the questions referred for a preliminary ruling

8 The defendants invited tenders to select architectural designs and decision parameters in order to award general planning contracts for building the new Engineering Faculty for the Technical University in Vienna. The first stage of the procedure involved a competition designed to be an 'open search for interested parties to identify ideas'.

9 Several interested parties, including Mr Hackermüller and the company Hans Lechner-ZT GmbH ('Lechner') replied to the invitation to tender and submitted projects. During the second stage of the procedure, the negotiation, the Beratungsgremium (the advisory panel) recommended pursuing the procedure in the short term with Lechner. By letter of 10 February 1999, the four other tenderers accepted for the negotiation procedure, including Mr Hackermüller, were informed that the Beratungsgremium had not recommended implementation of their project.

10 On 29 March 1999 Mr Hackermüller brought proceedings before the Bundesvergabeamt under Paragraph 113(2) of the BVergG seeking *inter alia* to have set aside (1) the decision in which the Beratungsgremium and/or the defendants accepted the bid of a rival tenderer as the best tender and recommended that the negotiation procedure should be pursued with the rival tenderer in the short term, and (2) the decision by which the selection of the bids was made without regard to the criteria laid down in the invitation to tender.

11 By decision of 31 May 1999 the Bundesvergabeamt, pursuant to Paragraph 115(1) of the BVergG, dismissed Mr Hackermüller's applications in their entirety on the grounds that he did not have *locus standi* because his bid should have been eliminated at the first stage of the procedure, under Paragraph 52(1), subparagraph 8, of the BVergG.

12 In support of its decision, the Bundesvergabeamt explained first of all that under Paragraph 115(1) of the BVergG a trader may apply for review only if he risks harm or some other disadvantage. It also pointed out that under Paragraph 52(1), subparagraph 8, of the BVergG the awarding body must, before selecting the successful bid, eliminate immediately, on the basis of the results of its examination of the bids, those which do not comply with the conditions of the invitation to tender or are incomplete or incorrect, if those errors have not been, or cannot be, rectified.

13 The Bundesvergabeamt went on to point out that point 1.6.7 of the invitation to tender expressly refers to Paragraph 36(4) of the Wettbewerbsordnung der Architekten (Competition rules for architects, 'the WOA'), which provides that, where there is a ground for exclusion under Paragraph 8 of the WOA, the project in question must be rejected, and that Paragraph 8(1)(d) excludes from participation in architectural competitions, among others, persons who include in the portfolio information enabling the author to be identified.

14 Finally, having established that Mr Hackermüller had given his name under the heading 'proposed organisation of overall planning', so that his project should have been eliminated under the combined provisions of Paragraph 52(1), subparagraph 8, of the BVergG and Paragraph 36(4) of the WOA, the Bundesvergabeamt concluded that the project could no longer be considered for the contract and that, since he could not be harmed by any potential infringements of the principle of the lowest tenderer and the rules of the negotiation procedure, Mr Hackermüller had no *locus standi* to claim the infringements alleged in his application.

15 On 7 July 1999, Mr Hackermüller brought an action for annulment of the Bundesvergabeamt's decision of 31 May 1999 before the Verfassungsgerichtshof (Constitutional Court), Austria. In its judgment of 14 March 2001 (B1137/99-9), the Verfassungsgerichtshof held that, in view of the broad interpretation that should be given, according to the Court's case-law (see, in particular, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 46, and Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraphs 34 and 35), to the concept of *locus standi* to instigate a review procedure under Article 1(3) of Directive 89/665, it was questionable to interpret the conditions for making an application under Paragraph 115(1) in conjunction with Paragraph 52(1) of the BVergG as meaning that a tenderer who was not eliminated by the contracting authority may be excluded from the review procedure by a decision of the body responsible for the procedure rejecting his claim for a judicial remedy, if that body finds at the outset a reason which would have given grounds for eliminating the tenderer. It therefore annulled the Bundesvergabeamt's decision of 31 May 1999 for breach of the constitutional right to a procedure before the appropriate court.

16 It was in those circumstances that the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 1(3) of Directive 89/665... to be interpreted as meaning that any person seeking the award of a specific public contract is entitled to institute a review procedure?

2. In the event that the answer given to Question 1 is no:

Is the abovementioned provision to be understood as meaning that, if a tenderer's bid is not eliminated by the contracting authority, but the review

body finds in the course of the review procedure that the contracting authority would have been bound to eliminate it, the tenderer has been or risks being harmed by the infringement alleged by him — in this case the finding by the contracting authority that a rival tenderer submitted the best bid — and that he must therefore be entitled to a review procedure?'

Question 1

17 In this connection, it need only be pointed out that, under Article 1(3) of Directive 89/665, Member States are required to ensure that the review procedures laid down by the directive are available 'at least' to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement of the Community law on public procurement or the national rules implementing that law.

18 It is thus apparent that the provision does not oblige the Member States to make those review procedures available to any person wishing to obtain a public contract but allows them to require, in addition, that the person concerned has been or risks being harmed by the infringement he alleges.

19 The reply which should therefore be given to Question 1 is that Article 1(3) of Directive 89/665 does not preclude the review procedures laid down by the directive being available to persons wishing to obtain a particular public contract only if they have been or risk being harmed by the infringement they allege.

Question 2

20 Since Question 2 has been raised in the event that Article 1(3) of Directive 89/665 should be interpreted as meaning that it allows access to the review procedures laid down by the directive to be made conditional on the fact that the alleged infringement has harmed or risks harming the applicant, it should be answered.

21 In the light of the facts in the main proceedings, this question must be understood as seeking to ascertain whether a tenderer seeking to contest the lawfulness of the decision of the contracting authority not to consider his bid as the best bid may be refused access to the review procedures laid down by Directive 89/665 on the ground that his bid should have been eliminated at the outset by the contracting authority for other reasons and that, therefore, he neither has been nor risks being harmed by the unlawfulness which he alleges.

22 In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in the preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community level, to ensure the effective application of the directives relating to public procurement, in particular at a stage when infringements can still be remedied. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (see, in particular, *Alcatel Austria*, cited above, paragraphs 33 and 34, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 74).

23 It is thus plain that the full achievement of the objective of Directive 89/665 would be compromised if it were permissible for a body responsible for the review procedures provided for by the directive to refuse access to them to a

tenderer alleging the unlawfulness of the decision by which the contracting authority had not considered its bid as being the best bid, on the ground that the same contracting authority was wrong not to eliminate that bid even before making the selection of the best bid.

24 There can be no doubt that a decision by which the contracting authority eliminates the bid of a tenderer even before making that selection is a decision of which it must be possible to seek review under Article 1(1) of Directive 89/665, since that provision applies to all decisions taken by contracting authorities which are subject to the rules of Community law on public procurement (see *inter alia* Case C-92/00 *HI* [2002] ECR I-5553, paragraph 37, and Case C-57/01 *Makedoniko Metro and Michaniki* [2003] ECR I-1091, paragraph 68) and makes no provision for any limitation as regards the nature and content of those decisions (see *inter alia* the aforementioned judgments in *Alcatel Austria*, paragraph 35, and *HI*, paragraph 49).

25 Therefore, if the tenderer's bid had been eliminated by the contracting authority at a stage prior to that of the selection of the best bid, he would have had to be allowed, as a person who has been or risks being harmed by that decision to eliminate his bid, to challenge the lawfulness of that decision by means of the review procedures provided for by Directive 89/665.

26 In those circumstances, if a review body were to refuse access to those procedures to a tenderer in a position like that of Mr Hackermüller, the effect would be to deny him not only his right to seek review of the decision he alleges to be unlawful but also the right to challenge the validity of the ground for exclusion raised by that body to deny him the status of a person who has been or risks being harmed by the alleged unlawfulness.

27 Admittedly, if in order to mitigate that situation the tenderer is afforded the right to challenge the validity of that ground of exclusion in the review procedure he instigates in order to challenge the lawfulness of the decision by which the contracting authority did not consider his bid as being the best bid, it is possible that at the end of that procedure the review body may reach the conclusion that the bid should actually have been eliminated at the outset and that the tenderer's application should be dismissed on the ground that, in the light of that circumstance, he neither has been nor risks being harmed by the infringement he alleges.

28 However, if the contracting authority has not taken a decision to exclude the tenderer's bid at the appropriate stage of the award procedure, the method of proceeding described in the previous paragraph must be regarded as the only one likely to guarantee the tenderer the right to challenge the validity of the ground for exclusion on the basis of which the review body intends to conclude that he neither has been nor risks being harmed by the decision he alleges to be unlawful and, accordingly, to ensure the effective application of the Community directives on public procurement at all stages of the award procedure.

29 In the light of the foregoing considerations, the reply which should be given to Question 2 is that Article 1(3) of Directive 89/665 does not permit a tenderer to be refused access to the review procedures laid down by the directive to contest the lawfulness of the decision of the contracting authority not to consider his bid as the best bid on the ground that his bid should have been eliminated at the outset by the contracting authority for other reasons and that therefore he neither has been nor risks being harmed by the unlawfulness which he alleges. In the review procedure thus open to the tenderer, he must be allowed to challenge the ground of exclusion on the basis of which the review body intends to conclude that he neither has been nor risks being harmed by the decision he alleges to be unlawful.

Costs

30 The costs incurred by the Austrian and Italian 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 25 June 2001, hereby rules:

1. **Article 1(3) of 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, 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, does not preclude the review procedures laid down by the directive being available to persons wishing to obtain a particular public contract only if they have been or risk being harmed by the infringement they allege.

2. Article 1(3) of Directive 89/665, as amended by Directive 92/50, does not permit a tenderer to be refused access to the review procedures laid down by the directive to contest the lawfulness of the decision of the contracting authority not to consider his bid as the best bid on the ground that his bid should have been eliminated at the outset by the contracting authority for other reasons and that therefore he neither has been nor risks being harmed by the unlawfulness which he alleges. In the review procedure thus open to the tenderer, he must be allowed to challenge the ground of exclusion on the basis of which the review body intends to conclude that he neither has been nor risks being harmed by the decision he alleges to be unlawful.

Puissochet Schintgen Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 19 June 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber