

JUDGMENT OF THE COURT (Sixth Chamber)

7 December 2000 *

In Case C-94/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that court between

ARGE Gewässerschutz

and

Bundesministerium für Land- und Forstwirtschaft,

on the interpretation of Council Directive 92/50/EC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), and of Article 59 of the EC Treaty (now, after amendment, Article 49 EC),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber,
J.-P. Puissochet and F. Macken, Judges,

Advocate General: P. Léger,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- ARGE Gewässerschutz, by J. Schramm, Rechtsanwalt, Vienna,
- the Austrian Government, by W. Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,
- the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and A. Bréville-Viéville, Chargé de Mission in that Directorate, acting as Agents,
- the Commission of the European Communities, by M. Nolin, of its Legal Service, acting as Agent, and R. Roniger, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of ARGE Gewässerschutz, represented by M. Öhler, Rechtsanwalt, Vienna; of the Austrian Government, represented by

M. Fruhmann, of the Chancellor's Office, acting as Agent; of the French Government, represented by S. Pailler, Rédacteur in the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agent, and of the Commission, represented by M. Nolin, assisted by R. Roniger at the hearing on 16 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2000,

gives the following

Judgment

- 1 By decision of 5 March 1999, received at the Court on 17 March 1999, the Bundesvergabeamt (Federal Procurement Office), Austria, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) four questions on the interpretation of 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), and of Article 59 of the EC Treaty (now, after amendment, Article 49 EC).

- 2 Those questions were raised in proceedings between ARGE Gewässerschutz ('ARGE') and the Bundesministerium für Land- und Forstwirtschaft (Federal Ministry of Agriculture and Forestry), the contracting authority, concerning the participation of semi-public tenderers in a procedure for the award of public service contracts.

The relevant Community provisions

- 3 The objective of Directive 92/50 is to coordinate procedures for the award of public service contracts. According to the second recital in the preamble thereto, the directive contributes to the progressive establishment of the internal market, defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

- 4 The sixth recital explains that the directive is intended to avoid obstacles to the free movement of services. The 20th recital adds that, in order to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular, it is necessary to improve the access of service providers to procedures for the award of contracts.

- 5 For the purposes of the directive, Article 1(b) of Directive 92/50 defines 'contracting authorities' as the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

- 6 As provided in Article 1(b), a 'body governed by public law' is any body:
 - established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, and

- having legal personality, and

 - financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to managerial supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.
- 7 Article 1(c) defines ‘service provider’ as any natural or legal person, including a public body, which provides services. A service provider who submits a tender is designated by the term ‘tenderer’.
- 8 Further, Article 1(d) defines ‘open procedures’ as those national procedures whereby all interested service providers may submit a tender.
- 9 Article 3 provides as follows:

‘(1) In awarding public service contracts ... contracting authorities shall apply procedures adapted to the provisions of this Directive.

(2) Contracting authorities shall ensure that there is no discrimination between different service providers.’

- 10 Article 6 sets out an exception to the application of the procedures for the award of public service contracts:

‘This Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.’

- 11 The first paragraph of Article 37, on the rejection of abnormally low tenders, provides as follows:

‘If, for a given contract, tenders appear to be abnormally low in relation to the service to be provided, the contracting authority shall, before it may reject those tenders, 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.’

The dispute in the main proceedings

- 12 ARGE, an association of undertakings and civil engineers, submitted tenders in an open procedure calling for tenders organised by the Bundesministerium für

Land- und Forstwirtschaft, in which the public contracts in question concerned the taking and analysis of samples of water from various lakes and rivers in Austria for the years 1998/99 and 1999/2000. In addition to ARGE's tender, tenders were also submitted by service providers from the public sector, namely Österreichische Forschungszentrum Seibersdorf GmbH and Österreichische Forschungs- und Prüfungszentrum Arsenal GmbH, which are research and testing institutes.

- 13 In arbitration proceedings before the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission), ARGE challenged the participation of those companies in the procedure for the award of the public procurement contracts concerned, claiming that, as semi-public tenderers, they received substantial State subsidies which were not actually linked to specific projects.
- 14 The Bundes-Vergabekontrollkommission considered that it was not contrary to paragraph 16 of the Bundesvergabegesetz (Federal Law on Public Procurement Contracts), which provides, *inter alia*, that the principles of free and fair competition must be observed and that all tenderers must be treated equally, for those institutes to participate, in competition with private tenderers.
- 15 ARGE then applied to the Bundesvergabeamt (Federal Procurement Office) for review.
- 16 The Bundesvergabeamt, taking the view that interpretation of Community law was essential to resolution of the dispute, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does the decision of a contracting authority to admit to an award procedure bodies which receive subsidies of any kind, either from the authority itself or

from other contracting authorities, which enable those bodies to tender in an award procedure at prices which are substantially below those of their commercially active competitors, infringe the principle of equal treatment of all tenderers and candidates in an award procedure?

- (2) Does the decision of a contracting authority to admit such bodies to an award procedure constitute covert discrimination, if the bodies which receive such subsidies without exception have the nationality of, or are established in, the Member State in which the contracting authority is also established?

- (3) Does the decision of a contracting authority to admit such bodies to an award procedure, even on the assumption that it does not discriminate against the other tenderers and candidates, constitute a restriction of the freedom to provide services which is not compatible with the provisions of the EC Treaty, in particular Article 59 et seq. thereof?

- (4) May the contracting authority conclude service contracts with bodies which are exclusively or at least predominantly in public ownership and provide their services exclusively or at least predominantly to the contracting authority or other State institutions, without making the service the subject of an award procedure in competition with commercially active tenderers in accordance with Directive 92/50/EEC?

Preliminary observations

- 17 According to the order for reference, ARGE applied for arbitration in order to resolve the question whether permitting public-sector tenderers to take part in an award procedure under the Bundesvergabegesetz at the same time as 'purely private' tenderers was compatible with the principles of free and fair competition and equal treatment of tenderers laid down in Article 16 of that Law.
- 18 In its order, the Bundesvergabeamt observes that if, as in the case in point, some of the tenderers are public bodies or undertakings which, as such, receive aid within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) or enjoy special advantages in terms of costs, the contracting authority is unable to ascertain reliably whether the price offered by those tenderers is reasonable or corresponds to the market situation, since it does not always reflect real economic costs. Those tenderers enjoy a substantial competitive advantage compared to other tenderers, in so far as the Member State concerned bears at least part of the costs, both fixed and variable, which are relevant to the calculation of their tender.
- 19 The Bundesvergabeamt thus raises the fundamental question of whether it is contrary to Community law for a contracting authority to allow bodies which are relieved by the Member State of some of the costs relevant to the calculation of their tender, in some circumstances by the granting of aid within the meaning of Article 92 of the Treaty, to take part in a tender procedure with unsubsidised tenderers.
- 20 By its first three questions, it asks, specifically, whether the decision to allow bodies thus enjoying an advantage to take part, when the advantages they enjoy enable them to submit tenders at prices appreciably lower than those of their

competitors, infringes the principle of equal treatment of tenderers which, in its view, is inherent in Directive 92/50 and, in so far as the advantaged bodies are all Austrian, whether that decision amounts to covert discrimination or an obstacle to freedom to provide services contrary to Article 59 of the Treaty.

- 21 It considers that it is not impossible that the answer to those questions will reveal that it is contrary to Community law for advantaged bodies to take part. Nevertheless, it considers that the consequences of such a solution would be out of all proportion, since all State bodies possessing separate legal personality would be excluded from providing services for the State for pecuniary interest on the basis of a written contract. It is against that background that it poses the fourth question, by which it seeks a definition of the limits to the 'in-house providing' exception to the application of the directives governing the award of public procurement contracts, relating to contracts concluded by a contracting authority with certain public bodies connected to it.

The first question

- 22 ARGE maintains that the Community directives applicable in the sphere of public contracts are based on the principle that tenderers must compete against each other under normal market conditions, that is to say, without the market's being distorted by, in particular, the actions of the Member State concerned. That is made explicit in the Treaty, which prohibits in principle restrictions on competition, whether attributable to private undertakings or to the Member States. It is also clear from the directives themselves: in accordance with Article 37 of Directive 92/50 and Article 34(5) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), the contracting authority must first examine in more detail those tenders which appear abnormally low and which, it is suspected, were made possible by the grant of aid. According to ARGE, if the legislature had considered that it was acceptable for subsidised bodies and undertakings to take part in award procedures, such provisions would have been unnecessary.

- 23 ARGE submits that the participation of tenderers receiving public subsidies necessarily entails unequal treatment and discrimination against unsubsidised tenderers in the determination of the best offer. In short, such participation is, in its view, unlawful in the light of the objective of Directive 92/50, as expressed in the 20th recital in the preamble thereto, namely, to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular.
- 24 The Court must observe that, as the Bundesvergabebamt has noted, the contracting authority is bound, under Directive 92/50, to observe the principle of equal treatment of tenderers. Under Article 3(2) of the directive, contracting authorities are to ensure that there is no discrimination between different service providers.
- 25 Nevertheless, as the Austrian and French Governments and the Commission have argued, the mere fact that contracting authorities allow bodies which receive subsidies enabling them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers, to take part in a procedure for the award of a public procurement contract does not amount to a breach of the principle of equal treatment.
- 26 If the Community legislature had intended to require contracting authorities to exclude such tenderers, it would have stated this explicitly.
- 27 Articles 23 and 29 to 37 of Directive 92/50 lay down detailed criteria for the selection of service providers permitted to submit a tender and the criteria for the

award of the contract, but none of those provisions provides that tenderers may be excluded or their tenders rejected simply because they receive public subsidies.

- 28 On the contrary, Article 1(c) of Directive 92/50 expressly authorises the participation, in a procedure for the award of a public procurement contract, of bodies funded in some cases out of the public purse. It provides that a tenderer means a service provider which has submitted a tender and defines that provider as any natural or legal person, 'including a public body', which offers its services.
- 29 While it is not, therefore, contrary in itself to the principle of equal treatment of tenderers for public bodies to take part in a procedure for the award of public procurement contracts, even in circumstances such as those described in the first question, it is not excluded that, in certain specific circumstances, Directive 92/50 requires, or at the very least allows, the contracting authorities to take into account the existence of subsidies, and in particular of aid incompatible with the Treaty, in order, where appropriate, to exclude tenderers in receipt of such aid.
- 30 The Commission correctly states in this connection that a tenderer may be excluded from a selection procedure where the contracting authority considers that it has received aid incompatible with the Treaty and that the obligation to repay illegal aid would threaten its financial well-being, so that that tenderer may be regarded as unable to offer the necessary financial or economic security.
- 31 However, in order to answer the question of principle raised in the main proceedings, it is neither necessary nor indeed possible, having regard to the contents of the case-file, to define the conditions in which contracting authorities would be bound, or entitled, to exclude tenderers which receive subsidies.

- 32 In answer to the first question it is, therefore, sufficient to state that the mere fact that the contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers to take part in a procedure for the award of a public service contract does not amount to a breach of the principle of equal treatment laid down in Directive 92/50.

The second and third questions

- 33 In its order for reference, the Bundesvergabeamt states that the subsidies received by certain tenderers benefit solely those bodies which have their principal place of business in Austria and which are connected to Austrian regional or local authorities. It considers it possible that the assumption of all or some of the operating costs of national bodies, thus enabling them to submit tenders at prices lower than those of any other, unsubsidised, tenderers, might be regarded as covert discrimination on grounds of nationality contrary to Article 59 of the Treaty. It adds that, while there might exist in other Member States bodies granted comparable subsidies by their Member State which could take part in the procedure for the award of a public service contract, commercial service providers of other Member States are not to be expected to encounter, in such a procedure, Austrian tenderers enjoying a considerable competitive advantage over them through subsidies received from Austrian regional or local authorities.
- 34 For the Bundesvergabeamt, even if permitting advantaged national bodies to take part in a tender procedure does not amount to covert discrimination, it must nevertheless be regarded as a restriction on freedom to provide services in other Member States since, relying on provisions which ensure that their costs are

covered in whole or in part, such bodies can, in addition to the public interest purposes for which they were established, offer services on conditions and at prices which the other, unsubsidised, tenderers cannot match.

35 ARGE maintains that the fact that advantaged tenderers can take part in a tendering procedure is contrary to the prohibition of discrimination on grounds of nationality.

36 As the Commission has observed in its written observations, as a rule aid is granted to undertakings established on the territory of the Member State granting it. Such a practice, and the consequent unequal treatment of undertakings of other Member States is thus inherent in the concept of State aid. It does not, however, amount in itself to covert discrimination or a restriction on freedom to provide services within the meaning of Article 59 of the Treaty.

37 Furthermore, in the dispute in the main proceedings it is not contended that participation in the procedure in question was subject, *de jure* or *de facto*, to a condition requiring in effect that subsidised tenderers should possess the nationality of the Member State to which the adjudicating authority belongs or that they should have their seat in that State.

38 In those circumstances, the reply to be given to the second and third questions must be that the mere fact that a contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers, to take part in a procedure for the award of a public service contract does not constitute either covert discrimination or a restriction contrary to Article 59 of the Treaty.

The fourth question

- 39 In view of the replies given to the first three questions and given the context in which the fourth question has been posed (see paragraph 21 above), there is no need to answer it.
- 40 It is also relevant to point out that the Court considered a similar question in its judgment in Case C-107/98 *Teckal v Comune di Viano* [1999] ECR I-8121, concerning Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1). It ruled that that directive is applicable where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority.

Costs

- 41 The costs incurred by the Austrian and French 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 (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by decision of 5 March 1999, hereby rules:

1. The mere fact that the contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers, to take part in a procedure for the award of a public service contract does not amount to a breach of the principle of equal treatment laid down in Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.
2. The mere fact that a contracting authority allows such bodies to take part in a procedure for the award of a public service contract does not constitute either covert discrimination or a restriction contrary to Article 59 of the EC Treaty (now, after amendment, Article 49 EC).

Gulmann

Puissochet

Macken

Delivered in open court in Luxembourg on 7 December 2000.

R. Grass

C. Gulmann

Registrar

President of the Sixth Chamber