JUDGMENT OF THE COURT (Third Chamber)

27 October 2005 *

In Case C-234/03,

REFERENCE for a preliminary ruling under Article 234 EC, from the Audiencia Nacional (Spain), made by decision of 16 April 2003, received at the Court on 2 June 2003, in the proceedings

Contse SA,

Vivisol Srl,

Oxigen Salud SA

v

Instituto Nacional de Gestión Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud),

* Language of the case: Spanish.

interested parties:

Air Liquide Medicinal SL,

Sociedad Española de Carburos Metálicos SA,

THE COURT (Third Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, J. Malenovský, J.-P. Puissochet, S. von Bahr and U. Lõhmus, Judges,

Advocate General: C. Stix-Hackl,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 January 2005,

after considering the observations submitted on behalf of:

— Contse SA, Vivisol Srl and Oxigen Salud SA, by R. García-Palencia and C. Urda Serrano, abogados,

— the Instituto Nacional de Gestión Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud), by M. Gómez Montes, procurador, and J.-M. Pérez-Gómez, abogado,

— the Spanish Government, by S. Ortiz Vaamonde, acting as Agent,

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

— the Commission of the European Communities, by G. Valero Jordana and K. Wiedner, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 43 EC et seq., 49 EC et seq. and Article 3(2) 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).

2 The reference was made in the course of proceedings between Contse SA ('Contse'), Vivisol Srl and Oxigen Salud SA (all three forming a temporary consortium owning oxygen-producing factories in Italy and Belgium), and the Instituto Nacional de la Salud (the National Health Institute, 'Insalud'). The applicants brought an action in respect of, first, two calls for tenders issued by Insalud for services of home respiratory treatments and other assisted breathing techniques in the provinces of Cáceres and Badajoz and, second, the decision of the Presidencia Ejecutiva (Executive Board) of Insalud of 10 July 2000 dismissing the complaints made against those calls for tenders.

Legal background

3 Article 12 EC provides that, within the scope of application of the EC Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is to be prohibited.

4 Articles 43 EC and 49 EC enshrine freedom of establishment and freedom to provide services respectively. Those provisions are a specific expression of the principle of non-discrimination.

5 Directive 92/50 also contains an expression of that principle in Article 3(2) stating that the contracting authorities are to ensure that there is no discrimination between different service providers.

The facts and the dispute in the main proceedings

6 By two decisions of 24 May 2000, Insalud issued calls for tenders for the supply of services of home respiratory treatments and other assisted breathing techniques in the provinces of Cáceres and Badajoz ('the contested calls for tenders').

7 The tendering specifications, the specific administrative clauses and the technical specifications of those two calls for tenders lay down the admission conditions and the evaluation criteria.

8 The admission conditions, which are not subject to any evaluation, must necessarily be fulfilled at the time the tender is submitted.

9 In that connection, it is stipulated that the tenderer must have at least one office open to the public for a minimum of eight hours a day, morning and afternoon, five days a week, in the provincial capital concerned ('the admission condition').

10 It is clear from the file that the evaluation criteria concern a number of economic and technical characteristics for which points are awarded. In this case, out of a maximum of 140 points which may be awarded, 40 relate to the financial aspect of the tender and 100 concern its technical evaluation criteria.

11 In addition to the submission of a quality certificate (for which 20 points are awarded) the technical specifications are set out in various sections: equipment (35 points), supply of services (35 points), information for the patient (5 points), and service inspection report (5 points).

12 Under the section 'equipment', in the part relating to the provision of oxygen by pressurised gas cylinder, it is stipulated that a maximum of 4.6 points, defined according to the total annual production, is to be awarded if at the time the tenders are submitted the tenderer owns at least two oxygen-producing factories situated within 1 000 kilometres of the province concerned. Half a point is also awarded if, at the time the tenders are submitted, the tenderer owns at least one cylinder-conditioning plant and at least one oxygen-bottling plant situated, in both cases, within 1 000 kilometres of the province concerned.

13 Under the section 'supply of services', the existence, at the time the tenders are submitted, of offices open to the public for a minimum of eight hours per day, morning and afternoon, five days a week, in certain towns in the province concerned may lead to the award of a maximum of 0.9 extra points (0.3 for each of the three towns mentioned in the contested calls for tenders).

14 The contract is awarded to the undertaking which submits the tender gaining the highest number of points. In the case of a tie, the tender with the best technical evaluation will be successful. If the position is still tied the undertaking which has previously provided that service will be successful.

15 The appellants in the main proceedings lodged complaints against the contested calls for tenders, which were dismissed on 10 July 2000 by decision of Insalud's Presidencia Ejecutiva.

16 Subsequently, the appellants in the main proceedings brought an action against that decision and the contested calls for tenders before the Juzgado Central de lo Contencioso-Administrativo Madrid (Central Court for Contentious Administrative Proceedings, Madrid) which dismissed that action on 20 September 2001. An appeal was brought before the referring court.

17 The appellants in the main proceedings, first, submit that a number of elements in the contested calls for tender, set out in paragraphs 8 to 14 of this judgment ('the disputed elements'), infringe Articles 12 EC, 43 EC and 49 EC and Article 3(2) of Directive 92/50, and, second, requested the referring court to make a reference to the Court of Justice for a preliminary ruling on this matter.

18 Insalud contends that the disputed elements in the contested calls for tender are lawful in that the fact that the service concerned is a health service and the particularly vulnerable category of patients who rely on it compel the competent authorities not only to ensure the supply of services at all times, but also to take account of and evaluate the circumstances likely to reduce the risks inherent in all human activity, by favouring the tender which minimises those risks.

19 In those circumstances the Audiencia Nacional decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is it contrary to Articles 12 EC, 43 EC et seq. and 49 EC et seq., and Article 3(2) of [Directive 92/50] to include in the tendering specifications, special administrative

clauses and technical specifications governing calls for tender relating to services of home respiratory treatments and other assisted breathing techniques

(1) admission conditions requiring undertakings which wish to submit a tender already to have offices open to the public in the province or the capital of the province in which the service is to be provided; and

(2) award criteria which [favour tenders submitted by undertakings:

(a) which have their own oxygen production, conditioning and bottling plants situated within a radius of 1 000 kilometres of the capital of the province where the service is to be provided],

(b) which already have offices open to the public in certain towns in that province or

(c) which have been providing the service previously?'

The question referred for a preliminary ruling

20 By its question the national court asks essentially whether Articles 12 EC, 43 EC and 49 EC and Article 3(2) of Directive 92/50 preclude a contracting authority from laying down, in the tendering specifications for a public contract for the provision of health services of home respiratory treatments and other assisted breathing techniques, first, an admission condition which requires the tenderer at the time the tender is submitted to have an office open to the public in the capital of the province where the service is to be provided and, second, evaluation criteria for the tenders which take account, by awarding extra points, of the existence at that time of oxygen producing, conditioning and bottling plants situated within 1 000 kilometres of that province or of offices open to the public in other specified towns in that province and which, in the event that there is a tie on points between a number of tenders, favour the undertaking which was previously providing the service in question.

21 The appellants in the main proceedings, the Commission of the European Communities and the Austrian Government suggest that the answer to that question should be in the affirmative. Insalud and the Spanish Government support the contrary argument.

22 As a preliminary point, it should be observed that the case in the main proceedings, contrary to the Spanish Government's submissions, appears to concern a public service contract and not a management contract for a service categorised as a concession. As Insalud stated at the hearing, the Spanish administration remains liable for all harm suffered on account of a failure of the service. That factor, which implies that there is no transfer of risks connected to the provision of the service concerned, and the fact that the service is paid for by the Spanish health administration, support that conclusion. It is, however, for the national court to determine whether in fact that is the case.

23 In any event, since the questions from the national court are based on the fundamental rules laid down by the Treaty, the following considerations will be helpful to it even if this contract is a public service concession not covered by Directive 92/50. It is in the light of primary law and, in particular, of the fundamental freedoms provided for by the Treaty that the consequences in Community law of the award of such concessions must be examined (see, in particular, Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 16).

24 Those fundamental rules, referred to by the national court, are of two kinds. Article 43 EC et seq. relates to freedom of establishment and Article 49 EC et seq. concerns freedom to provide services.

25 It must be recalled, as all the parties which lodged observations before the Court have done, that, disregarding Article 46 EC, the national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must, according to settled case-law, fulfil four conditions in order to comply with Article 43 EC and Article 49 EC: they must be applied in a non-discriminatory manner, they must be justified by imperative requirements in the general interest, they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it (see Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; and Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraphs 64 and 65).

26 Therefore, it is appropriate to examine the disputed elements of the contested calls for tender in order to determine whether those elements are liable to hinder or make

less attractive the exercise of the fundamental freedoms guaranteed by the Treaty by undertakings which are not established in Spain.

27 In so far as such elements are not obstacles to the establishment of the undertakings on Spanish territory it must be held, first of all, that no restriction on freedom of establishment exists in this case.

28 Second, it is appropriate to examine whether those elements constitute a restriction on the freedom to provide services.

29 In that regard, it is common ground that Insalud is the main recipient of the services concerned, since the public sector represents 90% of the requests for home respiratory treatments. The Commission rightly states therefore that the admission condition gives rise for undertakings to a series of costs which will be absorbed only if the contract is awarded to them, which has the effect of rendering the submission of a tender clearly less attractive. The same is true for the evaluation criterion, pursuant to which extra points are awarded if an office is already open in the towns listed in the calls for tenders.

30 As regards the evaluation criteria for the oxygen producing, conditioning and bottling plants, it is clear that unless it already owns such plants within a 1 000 kilometres radius, an undertaking could be hindered in submitting a tender.

31 Lastly, the fact that in the final analysis the method of deciding between two tenderers who have the same number of points operates in favour of the undertaking already established on the relevant Spanish market is liable to render the submission of a tender less attractive by any other undertaking on account, in particular, of the considerable homogeneity of the market.

32 It is clear from the file that the Spanish market in gas for medical use is 97% controlled by four multinational undertakings. Moreover, as Contse rightly observed without being contradicted on that point, there cannot be any major differences between the participants as regards the number of points awarded for the technical aspects because all the tenderers use similar technical equipment which is produced by only two or three undertakings.

33 Therefore, it must be held that the disputed elements in the contested calls for tender are all liable to hinder or render less attractive the exercise of the freedom to provide services as guaranteed by the Treaty. Therefore, it is appropriate to determine whether each of those disputed elements fulfils the four conditions which are clear from the case-law cited in paragraph 25 of this judgment.

34 As regards the division of jurisdiction between the Community judicature and national courts, it is for the national court to determine whether those conditions are fulfilled in the case pending before it. The Court, when giving a preliminary ruling, may, where appropriate, provide clarification designed to give the national court guidance in its interpretation (see, to that effect, Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraphs 28 and 29). In that connection, and in answer to the questions referred by the national court, it is for that court to take account of the factors stated in the following paragraphs.

The admission condition

35 First of all the national measure must be applied in a non-discriminatory manner.

36 According to the case-law of the Court, the principle of equality, of which Article 49 EC is a specific expression, prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing elements, lead in fact to the same result (see Case 22/80 *Boussac Saint-Frères* [1980] ECR 3427, paragraph 9, and Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 8).

37 Although the admission condition is applicable without distinction to any undertaking intending to respond to the call for tenders in question, it is for the national court to determine whether that condition may in practice be met more easily by Spanish operators than by those established in another Member State. In such a case, that criterion infringes the principle of non-discriminatory application (see, to that effect, *Gambelli and Others*, paragraph 71).

38 It must, however, be stated that in the absence of restrictions on the freedom of establishment the very fact of having an office open to the public in the capital of the province where the service will be provided would not pose a serious obstacle for foreign operators.

39 Second, the national provision must be justified by imperative requirements in the general interest.

40 In this case it is common ground that the admission condition and the other disputed elements in the contested calls for tender are intended to ensure better protection of the life and health of patients.

41 Third and fourth, the national measure must be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary for attaining it.

42 On that point the Commission and Contse take the view that the condition of having, at the time the tender is submitted, an office open to the public in the capital of the province concerned is irrelevant to the aim identified above of better ensuring the protection of the life and health of patients. Insalud considers, on the contrary, that the existence of such an office serves to achieve that aim.

43 Even assuming that the existence of such an office may be regarded as suitable for ensuring patients' health, it is evident that the requirement to have an office at the time the tender is submitted is clearly disproportionate.

44 The Spanish Government's argument which, by stating that the purpose of a call for tenders is to determine which undertakings already have the means necessary to

provide the service in question, places an office open to the public on the same footing as any other equipment necessary for the supply of the service cannot be accepted.

45 In that regard, the Commission rightly considers that such an office is not an essential element for the supply of the service in question. The minimum conditions already require a technical support service to be set up which is open 24 hours a day, seven days a week, which will, by means which are less restrictive of freedom to provide services, lead to the attainment in an initial period of the objective pursued in this case, that is, not to endanger the life or health of patients where there is a problem with the functioning or handling of the equipment.

46 Furthermore, as Contse pointed out, a transitional period during which the undertaking already providing the service in question transfers management of the service to the new contractor is provided, if necessary, in order to ensure that treatment of patients is not interrupted. It is important to note that, in such a case, the contractor is obliged to remunerate the undertaking which continues to provide services according to a formula set out in the specific administrative clauses in the call for tenders. The remuneration increases each month until the third month from the date on which the contract was awarded. If the new contractor has still not assumed responsibility for all the services required, the contract may be terminated.

The evaluation criteria

47 As a preliminary point it must be recalled that, although it is true that Directive 92/50 is evidently applicable to the contested calls for tenders, it is clear that the service concerned in this case features in Annex I B to that directive. Under Article 9 only Articles 14 and 16 apply to such services, together with the general provisions

of Title I including Article 3(2), referred to by the national court, and the final provisions in Title VII. Article 14 concerns common rules in the technical field and Article 16 concerns notices of the results of the award procedure.

48 Therefore, and in order to give a useful answer to the national court, it must be stated that the disputed elements in the contested calls for tenders are not, in any event, subject to Chapter 3, entitled 'Criteria for the award of contracts', in Title VI of Directive 92/50 or the limitations for which it provides.

49 It should also be recalled that the evaluation criteria, like any national measure, must comply with the principle of non-discrimination as derived from the provisions of the Treaty relating to the freedom to provide services, and that restrictions on that freedom must themselves fulfil four conditions which are set out in the case-law cited in paragraph 25 of this judgment.

50 As was stated in paragraph 34 of this judgment, it is for the national court to determine whether those conditions are fulfilled in the case pending before it, taking account of the factors set out in the following paragraphs.

51 As regards, first, the application in a non-discriminatory manner of the criterion by which extra points are awarded if the tenderer has offices open to the public in certain towns in the province where the service will be provided, it appears, as was stated in respect of the admission condition, that that criterion itself is applicable without distinction to any undertaking wishing to submit a tender.

52 Furthermore, as was stated in paragraph 40 of this judgment, it is common ground that the disputed elements in the contested calls for tenders have all been included in order to provide better protection for the life and health of patients. Insalud goes on to explain that those elements are designed, more particularly, to resolve problems with the supply of oxygen and the functioning of equipment and to ensure an adequate supply of the service in question, without undue delay or harm to the patient.

53 Next, it should be determined whether that criterion is suitable for securing the attainment of that objective but does not go beyond that which is necessary to attain it.

54 In that regard, the Commission repeats the argument it put forward in relation to the admission condition, that having those offices available prior to the performance of the contract is unnecessary and disproportionate. Contse accepts that such a criterion, given the purpose of assisting patients, might be consistent with the objective pursued, but takes the view that a simple contractual undertaking to set up such offices in the event that the contract is awarded would have enabled that objective to be attained. Neither Insalud nor the Spanish Government deal specifically with this evaluation criterion.

55 As regards that issue, as was stated in paragraph 43 of this judgment, even assuming that the existence of such offices might be regarded as suitable for protecting patients' health, it is clear that the requirement to have those offices already available at the time the tender is submitted is clearly disproportionate, even more so as the minimum conditions already require, as it was stated in paragraph 45 of this judgment, the setting up of a technical support service.

56 As regards the evaluation criteria relating to the ownership of certain plants for oxygen production, conditioning and bottling, situated within a radius of 1 000 kilometres of the province where the service will be provided, it is important to determine whether, although applicable without distinction to any undertaking, those elements might in fact favour essentially those undertakings already established in Spain.

57 Unlike having an office available, a condition which could by its very nature be fulfilled on many occasions or even each time the award of a contract made it necessary, the existence of production, conditioning or bottling plants belonging to the tenderer requires a much more substantial investment which is not normally repeated. The nature of this criterion means that it would not be easy to satisfy it if such plants are not already in place. The fact that it is not just availability but ownership of the plants in question which is required only reinforces the idea that that criterion is intended, in fact, to favour permanence.

58 Therefore, only undertakings which already own such plants on Spanish territory, or outside Spanish territory but still within a distance of 1 000 kilometres of the province in question, could be awarded the points relating to those elements.

59 Furthermore, although the geographical zone situated within a radius of 1 000 kilometres of the provinces concerned, namely Cáceres and Badajoz, includes in addition to Spanish territory all Portuguese territory, it includes only a part of France and excludes almost all the Member States so that plants which, as in this case, are situated in Belgium and Italy would be outside the required radius.

60 As was stated in paragraph 37 of this judgment, if the national court finds that a criterion is in practice more easily fulfilled by Spanish operators than by those established in another Member State, that criterion infringes the principle of non-discriminatory application (see *Gambelli and Others*, paragraph 71).

61 In any event, although reliability of supplies may be included in the elements to be considered in order to ascertain the most economically advantageous tender in the case of a service such as that in question in the main proceedings, which aims to protect the life and health of persons by providing a suitable and diversified production close to the place of consumption (see, by analogy Case C-324/93 *Evans Medical and Macfarlan Smith* [1995] ECR I-563, paragraph 44), it must be held that those elements do not appear, in this case, to be adapted to the objective pursued in several respects.

62 In the first place, although the Spanish Government rightly observes that any choice of distance or transport time is arbitrary, the fact remains that the criterion of 1 000 kilometres chosen in this case appears to be inappropriate for securing the attainment of the objective in question.

63 First, the Spanish Government does not provide any evidence in support of its argument that the risk of delays, which increases proportionally with the distance to be covered, is lower because of the control that the Spanish authorities could exercise in the event of a problem arising on Spanish territory. That argument cannot be accepted.

64 Second, even assuming that crossing the internal borders of the European Community creates the delays feared by the Spanish Government, the radius of 1 000 kilometres, in that it goes beyond the Spanish borders, is not suitable for attaining the objective pursued.

65 In the second place, the Commission points out that the oxygen produced in the production plants is delivered to compression centres, in order to be compressed into bottles and that in those centres there is an emergency stock of full bottles which is sufficient in the event of damage, technical interruption or emergency to ensure the supply of oxygen for at least 15 days.

66 Therefore, as Contse also states, the proximity of the production plants does not secure the attainment of the objective of reliable supplies. It is for the national court to determine whether the situation is different for oxygen conditioning and bottling plants.

67 The stated practice of the undertakings confirms, moreover, that means exist, which are less restrictive of the freedom to provide services, for attaining the objective pursued of guaranteed availability of gas for medical use close to the place of consumption. As the Commission and Contse point out, that is to give credit, by awarding extra points, to storage depots with a stock of gas intended to cover, where necessary for a stated period, any interruptions or irregularities in transport from production or bottling plants.

68 Lastly, in so far as the Commission and Contse criticise the importance attributed to the ownership of production plants, it must be observed that the contracting authorities are free not only to choose the elements for awarding the contract but also to determine the weighting of such elements, provided that the weighting enables an overall evaluation to be made of the elements applied in order to identify the most economically advantageous tender (see, to that effect, Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 39). The same would be true if the service in question came under Annex I B to Directive 92/50, which could be the case for the contracts in question, and, therefore, were covered by a less restrictive scheme for the award of contracts.

69 In the main proceedings the criterion relating to production plants does not concern the supply which is the subject of the contract, namely the supply of home respiratory treatments, or even the amount of gas which will be produced, but the maximum production capacity of the plants owned by the tenderer in so far as extra points are awarded each time one of the three thresholds for total annual production is reached.

70 Therefore the evaluation criteria relating, in this case, to the award of extra points for an ever-increasing production capacity, cannot be regarded as linked to the objective of the contract and even less as suitable for ensuring that it is attained (see, to that effect, *EVN and Wienstrom*, paragraph 68)

71 Finally, even assuming that those elements were a response to the need to ensure reliability of supplies and, therefore, that they were linked to the objective pursued in the contested calls for tenders and suitable for attaining it, the capacity of tenderers to provide the largest possible amount of the product cannot legitimately be given the status of an award criterion (see, to that effect, *EVN and Wienstrom*, paragraph 70).

72 In that regard, it must be recalled that the contested calls for tender provide, as conditions for the submission of a tender, that the tenderer should have more than one source of production and bottling and be able to produce at least 400 000 m^3 per year, in connection with the call for tenders relating to the province of Cáceres, and 550 000 m^3 per year in connection with that relating to the province of Badajoz. It is clear from the file that those quantities represent approximately 75% and 80% respectively of the consumption planned for the first year of the contract concerned.

73 Furthermore, it must be observed that the first of the three thresholds provided for in the contested calls for tenders, that is a total annual production, for each of the contracts, of at least 800 000 m^3 and 1 000 000 m^3 respectively, in respect of which extra production confers in both cases 1.3 points, corresponds to a volume exceeding the total consumption anticipated for the fourth and final year of the contract concerned. Therefore, a total annual production capacity of such a level could, in some circumstances, be regarded as being necessary to the objective, recalled in paragraph 71 of this judgment, of ensuring reliability of supplies.

74 However, the evaluation criteria under consideration go beyond what is necessary. 1.3 points are still awarded where total annual production exceeds a threshold of at least 1 200 000 m^3 and 1 500 000 m^3 respectively and 2 extra points if that production is at least 1 600 000 m^3 and 2 000 000 m^3 respectively.

75 It should be noted that those figures, which correspond to the third total annual production threshold, represent each time twice the figure for the first threshold, set out in paragraph 73 of this judgment.

76 It follows that, in so far as the maximum number of points is allocated to tenderers with a production capacity which largely exceeds the consumption expected in the context of the contested calls for tenders, while the first threshold already appears suitable for ensuring, as far as possible, a reliable supply of gas, the evaluation criteria used in the case, as regards the award of extra points where the second and third total annual production thresholds are exceeded, are not compatible with the requirements of the relevant Community law (see, by analogy, *EVN and Wienstrom*, paragraph 71).

77 Finally, as regards the manner of deciding between two tenderers with the same number of points, the award criterion used applies not only where there is an overall

tie, but also where there is a tie in respect of technical aspects between two tenders with the same number of points, and favours the undertaking which was already supplying the service.

78 The conditions to be fulfilled, set out above, are also applicable to such a criterion. Deciding automatically and definitively in favour of the operator already present on the market concerned is discriminatory.

79 It follows from all the foregoing considerations that Article 49 EC precludes a contracting authority from providing in the tendering specifications for a public contract for health services of home respiratory treatment and other assisted breathing techniques, first, for an admission condition which requires an undertaking submitting a tender to have, at the time the tender is submitted, an office open to the public in the capital of the province where the service is to be supplied and, second, for evaluation criteria which reward, by awarding extra points, the existence at the time the tender is submitted of oxygen production, conditioning and bottling plants situated within 1 000 kilometres of that province or offices open to the public in other specified towns in that province, and which, in the case of a tie between a number of tenders, favour the undertaking which was already providing the service concerned, in so far as those elements are applied in a discriminatory manner, are not justified by imperative requirements in the general interest, are not suitable for securing the attainment of the objective which they pursue or go beyond what is necessary to attain it, which is a matter for the national court to determine.

Costs

80 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 49 EC precludes a contracting authority from providing, in the tendering specifications for a public contract for health services of home respiratory treatments and other assisted breathing techniques, first, for an admission condition which requires an undertaking submitting a tender to have, at the time the tender is submitted, an office open to the public in the capital of the province where the service is to be supplied and, second, for evaluation criteria which reward, by awarding extra points, the existence at the time the tender is submitted of oxygen production, conditioning and bottling plants situated within 1 000 kilometres of that province or offices open to the public in other specified towns in that province, and which, in the case of a tie between a number of tenders, favours the undertaking which was previously providing the service concerned, in so far as those criteria are applied in a discriminatory manner, are not justified by imperative requirements in the general interest, are not suitable for securing the attainment of the objective which they pursue or go beyond what is necessary to attain it, which is a matter for the national court to determine.

[Signatures]