

JUDGMENT OF THE COURT (Sixth Chamber)

12 February 2004 *

In Case C-230/02,

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

Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG

and

Republik Österreich,

on the interpretation of Articles 1(3) and 2(1)(b) 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

* Language of the case: German.

coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT (Sixth Chamber),

composed of: V. Skouris, acting as President of the Sixth Chamber, C. Gulmann, J.N. Cunha Rodrigues, J.-P. Puissochet and R. Schintgen (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG, by P. Schmutzner, Rechtsanwalt,

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

— the Commission of the European Communities, by K. Wiedner, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Grossmann Air Service, Bedarfsluftfahrt-unternehmen GmbH & Co. KG, represented by P. Schmutzer, of the Austrian Government, represented by M. Winkler, acting as Agent, and of the Commission, represented by J.C. Schieferer, acting as Agent, at the hearing on 10 September 2003,

after hearing the Opinion of the Advocate General at the sitting on 16 October 2003,

gives the following

Judgment

- 1 By order of 14 May 2002, received at the Registry of the Court on 20 June 2002, the Bundesvergabeamt (Federal Public Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 1(3) and 2(1)(b) 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 a dispute between Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG ('Grossmann') and Republik Österreich (Republic of Austria), represented by the Federal Ministry of Finance ('the Ministry'), concerning an award procedure for a public contract.

Legal background

Community legislation

- 3 Articles 1(1) and (3) of Directive 89/665 provide:

'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 conditions 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:

'1. 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) either 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 an infringement.’

National legislation

- 5 Directive 89/665 was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Law on Public Procurement, BGBl. I, 1997/56, ‘the BVergG’). The BVergG provides for the creation of the Bundes-Vergabekontrollkommission (Federal Public Procurement Review Commission, ‘the B-VKK’) and of the Bundesvergabeamt (Federal Public Procurement Office).
- 6 Paragraph 109 of the BVergG sets out the powers of the B-VKK. It contains the following provisions:

‘1. The B-VKK shall be competent:

- (1) until such time as the contract is awarded, to reconcile any differences of opinion between the awarding body and one or more candidates or tenderers concerning the application of the present federal law or its implementing regulations.

...

6. A request for the B-VKK to take action made under paragraph 1(1) must be submitted to the directors of the Commission as soon as possible after the difference of opinion comes to light.

7. If the B-VKK does not take action following a request from the awarding body, it must inform that body immediately it does take action.

8. The awarding body may not award the contract until four weeks after... it has been informed in accordance with paragraph 7, failing which the tendering procedure shall be declared void....'

7 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.... ’

8 Paragraph 115(1) of the BVergG provides that:

‘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.’

9 According to Paragraph 122(1) of the BVergG, ‘in the event of a culpable breach of the Federal Law or its implementing rules by the organs of an awarding body, an unsuccessful candidate or tenderer may bring a claim against the contracting authority to which the conduct of the organs of the awarding body is attributable for reimbursement of the costs incurred in drawing up its bid and other costs borne as a result of its participation in the tendering procedure.’

10 Under Paragraph 125(2) of the BVergG, a claim for damages, which must be brought before the civil courts, is admissible only if the Bundesvergabeamt has made a declaration under Paragraph 113(3) prior to that claim being made. The

civil court called upon to hear the claim for damages, and the parties to the proceedings before the Bundesvergabeamt, are bound by that declaration.

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

- 11 On 27 January 1998, the Ministry invited tenders for ‘the provision for the Austrian Federal Government and its delegations of non-scheduled passenger transport services by air in executive jets and aircraft’. Grossmann participated in the award procedure for that contract by submitting a tender.

- 12 On 3 April 1998, the Ministry decided to annul the first invitation to tender, in accordance with Paragraph 55(2) of the BVergG, which provides that ‘the invitation to tender may be revoked when, after offers have been rejected pursuant to Paragraph 52, only one offer remains’.

- 13 On 28 July 1998, the Ministry issued another invitation to tender for non-scheduled passenger transport services by air for the Austrian Federal Government and its delegations. Grossmann obtained the documents for that invitation to tender, but it did not submit an offer.

- 14 By letter of 8 October 1998, the Austrian Government notified Grossmann of its intention to award the contract to Lauda Air Luftfahrt AG (‘Lauda Air’). Grossmann received that letter on the following day. The contract with Lauda Air was concluded on 29 October 1998.

- 15 By application dated 19 October 1998, posted on 23 October and received at the Bundesvergabeamt on 27 October 1998, Grossmann applied to have the contracting authority's decision to award the contract to Lauda Air set aside. In support of its application Grossmann claimed essentially that the invitation to tender had been tailored from the beginning to one tenderer, namely Lauda Air.
- 16 By decision of 4 January 1999, the Bundesvergabeamt dismissed Grossmann's application pursuant to Paragraphs 115(1) and 113(2) and (3) of the BVergG, on the ground that Grossmann had failed to assert its legal interest in obtaining the entire contract and, that in any event, after the award of the contract, the Bundesvergabeamt no longer has competence to set it aside.
- 17 As regards the absence of interest, the Bundesvergabeamt found that since it did not have large aircraft available to it, Grossmann was not in a position to provide all the services requested, and that it had not submitted a tender in the second award procedure for the contract at issue.
- 18 Grossmann appealed to the Verfassungsgerichtshof (Constitutional Court) (Austria) seeking to have the Bundesvergabeamt's decision set aside. By judgment of 10 December 2001, the Verfassungsgerichtshof set aside that decision for breach of the constitutionally guaranteed right to proceedings before the ordinary courts, on the ground that the Bundesvergabeamt had wrongly failed to refer a question to the Court of Justice for a preliminary ruling relating to whether its interpretation of Paragraph 115(1) of the BVergG was in accordance with Community law.
- 19 In its order for reference, the Bundesvergabeamt explains that the provisions of Paragraph 109(1), (6) and (8) of the BVergG are intended to guarantee that no contract will be concluded during the conciliation procedure. It adds that if an

amicable agreement is not reached during that procedure an undertaking may still request, before the conclusion of the contract, the annulment of any decision of the contracting authority, including the decision awarding the contract, but subsequently the Bundesvergabebamt is competent only to rule that the contract has not been awarded to the tenderer who made the best offer by reason of an infringement of the BVergG or its implementing rules.

- 20 The national court points out that, in this case, Grossmann's application to have the decision awarding the contract to Lauda Air set aside, was indeed received before the contract between Lauda Air and the contracting authority was concluded, but that it could be dealt with by the Bundesvergabebamt, within the time-limit prescribed, only after the conclusion of the contract. The Bundesvergabebamt also states that the application was only posted on 23 October 1998, although the contracting authority had notified Grossmann by letter of 8 October 1998, received the following day, of its intention to award the contract to Lauda Air.
- 21 The Bundesvergabebamt thus finds that Grossmann allowed 14 days to elapse between notification to it of the decision awarding the contract (9 October 1998) and the institution by Grossmann of proceedings before the Bundesvergabebamt (23 October 1998), without any request for conciliation being lodged with the B-VKK (a request which would have caused the four-week time-limit laid down in Paragraph 109(8) of the BVergG, during which the contracting authority may not award the contract, to begin to run) or, in the case of a failure of the conciliation process, without the B-VKK being requested to grant interim measures and to set aside the decision awarding the contract. Therefore, according to the national court, the question arises whether Grossmann can establish an interest in bringing proceedings, in accordance with Article 1(3) of Directive 89/665, since as it was not in a position to provide the services in question, owing, it claims, to provisions in the documents relating to the invitation to tender that are discriminatory within the meaning of Article 2(1)(b) of the Directive, it did not submit an offer in the contract award procedure at issue.

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

‘(1) Is Article 1(3) of... Directive 89/665... to be interpreted as meaning that the review procedure must be available to any undertaking which has submitted a bid, or applied to participate, in a public procurement procedure?’

In the event that the answer to Question 1 is no:

(2) Is the abovementioned provision to be understood as meaning that an undertaking only has or had an interest in a particular public contract if — in addition to its participating in the public procurement procedure — it takes all steps available to it under national law to prevent the contract from being awarded to another bidder?

(3) Is Article 1(3) of Directive 89/665, in conjunction with Article 2(1) thereof, to be interpreted as meaning that an undertaking must be afforded the opportunity in law to seek review of an award procedure regarded by it as unlawful or discriminatory even where it is not capable of performing the totality of the services for which bids were invited and, for that reason, did not submit a bid in that award procedure.’

The first and third questions

- 23 In the light of the facts in the main proceedings, as described by the national court, the first and third questions, which it is appropriate to examine together, must be regarded as asking, essentially, whether Articles 1(3) and 2(1)(b) of Directive 89/665 must be interpreted as precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.
- 24 In order to assess whether a person in a situation such as that referred to in the questions thus reformulated can establish an interest in bringing proceedings within the meaning of Article 1(3) of Directive 89/665, it is appropriate to consider the fact that he neither participated in the contract award procedure at issue nor did he appeal against the invitation to tender before the contract was awarded.

Failure to participate in the contract award procedure

- 25 In that regard, it must be recalled that, in accordance with Article 1(3) of Directive 89/665, the Member States are required to ensure that the review procedures provided for 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 national rules transposing that law.

- 26 It follows that the Member States are not obliged to make those review procedures available to any person wishing to obtain a public contract, but may also require that the person concerned has been or risks being harmed by the infringement he alleges (Case C-249/01 *Hackermüller* [2003] ECR I-6319, paragraph 18).
- 27 In that sense, as the Commission pointed out in its written observations, participation in a contract award procedure may, in principle, with regard to Article 1(3) of Directive 89/665, validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract. If he has not submitted a tender it will be difficult for such a person to show that he has an interest in challenging that decision or that he has been harmed or risks being harmed as a result of that award decision.
- 28 However, where an undertaking has not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested, it would be entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned is terminated.
- 29 On the one hand, it would be too much to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender, before being able to avail itself of the review procedures provided for by Directive 89/665 against such specifications, in the award procedure for the contract at issue, even though its chances of being awarded the contract are non-existent by reason of the existence of those specifications.

30 On the other hand, it is clear from the wording of Article 2(1)(b) of Directive 89/665 that the review procedures to be organised by the Member States in accordance with the Directive must, in particular, ‘set aside decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications...’. It must, therefore, be possible for an undertaking to seek review of such discriminatory specifications directly, without waiting for the contract award procedure to be terminated.

Absence of proceedings against the invitation to tender

31 In this case, Grossmann complains that the contracting authority imposed requirements in respect of a contract for non-scheduled air transport services that only an air company offering scheduled flights would be in a position to fulfil, which had the effect of reducing the number of candidates capable of providing all the services required.

32 It is apparent, however, from the file that Grossmann did not seek review of the contracting authority’s decision determining the specifications of the invitation to tender directly, but waited until the decision to award the contract to Lauda Air was notified before asking the Bundesvergabeamt to set that decision aside.

33 In that regard, in its order for reference the Bundesvergabeamt points out that, under Paragraph 115(1) of the BVergG, an undertaking may institute review proceedings against a decision of the contracting authority where it claims to have an interest in the conclusion of a contract in an award procedure and the unlawfulness on which it relies has caused or risks causing it harm.

34 The national court therefore asks, essentially, whether Article 1(3) of Directive 89/665 must be interpreted as meaning that it precludes a person who not only has not participated in the award procedure for a public contract but has not sought any review of the decision of the contracting authority determining the specifications of the invitation to tender either, from being regarded as having lost his interest in obtaining the contract and, therefore, the right of access to the review procedures provided for by the Directive.

35 This question must be examined in the light of the purpose of Directive 89/665.

36 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 Community 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, Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraphs 33 and 34, Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 74, and Case C-410/01 *Fritsch, Chiari & Partner and Others* [2003] ECR I-6413, paragraph 30).

37 It must be pointed out that the fact that a person does not seek review of a decision of the contracting authority determining the specifications of an invitation to tender which in his view discriminate against him, in so far as they effectively disqualify him from participating in the award procedure for the contract at issue, but awaits notification of the decision awarding the contract and then challenges it before the body responsible, on the ground specifically that

those specifications are discriminatory, is not in keeping with the objectives of speed and effectiveness of Directive 89/665.

38 Such conduct, in so far as it may delay, without any objective reason, the commencement of the review procedures which Member States were required to institute by Directive 89/665 impairs the effective implementation of the Community directives on the award of public contracts.

39 In those circumstances, a refusal to acknowledge the interest in obtaining the contract in question and, therefore, the right of access to the review procedures provided for by Directive 89/665 of a person who has not participated in the contract award procedure, or sought review of the decision of the contracting authority laying down the specifications of the invitation to tender, does not impair the effectiveness of that directive.

40 Having regard to the foregoing, the answer to the first and third questions must be that Articles 1(3) and 2(1)(b) of Directive 89/665 must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.

Second question

- 41 In the light of the facts in the main proceedings, as set out by the national court, the second question must be understood as asking, essentially, whether Article 1(3) of Directive 89/665 must be interpreted as precluding a person who has participated in a contract award procedure from being regarded as having lost his interest in obtaining the contract on the ground that, before seeking the review provided for by the Directive, he failed to refer the case to a conciliation committee such as the B-VKK.
- 42 In that regard, it is sufficient to recall that, in paragraphs 31 and 34 of *Fritsch, Chiari & Partner and Others*, the Court held that, even though Article 1(3) of Directive 89/665 expressly allows Member States to determine the detailed rules according to which they must make the review procedures provided for in that directive available 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 it none the less does not authorise them to give the term ‘interest in obtaining a public contract’ an interpretation which may limit the effectiveness of that directive. The fact that access to the review procedures provided for by the Directive is made subject to prior referral to a conciliation committee such as the B-VKK would be contrary to the objectives of speed and effectiveness of that directive.
- 43 Accordingly, the answer to the second question must be that Article 1(3) of Directive 89/665 must be interpreted as precluding a person who has participated in a contract award procedure from being regarded as having lost his interest in obtaining the contract on the ground that, before seeking the review provided for by the Directive, he failed to refer the case to a conciliation committee such as the B-VKK.

Costs

- 44 The costs incurred by the Austrian Government 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 order of 14 May 2002, hereby rules:

1. **Articles 1(3) and 2(1)(b) 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, 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, must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as**

having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.

2. Article 1(3) of Directive 89/665, as amended by Directive 92/50, must be interpreted as precluding a person who has participated in a contract award procedure from being regarded as having lost his interest in obtaining the contract on the ground that, before seeking the review provided for by the Directive, he failed to refer the case to a conciliation committee such as Bundes-Vergabekontrollkommission (Federal Public Procurement Review Commission, established by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Law on Public Procurement)).

Skouris

Gulmann

Cunha Rodrigues

Puissochet

Schintgen

Delivered in open court in Luxembourg on 12 February 2004.

R. Grass

V. Skouris

Registrar

President