

JUDGMENT OF THE COURT (Sixth Chamber)
9 July 1987*

In Joined Cases 27 to 29/86

REFERENCES to the Court under Article 177 of the EEC Treaty by the Third Chamber of the Administrative Appeals Section of the Conseil d'Etat (State Council) of Belgium for a preliminary ruling in the proceedings pending before that court

In Case 27/86 between

SA Constructions et entreprises industrielles (CEI)

and

Société coopérative 'Association intercommunale pour les autoroutes des Ardennes',

whose successor in title is

Fonds des routes (Road Fund), represented by the Minister for Public Works;

In Case 28/86 between

Ing. A. Bellini & Co. SpA, a limited company incorporated under Italian law,

and

Régie des bâtiments (Building Commission), represented by the Minister for Public Works;

and

Confédération nationale de la construction Asbl,

intervener;

In Case 29/86 between

Ing. A. Bellini & Co. SpA

and

Belgian State, represented by the Minister for Defence,

* Language of the Case: French.

on the interpretation of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682),

THE COURT (Sixth Chamber),

composed of: C. Kakouris, President of Chamber, T. F. O'Higgins, T. Koopmans, K. Bahlmann and G. C. Rodríguez Iglesias, Judges,

Advocate General: J. Mischo

Registrar: B. Pastor, Administrator

after considering the observations submitted on behalf of

Constructions et entreprises industrielles SA, the plaintiff in the main proceedings in Case 27/86, by R. Libiez, J. Putzeys and X. Leurquin, *avocats*,

Ing. A. Bellini & Co. SpA, the plaintiff in the main proceedings in Cases 28 and 29/86, by J. Putzeys and X. Leurquin, *avocats*,

Association intercommunale pour les autoroutes des Ardennes, now the Fonds des routes, the defendant in the main proceedings in Case 27/86, by P. Lambert, *avocat*,

Régie des bâtiments, the defendant in the main proceedings in Case 28/86, by P. Lambert, *avocat*,

the Belgian State, the defendant in the main proceedings in Case 29/86, by J. P. Pierard, Agent for the Minister for Defence,

Confédération nationale de la construction, the intervener in the main proceedings in Case 28/86, by L. Goffin and J.-L. Lodomez, *avocats*,

the Kingdom of Spain, by L. J. Casanova Fernández, Secretary-General for European Communities Affairs,

the Italian Republic, by Ivo Braguglia, *Avvocato dello Stato*,
the Commission of the European Communities, by M. Guerrin, Legal Adviser,
having regard to the Report for the Hearing and further to the hearing on 13 May 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 11 June 1987,

gives the following

Judgment

- 1 By three judgments of 15 January 1986, which were received at the Court on 3 February 1986, the Conseil d'Etat of Belgium referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (*Official Journal*, English Special Edition 1971 (II), p. 682).
- 2 Those questions arose in the context of proceedings for the annulment of decisions awarding various public works contracts.
- 3 The plaintiff in the main proceedings in Case 27/86 (CEI) was excluded in favour of an undertaking which had submitted a higher tender on the ground that the total value of the works, both public and private, which CEI had in hand at the time of the award of the contract exceeded the limit laid down by the applicable Belgian rules.
- 4 The tenders submitted by the plaintiff in the main proceedings in Cases 28 and 29/86 (Bellini) were also excluded in favour of undertakings which had submitted higher tenders on the ground that Bellini did not satisfy the criteria laid down by the Belgian legislation for recognition in the classes required by the contract

documents notwithstanding the fact that it had submitted a certificate of recognition issued in Italy in a class which entitled it to bid in Italy for contracts of a value corresponding to that of the Belgian contracts in question.

- 5 In the three main proceedings, the plaintiffs allege in support of their applications for annulment of the decisions awarding the contracts, *inter alia*, that those decisions were contrary to the provisions of Directive 71/305.
- 6 Since it considered that an interpretation of certain provisions of that directive was necessary, the Conseil d'Etat stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

A — In Case 27/86

- '(1) Are the references enabling a contractor's financial and economic standing to be determined exhaustively enumerated in Article 25 of Directive 71/305/EEC?
- (2) If not, can the value of the works which may be carried out at one time be regarded as a reference enabling a contractor's financial and economic standing to be determined within the meaning of Article 25 of the directive?'

B — In Cases 28 and 29/86

'Does Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, and in particular Article 25 and Article 26 (d) thereof, permit a Belgian awarding authority to reject a tender submitted by an Italian contractor on the grounds that the undertaking has not shown that it possesses the minimum amount of own funds required by Belgian legislation and that it does not have in its employ on average the minimum number of workers and managerial staff required by that legislation, when the contractor is recognized in Italy in a class equivalent to that required in Belgium by virtue of the value of the contract to be awarded?'

- 7 Reference is made to the Report for the Hearing for a fuller account of the background to the main proceedings, the Community and national legislation at issue, the written observations submitted to the Court and the conduct of the procedure, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The question concerning the exhaustive nature of the list of references in Article 25 of the directive

- 8 The first paragraph of Article 25 of the directive provides that proof of the contractor's economic and financial standing may, as a general rule, be furnished by one or more of the references mentioned therein. Under the second paragraph, the authorities awarding contracts are required to specify in the notice or in the invitation to tender which references they have chosen from among those mentioned in the previous paragraph 'and what references other than those mentioned under (a), (b) or (c) are to be produced'.
- 9 It can be seen from the very wording of that article and, in particular, the second paragraph thereof, that the list of references mentioned therein is not exhaustive.
- 10 The reply to the national court must therefore be that the references enabling a contractor's financial and economic standing to be determined are not exhaustively enumerated in Article 25 of Directive 71/305/EEC.

The question concerning the value of the works which may be carried out at one time

- 11 With regard to the national court's second question in Case 27/86, it should be noted that the total value of the works awarded to a contractor at a particular moment may be a useful factor in determining, in a specific instance, the financial and economic standing of a contractor in relation to his obligations. Since the references are not exhaustively enumerated in Article 25 of the directive, there is therefore no reason why such information should not be required of tenderers by way of a reference within the meaning of that article.

- 12 However, in the light of the grounds of the order for reference, the content of the Belgian legislation mentioned therein and the arguments before this Court, the national court's question must be understood as also seeking to ascertain whether a national rule fixing the maximum value of works which may be carried out at one time is compatible with the directive.
- 13 In that regard, it should be noted that the fixing of such a limit is neither authorized nor prohibited by Article 25 of the directive, because the purpose of that provision is not to delimit the power of the Member States to fix the level of financial and economic standing required in order to take part in procedures for the award of public works contracts but to determine the references or evidence which may be furnished in order to establish the contractor's financial and economic standing.
- 14 In order to rule on the compatibility of such a limit with the directive as a whole, the purpose and object of the directive must be borne in mind. The purpose of Directive 71/305 is to ensure that the realization within the Community of freedom of establishment and freedom to provide services in regard to public works contracts involves, in addition to the elimination of restrictions, the coordination of national procedures for the award of public works contracts. Such coordination 'should take into account as far as possible the procedures and administrative practices in force in each Member State' (second recital in the preamble to the directive). Article 2 expressly provides that the authorities awarding contracts are to apply their national procedures adapted to the provisions of the directive.
- 15 The directive therefore does not lay down a uniform and exhaustive body of Community rules. Within the framework of the common rules which it contains, the Member States remain free to maintain or adopt substantive and procedural rules in regard to public works contracts on condition that they comply with all the relevant provisions of Community law and, in particular, the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services.
- 16 The fixing in a Member State of a maximum value for works which may be carried out at one time is not contrary to the said principles and there is nothing to

suggest that it has the effect of restricting access by contractors in the Community to public works contracts.

- 17 In those circumstances, it must be held that as Community law now stands, there is no reason why the Member States, in the context of their powers in regard to public works contracts, should not fix a maximum value for works which may be carried out at one time.
- 18 The reply to the national court should therefore be that a statement of the total value of the works awarded to a contractor may be required from tenderers as a reference within the meaning of Article 25 of Directive 71/305 and that neither that article nor any other provision of the directive precludes a Member State from fixing the value of the works which may be carried out at one time.

The question concerning the effects of being included in an official list of recognized contractors in one Member State *vis-à-vis* the authorities awarding contracts in other Member States

- 19 In order to reply to this question, it is necessary to make clear the function of a contractor's inclusion in an official list of recognized contractors in a Member State in the overall scheme of the directive.
- 20 Under Article 28 (1), Member States which have official lists of recognized contractors must adapt them to the provisions of Article 23 (a) to (d) and (g) and of Articles 24 to 26.
- 21 The said provisions of Article 23 define the circumstances relating to the insolvency or dishonesty of a contractor justifying his exclusion from participation in a contract. The provisions of Articles 25 and 26 concern the references which may be furnished as proof of the contractor's financial and economic standing, on the one hand, and technical knowledge or ability on the other.
- 22 The harmonization of official lists of recognized contractors provided for in Article 28 (1) is therefore of limited scope. It concerns in particular references

attesting to the financial and economic standing of contractors and their technical knowledge and ability. On the other hand, the criteria for their classification are not harmonized.

23 Article 28 (2) provides that contractors registered in such lists may, for each contract, submit to the authority awarding contracts a certificate of registration issued by the competent authority. That certificate is to state the references which enabled them to be registered in the list and the classification given in that list.

24 Article 28 (3) entitles contractors registered in an official list in any Member State whatever to use such registration, within the limits laid down in that provision, as an alternative means of proving before the authority of another Member State awarding contracts that they satisfy the qualitative criteria listed in Articles 23 to 26 of the directive (judgment of 10 February 1982 in Case 76/81 *Transporoute v Minister for Public Works* [1982] ECR 417).

25 In regard, in particular, to evidence of contractors' economic and financial standing and technical knowledge or ability, registration in an official list of recognized contractors may therefore replace the references referred to in Articles 25 and 26 in so far as such registration is based upon equivalent information.

26 Information deduced from registration in an official list may not be questioned by the authorities awarding contracts. None the less, those authorities may determine the level of financial and economic standing and technical knowledge and ability required in order to participate in a given contract.

27 Consequently, the authorities awarding contracts are required to accept that a contractor's economic and financial standing and technical knowledge and ability are sufficient for works corresponding to his classification only in so far as that classification is based on equivalent criteria in regard to the capacities required. If that is not the case, however, they are entitled to reject a tender submitted by a contractor who does not fulfil the required conditions.

- 28 The reply to the national court should therefore be that Article 25, Article 26 (d) and Article 28 of the directive must be interpreted as not precluding an awarding authority from requiring a contractor recognized in another Member State to furnish proof that his undertaking has the minimum own funds, manpower and managerial staff required by national law even when the contractor is recognized in the Member State in which he is established in a class equivalent to that required by the national law by virtue of the value of the contract to be awarded.

Costs

- 29 The costs incurred by the Commission of the European Communities, the Kingdom of Spain and the Italian Republic, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 Conseil d'Etat of Belgium by judgments of 15 January 1986, hereby rules:

- (1) The references enabling a contractor's financial and economic standing to be determined are not exhaustively enumerated in Article 25 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts.
- (2) A statement of the total value of the works awarded to a contractor may be required from tenderers as a reference within the meaning of Article 25 of Directive 71/305/EEC and neither that article nor any other provision of the directive precludes a Member State from fixing the value of the works which may be carried out at one time.

- (3) Article 25, Article 26 (d) and Article 28 of Directive 71/305/EEC must be interpreted as not precluding an awarding authority from requiring a contractor recognized in another Member State to furnish proof that his undertaking has the minimum own funds, manpower and managerial staff required by national law even when the contractor is recognized in the Member State in which he is established in a class equivalent to that required by the national law by virtue of the value of the contract to be awarded.

Kakouris

O'Higgins

Koopmans

Bahlmann

Rodríguez Iglesias

Delivered in open court in Luxembourg on 9 July 1987.

P. Heim

C. Kakouris

Registrar

President of the Sixth Chamber