

JUDGMENT OF THE COURT

22 June 1989*

In Case 103/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Tribunal for Lombardy) for a preliminary ruling in the proceedings before that court between

Fratelli Costanzo SpA, a company incorporated under Italian law, whose registered office is at Misterbianco,

and

Comune di Milano (Municipality of Milan)

on the interpretation of Article 29(5) 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) and the third paragraph of Article 189 of the EEC Treaty,

THE COURT

composed of: O. Due, President, R. Joliet and F. Grévisse (Presidents of Chambers), Sir Gordon Slynn, G. F. Mancini, F. A. Schockweiler and J. C. Moitinho de Almeida, Judges,

Advocate General: C. O. Lenz

Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of:

Fratelli Costanzo SpA, the plaintiff in the main proceedings, by L. Acquarone, M. Ali, F. P. Pugliese, M. Annoni and G. Ciampoli, avvocati, in the written procedure and by L. Acquarone in the oral procedure,

* Language of the case Italian

the Comune di Milano, the defendant in the main proceedings, by P. Marchese, C. Lopopolo and S. Ammendola, avvocati, in the written procedure and by P. Marchese in the oral procedure,

Ing. Lodigiani SpA, the intervener in the main proceedings, by E. Zauli and G. Pericu, avvocati, in the written procedure and by G. Pericu in the oral procedure,

the Government of the Kingdom of Spain, by J. Conde de Saro and R. Silva de Lapuerta, acting as Agents, in the written procedure and by R. Silva de Lapuerta, acting as Agent, in the oral procedure,

the Government of the Italian Republic, by Professor L. Ferrari Bravo, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by I. M. Braguglia, avvocato dello Stato,

the Commission of the European Communities, by G. Berardis, a member of its Legal Department, acting as Agent, in the written and oral procedures,

having regard to the Report for the Hearing and further to the hearing on 7 March 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 25 April 1989,

gives the following

Judgment

- 1 By order of 16 December 1987, which was received at the Court Registry on 30 March 1988, the Tribunale amministrativo regionale per la Lombardia referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Article 29(5) 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) and the third paragraph of Article 189 of the EEC Treaty.

2 The questions were raised in proceedings brought by Fratelli Costanzo SpA (hereinafter referred to as 'Costanzo'), the plaintiff in the main proceedings, for the annulment of a decision of the Giunta municipale (Municipal Executive Board) of Milan eliminating the tender submitted by Costanzo from a tendering procedure for a public works contract and awarding the contract in question to Ing. Lodigiani SpA (hereinafter: 'Lodigiani').

3 Article 29(5) of Council Directive 71/305/EEC provides as follows:

'If, for a given contract, tenders are obviously abnormally low in relation to the transaction, the authority awarding contracts shall examine the details of the tenders before deciding to whom it will award the contract. The result of this examination shall be taken into account.

For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable.

If the documents relating to the contract provide for its award at the lowest price tendered, the authority awarding contracts must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 the rejection of tenders which it considers to be too low.'

4 Article 29(5) of Directive 71/305 was implemented in Italy by the third paragraph of Article 24 of Law No 584 of 8 August 1977 amending the procedures for the award of public works contracts in accordance with the directives of the European Economic Community (*Gazzetta ufficiale della Repubblica italiana* (Official Journal of the Italian Republic) No 232, 26.8.1977, p. 6272). That provision is worded as follows:

'If, for a given contract, tenders are abnormally low in relation to the transaction, the authority awarding the contract shall, after requesting the tenderer to furnish the necessary explanations and after indicating, where appropriate, which parts it considers unacceptable, examine the details of the tenders and may disallow them

if it takes the view that they are not valid; in that event, if the call for tenders provides that the lowest tender price is the criterion for the award of the contract, the awarding authority is obliged to notify the rejection of the tenders, together with its reasons for doing so, to the Ministry of Public Works, which is responsible for forwarding the information to the Advisory Committee for Public Works Contracts of the European Economic Community within the period laid down by the first paragraph of Article 6 of this Law.'

- 5 Subsequently, in 1987, the Italian Government adopted three decree laws in succession which provisionally amended the third paragraph of Article 24 of Law No 584 (Decree Law No 206 of 25 May 1987, *Gazzetta ufficiale* No 120, 26.5.1987, p. 5; Decree Law No 302 of 27 July 1987, *Gazzetta ufficiale* No 174, 28.7.1987, p. 3; and Decree Law No 393 of 25 September 1987, *Gazzetta ufficiale* No 225, 26.9.1987, p. 3).

- 6 The three decree laws each contain an Article 4 worded in identical terms, as follows:

'In order to speed up the procedures for the award of public works contracts, for a period of two years from the date on which this decree enters into force tenders with a percentage discount greater than the average percentage divergence of the tenders admitted, increased by a percentage which must be stated in the call for tenders, shall be considered abnormal for the purposes of the third paragraph of Article 24 of Law No 584 of 8 August 1977 and shall be excluded from the tendering procedure.'

- 7 The decree laws lapsed because they were not converted into laws within the period prescribed by the Italian Constitution. However, a subsequent law provided that the effects of legal measures adopted pursuant to them were to remain valid (Article 1(2) of Law No 478 of 25 November 1987, *Gazzetta ufficiale* No 277, 26.11.1987, p. 3).

- 8 In preparation for the 1990 World Cup for football, to be held in Italy, the Comune di Milano issued a restricted call for tenders for alteration work on a football stadium. The criterion chosen for awarding the contract was that of the lowest price.

9 The call for tenders stated that in accordance with Article 4 of Decree Law No 206 of 25 May 1987 tenders which exceeded the basic amount fixed for the price of the work by a percentage more than 10 points below the average percentage by which the tenders admitted exceeded that amount would be considered anomalous and consequently eliminated.

10 The tenders admitted to the procedure exceeded the basic amount fixed for the price of the work by an average of 19.48%. In accordance with the call for tenders any tender which did not exceed the basic amount by at least 9.48% was to be automatically eliminated.

11 The tender submitted by Costanzo was less than the basic amount. Accordingly, on 6 October 1987 the Giunta Municipale, on the basis of Article 4 of Decree Law No 393 of 25 September 1987, which in the mean time had replaced the decree law cited in the call for tenders, decided to exclude Costanzo's bid from the tendering procedure and to award the contract to Lodigiani, which had submitted the lowest tender of those which fulfilled the condition set out in the call for tenders.

12 Costanzo challenged that decision in proceedings before the Tribunale amministrativo regionale per la Lombardia, claiming *inter alia* that it was illegal on the ground that it was based on a decree law which was itself incompatible with Article 29(5) of Council Directive 71/305.

13 The national court therefore referred the following questions to the Court of Justice for a preliminary ruling:

'A — Given that, under Article 189 of the EEC Treaty, the provisions contained in a directive may relate to the "result to be achieved" (hereinafter referred to as "provisions as to results") or else be concerned with the "form and methods" required to achieve a given result (hereinafter referred to as "provisions as to form and methods"), is the rule contained in Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 (where it provides that — should a tender be obviously abnormally low — the authority must "examine the details" of the

tender and request the tenderer to furnish the necessary explanations, indicating where appropriate which parts it finds unacceptable) a “provision as to results” and therefore of such a nature that the Italian Republic was obliged to “transpose” it without any amendment of substance (as indeed it did, by the third paragraph of Article 24 of Law No 584 of 8 August 1977) or is it a “provision as to form and methods”, with the result that the Italian Republic could derogate from it by providing that where a tender is abnormally low the tenderer must *automatically* be eliminated from the tendering procedure, without any “examination of the details” and without any request to the tenderer to furnish “explanations” for the “abnormal tender”?

B — If the reply to Question A is negative (in the sense that Article 29(5) of Council Directive 71/305/EEC is to be held to be a “provision as to form and methods”):

B — 1. Did the Italian Republic (after “transposing” the aforesaid provision by way of Law No 584 of 8 August 1977 without introducing any amendment of substance regarding the procedure to be followed in cases where a tender is abnormally low) retain the power to amend the domestic implementing provision? In particular, could Article 4 of Decree Law No 206 of 25 May 1987, Decree Law No 302 of 27 July 1987 and Decree Law No 393 of 25 September 1987 (whose wording is identical) amend Article 24 of Law No 584 of 8 August 1977?

B — 2. Could the (identically worded) Articles 4 of the decree laws mentioned above amend Article 29(5) of Council Directive 71/305/EEC, as implemented by Law No 584 of 8 August 1977, without stating adequate reasons therefor, regard being had to the fact that a statement of reasons — which is necessary for Community legislation (see Article 190 of the EEC Treaty) — appears also to be necessary for domestic legislation introduced to give effect to Community provisions (which is therefore “sub-primary” legislation and, in the absence of indication to the contrary, must also be subject to the rule which requires “primary” legislation to state reasons)?

C — Is there, in any event, a conflict between Article 29(5) of Council Directive 71/305/EEC and the following provisions:

- (a) the third paragraph of Article 24 of Law No 584 of 8 August 1977 (which refers to “abnormally low” tenders, whereas the directive is concerned with tenders which are “obviously” abnormally low and provides for examination of the details only in cases of “obvious” abnormality);
- (b) Article 4 of Decree Laws Nos 206 of 25 May 1987, 302 of 27 July 1987 and 393 of 25 September 1987 (which make no allowance for preliminary examination of the details or a request for clarification to the party concerned, contrary to Article 29(5) of the Directive; furthermore, the decree laws mentioned above do *not* refer to “obviously” abnormal tenders and to that extent appear to be invalid, as does Law No 584 of 8 August 1977)?

D — If the Court of Justice rules that the aforesaid Italian legislative provisions conflict with Article 29(5) of Council Directive 71/305/EEC, was the municipal authority empowered, or obliged, to disregard the domestic provisions which conflicted with the aforesaid Community provision (consulting the central authorities if necessary), or does that power or obligation vest solely in the national courts?’

- 14 Reference is made to the Report for the Hearing for a fuller account of the facts of the case before the national court, the applicable legislation, the course of the procedure, and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The second part of the third question and the first question

- 15 In the second part of the third question the Tribunale amministrativo regionale seeks in essence to establish whether Article 29(5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the directive, giving the tenderer an opportunity to furnish explanations. In its first question it asks whether the Member States may, when implementing Council Directive 71/305, depart to any material extent from Article 29(5) thereof.

- 16 With regard to the second part of the third question it should be noted that Article 29(5) of Directive 71/305 requires the awarding authority to examine the details of tenders which are obviously abnormally low, and for that purpose obliges the authority to request the tenderer to furnish the necessary explanations. Article 29(5) further requires the awarding authority, where appropriate, to indicate which parts of those explanations it finds unacceptable. Finally, if the criterion adopted for the award of the contract is the lowest price tendered, the awarding authority must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 (Official Journal, English Special Edition 1971 (II), p. 693) the rejection of tenders which it considers to be too low.
- 17 The Comune di Milano and the Italian Government maintain that it is in keeping with the aim of Article 29(5) to replace the examination procedure which it envisages, giving the tenderer an opportunity to state its views, with a mathematical criterion for exclusion. They point out that the aim of that provision is, as the Court ruled in its judgment of 10 February 1982 in Case 76/81 *Transporoute v Minister for Public Works* [1982] ECR 417, at p. 428, to protect tenderers against arbitrariness on the part of the authority awarding the contract. A mathematical criterion for exclusion affords an absolute safeguard. It has the further advantage of being faster in its application than the procedure laid down by the Directive.
- 18 That argument cannot be upheld. A mathematical criterion for exclusion deprives tenderers who have submitted exceptionally low tenders of the opportunity of demonstrating that those tenders are genuine ones. The application of such a criterion is contrary to the aim of Directive 71/305, namely to promote the development of effective competition in the field of public contracts.
- 19 The answer to the second part of the third question must therefore be that Article 29(5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the Directive, giving the tenderer an opportunity to furnish explanations.
- 20 With regard to the first question, it should be observed that it was in order to enable tenderers submitting exceptionally low tenders to demonstrate that those

tenders are genuine ones that the Council, in Article 29(5) of Directive 71/305, laid down a precise, detailed procedure for the examination of tenders which appear to be abnormally low. That aim would be jeopardized if Member States were able, when implementing Article 29(5) of the Directive, to depart from it to any material extent.

21 The answer to the first question must therefore be that when implementing Council Directive 71/305 Member States may not depart to any material extent from the provisions of Article 29(5) thereof.

The second question

22 In its second question the national court asks whether, after implementing Article 29(5) of Council Directive 71/305 without departing from it to any material extent, Member States may subsequently amend the domestic implementing provision, and if so whether they must give reasons for doing so.

23 The national court raised this question only in the event that the answer to the first question should be that Member States could, when implementing Article 29(5) of Directive 71/305, depart materially from it.

24 In the light of the answer given to the first question the second question is devoid of purpose.

The first part of the third question

25 In the first part of its third question the national court seeks to establish whether Article 29(5) of Council Directive 71/305 allows Member States to require the examination of tenders whenever they appear to be abnormally low, and not only when they are obviously abnormally low.

26 The examination procedure must be applied whenever the awarding authority is contemplating the elimination of tenders because they are abnormally low in relation to the transaction. Consequently, whatever the threshold for the commencement of that procedure may be, tenderers can be sure that they will not be disqualified from the award of the contract without first having the opportunity of furnishing explanations regarding the genuine nature of their tenders.

27 It follows that the answer to be given to the first part of the third question is that Article 29(5) of Council Directive 71/305 allows Member States to require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

The fourth question

28 In the fourth question the national court asks whether administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305 and to refrain from applying provisions of national law which conflict with them.

29 In its judgments of 19 January 1982 in Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53, at p. 71 and 26 February 1986 in Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, at p. 748, the Court held that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the Directive correctly.

30 It is important to note that the reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.

31 It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.

32 With specific regard to Article 29(5) of Directive 71/305, it is apparent from the discussion of the first question that it is unconditional and sufficiently precise to be relied upon by an individual against the State. An individual may therefore plead that provision before the national courts and, as is clear from the foregoing, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply it.

33 The answer to the fourth question must therefore be that administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them.

Costs

34 The costs incurred by the Spanish Government, the Italian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunale amministrativo regionale per la Lombardia, by order of 16 December 1987, hereby rules:

- (1) Article 29(5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the Directive, giving the tenderer an opportunity to furnish explanations.
- (2) When implementing Council Directive 71/305/EEC, Member States may not depart to any material extent from the provisions of Article 29(5) thereof.
- (3) Article 29(5) of Council Directive 71/305 allows Member States to require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.
- (4) Administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them.

Due	Joliet	Grévisse	
Slynn	Mancini	Schockweiler	Moitinho de Almeida

Delivered in open court in Luxembourg on 22 June 1989.

J.-G. Giraud
Registrar

O. Due
President