JUDGMENT OF THE COURT (Fourth Chamber)
20 September 1988 *

In Case 31/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the Sixth Chamber of the Arrondissementsrechtbank (District Court), The Hague, for a preliminary ruling in the proceedings pending before that court between

Gebroeders Beentjes BV

and

State of the Netherlands,

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 (Fourth Chamber)

composed of: G. C. Rodríguez Iglesias, President of the Chamber, T. Koopmans and C. N. Kakouris, Judges,

Advocate General: M. Darmon
Registrar: J.-G. Giraud

after considering the observations submitted on behalf of

the Italian Government, by P. G. Ferri,

the Commission of the European Communities, by R. Wainwright and R. Barents,

* Language of the Case: Dutch.

having regard to the Report for the Hearing and further to the hearing on 8 March 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 4 May 1988,

gives the following

Judgment

1 By a judgment of 28 January 1987, which was received at the Court on 3 February 1987, the Arrondissementsrechtbank, The Hague, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of 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 These questions arose in proceedings between Gebroeders Beentjes BV and the Netherlands Ministry of Agriculture and Fisheries in connection with a public invitation to tender for a public works contract in connection with a land consolidation operation.

3 In the main proceedings, Beentjes, the plaintiff, claimed that the decision of the awarding authority rejecting its tender, although it was the lowest, in favour of the next-lowest bidder had been taken in breach of the provisions of the abovementioned directive.

4 It was in these circumstances that the Arrondissementsrechtbank stayed the proceedings and asked the Court for a preliminary ruling on the following questions:

'(1) Is a body with the characteristics of a "local committee", as provided for in the Ruilverkavelingswet 1954 and described in paragraph 5.3 of [the national court's] judgment to be regarded as "the State" or a "regional or local authority" for the purposes of Council Directive 71/305/EEC of 26 July 1971?

(2) Does Directive 71/305/EEC allow a tenderer to be excluded from a tendering procedure on the basis of considerations such as those mentioned in paragraph 6.2 of [the national court's] judgment if in the invitation itself no qualitative criteria are laid down in this regard (but reference is simply made to general conditions containing a general reservation such as that relied upon by the State in this case)?

(3) May parties such as Beentjes in a civil action such as this rely on the provisions of Directive 71/305/EEC indicating the cases in which and the conditions under which a tenderer may be excluded from the tendering procedure on qualitative grounds, even if in the incorporation of those provisions of the directive in national legislation the contracting authority is given wider powers to refuse to award a contract than are permitted under the directive?'

5 As regards the second question, it should be stated that the considerations referred to in the national court's judgment concern the reasons for which Beentjes' tender was rejected by the awarding authority, which considered that Beentjes lacked sufficient specific experience for the work in question, that its tender appeared to be less acceptable and that it did not seem to be in a position to employ long-term unemployed persons. It is apparent from the documents before the Court that the first two criteria cited above were provided for in Article 21 of the Uniform Rules on Invitations to Tender of 21 December 1971 (Uniform Aanbestedingsreglement, hereinafter referred to as 'the Uniform Rules'), to which the contested invitation to tender referred, while the condition regarding the employment of long-term unemployed persons was expressly set out in the invitation to tender.

6 Reference is made to the Report for the Hearing for a more detailed account of the facts of the main proceedings, the relevant provisions of Community and national law, the written observations submitted to the Court and the course of the proceedings, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

7 By its first question, the national court seeks in substance to establish whether Directive 71/305/EEC applies to the award of public works contracts by a body such as the local land consolidation committee.

8 It appears from the documents before the Court that the local land consolidation committee is a body with no legal personality of its own whose functions and composition are governed by legislation and that its members are appointed by the Provincial Executive of the province concerned. It is bound to apply rules laid down by a central committee established by royal decree, whose members are appointed by the Crown. The State ensures observance of the obligations arising out of measures of the committee and finances the public works contracts awarded by the local committee in question.

9 The objective of Directive 71/305/EEC is to coordinate national procedures for the award of public works contracts concluded in Member States on behalf of the State, regional or local authorities or other legal persons governed by public law.

10 Pursuant to Article 1 (b) of the Directive, the State, regional or local authorities and the legal persons governed by public law specified in Annex I are to be regarded as 'authorities awarding contracts'.

11 For the purposes of this provision, the term 'the State' must be interpreted in functional terms. The aim of the directive, which is to ensure the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts, would be jeopardized if the provisions of the directive were to be held to be inapplicable solely because a public works contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration.

12 Consequently, a body such as that in question here, whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it is its task to award, must be regarded as falling within the notion of the State for the purpose of the abovementioned provision, even though it is not part of the State administration in formal terms.

13 In reply to the first question put by the national court, it should therefore be stated that Directive 71/305/EEC applies to public works contracts awarded by a body such as the local land consolidation committee.

The second question

14 The second question put by the national court seeks, in the first place, to establish whether Directive 71/305/EEC precludes the rejection of a tender on the following grounds:

(i) lack of specific experience relating to the work to be carried out;

(ii) the tender does not appear to be the most acceptable in the view of the awarding authority;

(iii) inability of the contractor to employ long-term unemployed persons.

Secondly, it seeks to determine what prior notice is required by the directive as regards the use of such criteria, should they be regarded as compatible with the directive.

15 According to the structure of the directive, in particular Title IV (Common rules on participation), the examination of the suitability of contractors to carry out the contracts to be awarded and the awarding of the contract are two different operations in the procedure for the award of a public works contract. Article 20 of the directive provides that the contract is to be awarded after the contractor's suitability has been checked.

16 Even though the directive, which is intended to achieve the coordination of national procedures for the award of public works contracts while taking into account, as far as possible, the procedures and administrative practices in force in each Member State (second recital in the preamble), does not rule out the possibility that examination of the tenderer's suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules.

17 Article 20 provides that the suitability of contractors is to be checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 25 to 28. The purpose of these articles is not to delimit the power of the Member States to fix the level of financial and economic standing and technical knowledge 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 and technical knowledge or ability (see judgment of 9 July 1987 in Joined Cases 27 to 29/86 *CEI and Bellini* [1987] ECR 3347). Nevertheless, it is clear from these provisions that the authorities awarding contracts can check the suitability of the contractors only on the basis of criteria relating to their economic and financial standing and their technical knowledge and ability.

18 As far as the criteria for the award of contracts is concerned, Article 29 (1) provides that the authorities awarding contracts must base their decision either on the lowest price only or, when the award is made to the most economically advantageous tender, on various criteria according to the contract: e. g. price, period for completion, running costs, profitability, technical merit.

19 Although the second alternative leaves it open to the authorities awarding contracts to choose the criteria on which they propose to base their award of the contract, their choice is limited to criteria aimed at identifying the offer which is economically the most advantageous. Indeed, it is only by way of exception that Article 29 (4) provides that an award may be based on criteria of a different nature 'within the framework of rules whose aim is to give preference to certain tenderers by way of aid, on condition that the rules invoked are in conformity with the Treaty, in particular Article 92 *et seq.*'

20 Furthermore, the directive 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, 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 (judgment of 9 July 1987, cited above).

21 Finally, in order to meet the directive's aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts.

22 To this end, Title III of the directive sets out rules for Community-wide advertising of contracts drawn up by awarding authorities in the Member States so as to give contractors in the Community adequate information on the work to be done and the conditions attached thereto, and thus enable them to determine whether the proposed contracts are of interest. At the same time additional information concerning contracts must, as is customary in the Member States, be given in the contract documents for each contract or else in an equivalent document (see ninth and tenth recital in the preamble to the directive).

23 The different aspects of the question put by the national court must be examined in the light of the foregoing.

24 In this case specific experience relating to the work to be carried out was a criterion for determining the technical knowledge and ability of the tenderers. It is therefore a legitimate criterion for checking contractors' suitability under Articles 20 and 26 of the directive.

25 The exclusion of a tenderer because its tender appears less acceptable to the authorities awarding the contract was provided for, as appears from the documents before the Court, in Article 21 of the Uniform Rules. Under Article 21 (3), 'the contract shall be awarded to the tenderer whose tender appears the most acceptable to the awarding authority'.

26 The compatibility of such a provision with the directive depends on its interpretation under national law. It would be incompatible with Article 29 of the directive if its effect was to confer on the authorities awarding contracts unrestricted freedom of choice as regards the awarding of the contract in question to a tenderer.

27 On the other hand, such a provision is not incompatible with the directive if it is to be interpreted as giving the authorities awarding contracts discretion to compare the different tenders and to accept the most advantageous on the basis of objective criteria such as those listed by way of example in Article 29 (2) of the directive.

28 As regards the exclusion of a tenderer on the ground that it is not in a position to employ long-term unemployed persons, it should be noted in the first place that such a condition has no relation to the checking of contractors' suitability on the basis of their economic and financial standing and their technical knowledge and ability or to the criteria for the award of contracts referred to in Article 29 of the directive.

29 It follows from the judgment of 9 July 1987, cited above, that in order to be compatible with the directive such a condition must comply with all the relevant provisions of Community law, 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.

30 The obligation to employ long-term unemployed persons could *inter alia* infringe the prohibition of discrimination on grounds of nationality laid down in the second paragraph of Article 7 of the Treaty if it became apparent that such a condition could be satisfied only by tenderers from the State concerned or indeed that tenderers from other Member States would have difficulty in complying with it. It is for the national court to determine, in the light of all the circumstances of the case, whether the imposition of such a condition is directly or indirectly discriminatory.

31 Even if the criteria considered above are not in themselves incompatible with the directive, they must be applied in conformity with all the procedural rules laid down in the directive, in particular the rules on advertising. It is therefore necessary to interpret those provisions in order to determine what requirements must be met by the various criteria referred to by the national court.

32 It appears from the documents before the Court that in this case the criterion of specific experience relating to the work to be carried out and that of the most acceptable tender were not mentioned in the contract documents or in the contract notice; these criteria are derived from Article 21 of the Uniform Rules, to which the notice made a general reference. On the other hand, the requirement regarding the employment of long-term unemployed persons was the subject of special provisions in the contract documents and was expressly mentioned in the notice published in the *Official Journal of the European Communities.*

33 As regards the criterion of specific experience relating to the work to be carried out, it should be stated that although the last sentence of Article 26 of the directive requires the authorities awarding contracts to specify in the contract notice which of the references concerning the technical knowledge and ability of the contractor are to be produced, it does not require them to list in the notice the criteria on which they propose to base their assessment of the contractors' suitability.

34 Nevertheless, in order for the notice to fulfil its role of enabling contractors in the Community to determine whether a contract is of interest to them, it must contain at least some mention of the specific conditions which a contractor must meet in order to be considered suitable to tender for the contract in question. However, such a mention cannot be required where, as in this case, the condition is not a specific condition of suitability but a criterion which is inseparable from the very notion of suitability.

35 As regards the criterion of 'the most acceptable offer', it should be noted that even if such a criterion were compatible with the directive in the circumstances set out above, it is clear from the wording of Article 29 (1) and (2) of the directive that where the authorities awarding the contract do not take the lowest price as the sole criterion for awarding the contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state these criteria in the contract notice or the contract documents. Consequently, a general reference to a provision of national legislation cannot satisfy the publicity requirement.

36 A condition such as the employment of long-term unemployed persons is an additional specific condition and must therefore be mentioned in the notice, so that contractors may become aware of its existence.

37 In reply to the second question put by the national court it should therefore be stated that:

(i) the criterion of specific experience for the work to be carried out is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of contractors. Where such a criterion is laid down by a provision of national legislation to which the contract notice refers, it is not subject to the specific requirements laid down in the directive concerning publication in the contract notice or the contract documents;

(ii) the criterion of 'the most acceptable tender', as laid down by a provision of national legislation, may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of objective criteria and thus does not involve an element of arbitrary choice. It follows from Article 29 (1) and (2) of the directive that where the authorities awarding contracts do not take the lowest price as the sole criterion for the award of a contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents;

(iii) the condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.

The third question

38 The third question seeks in substance to establish whether Articles 20, 26 and 29 of Directive 71/305 may be relied upon by individuals before the national courts.

39 As the Court held in its judgment of 10 April 1984 in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts. It follows that in applying national law, in particular the provisions of a national law specifically introduced in order to implement a directive, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the Treaty.

40 Furthermore, the Court has consistently held (see most recently the judgment of 26 February 1986 in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Health Authority* [1986] ECR 723) that where 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 on by individuals against the State where that State fails to implement the directive in national law within the prescribed period or where it fails to implement the directive correctly.

41 It is therefore necessary to consider whether the provisions of Directive 71/305 in question are, as far as their subject-matter is concerned, unconditional and sufficiently precise to be relied on by an individual against the State.

42 As the Court held in its judgment of 10 February 1982 in Case 76/81 *Transporoute* v *Minister for Public Works* [1982] ECR 417, in relation to Article 29, the directive's rules regarding participation and advertising are intended to protect tenderers against arbitrariness on the part of the authority awarding contracts.

43 To this end, as has been stated in relation to the reply to the second question, the rules in question provide *inter alia* that in checking the suitability of contractors the awarding authorities must apply criteria of economic and financial standing and technical knowledge and ability, and that the contract is to be awarded either solely on the basis of the lowest price or on the basis of several criteria relating to the tender. They also set out the requirements regarding publication of the criteria

adopted by the awarding authorities and the references to be produced. Since no specific implementing measure is necessary for compliance with these requirements, the resulting obligations for the Member States are therefore unconditional and sufficiently precise.

44 In reply to the third question it should therefore be stated that the provisions of Articles 20, 26 and 29 of Directive 71/305 may be relied on by an individual before the national courts.

Costs

45 The costs incurred by the Commission of the European Communities and by the Italian Republic are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the questions referred to it by the Arrondissementsrechtbank, The Hague, by a judgment of 28 January 1987, hereby rules:

(1) Directive 71/305 applies to public works contracts awarded by a body such as the local land consolidation committee.

(2) The criterion of specific experience for the work to be carried out is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of contractors. Where such a criterion is laid down by a provision of national legislation to which the contract notice refers, it is not subject to the specific requirements laid down in the directive concerning publication in the contract notice or the contract documents.

The criterion of 'the most acceptable tender', as laid down by a provision of national legislation, may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of objective criteria and thus does not involve an element of arbitrary choice. It follows from Article 29 (1) and (2) of the directive that where the authorities awarding contracts do not take the lowest price as the sole criterion for the award of a contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents.

The condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.

(3) The provisions of Articles 20, 26 and 29 of Directive 71/305 may be relied on by an individual before the national courts.

Rodríguez Iglesias Koopmans Kakouris

Delivered in open court in Luxembourg on 20 September 1988.

J.-G. Giraud
Registrar

G. C. Rodríguez Iglesias
President of the Fourth Chamber