JUDGMENT OF THE COURT (Sixth Chamber)

19 June 2003 *

In Case C-410/01,

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

Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others

and

Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag),

on the interpretation of Article 1(3) 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

* Language of the case: German.

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),

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen (Rapporteur), V. Skouris, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: J. Mischo,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

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

— the French Government, by G. de Bergues and A. Bréville-Viéville, acting as Agents,

— the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by R. Roniger, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others, represented by S. Wurst, Rechtsanwalt, the Austrian Government, represented by M. Fruhmann, the French Government, represented by S. Pailler, acting as Agent, and the Commission, represented by M. Nolin, assisted by R. Roniger, at the hearing on 16 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 25 February 2003,

gives the following

Judgment

1 By order of 8 October 2001, received at the Court on 16 October 2001, the Bundesvergabeamt (Federal Public Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 1(3) 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 proceedings between several companies, among them Fritsch, Chiari & Partner, Ziviltechniker GmbH, which formed a consortium of tenderers (hereinafter together called 'Fritsch and Others') and Autobahnen- und Schnellstraßen-Finanzierungs-AG ('Asfinag') concerning the award of a public service contract for which Fritsch and Others had tendered.

Legal context

Community provisions

3 Article 1 of Directive 89/665 provides:

'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 provisions 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 Article 2 provides:

'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.

...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person 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 Public Procurement Law, BGBl. I, 1997/56, 'the BVergG'). The BVergG provides for the creation of a Bundes-Vergabekontrollkommission (Federal Public Procurement Review Commission, 'the B-VKK') and of a 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:

'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 Paragraph 122(1) of the BVergG provides that '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 Bundevergabeamt has made a declaration under Paragraph 113(3). 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 main proceedings and the questions referred for a preliminary ruling

11 In the autumn of 1999 Asfinag invited tenders prior to the award of a public services contract for 'site management in respect of the construction of principal and subsidiary toll barriers, including electrical, internal and technological work, and the introduction of a data-transmission facility as part of the "LKW Maut Österreich" project'. The tenders were opened on 18 November 1999.

12 By letter of 28 January 2000 Fritsch and Others were informed that the bid they had submitted had been placed second in the evaluation of the bids and was therefore unsuccessful. By letter of 8 February 2001, they were told that the contract had been awarded and were informed of the contract price.

13 Fritsch and Others then instituted a procedure under Paragraph 113(3) of the BVergG for a review by the Bundesvergabeamt seeking a declaration that the contract had not been awarded to the best tenderer.

14 Before the Bundesvergabeamt, Asfinag stated that under Paragraph 115(1) of the BVergG only an undertaking claiming an interest in obtaining a contract falling

within the scope of that Law is entitled to apply for review of a decision of the contracting authority challenging the lawfulness of the decision, where the alleged unlawfulness has caused or risks causing it harm. According to Asfinag, Fritsch and Others clearly had no interest in obtaining the contract since they had not submitted an application for conciliation to the B-VKK, as they were entitled to do under Paragraph 109(1) of the BVergG.

15 In support of its view, Asfinag maintained that public procurement law does not exist for its own sake but rather serves to determine where pre-contractual liability lies amongst the various parties to public procurement procedures, including the tenderers. According to Asfinag, if a tenderer considers that the award criteria do not comply with the law, it is required, as provided *inter alia* in Paragraph 109(6) of the BVergG, to raise that objection as soon as possible, even before the tenders are opened. The principle of competition prohibits allowing a tenderer who considers that the award criteria do not comply with the law first to submit a bid in order to ascertain whether it is the best tenderer and then to decide on its actions according to how the contract is awarded, not making an application if it is the best tenderer or, if it fails to obtain the contract or is not the best tenderer, applying to the competent authorities in order to have 'a second bite at the cherry' as a result of the invitation to tender being revoked.

16 According to Asfinag, it is therefore apparent from Paragraph 109(6) of the BVergG that the submission of a tender without a prior request for conciliation being made to the B-VKK means that no claim of illegality may be brought in respect of the tendering procedure of which the tenderer, if it had exercised due care, should have been aware at the time it prepared its bid. If in the present case Fritsch and Others had applied to the B-VKK before preparing their bid and had drawn Asfinag's attention to the alleged errors, no costs would have been incurred in preparing the bid.

17 Fritsch and Others denied the allegation that they had no interest, stating that, according to the practice consistently followed by the public procurement supervisory bodies, submission of a bid within the time-limit was sufficient to establish an interest in obtaining a contract.

18 Considering that the Austrian legislation applying to the case before it should be interpreted in the light of Article 1(3) of Directive 89/665 and that a decision in the case therefore required an interpretation of that provision, the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court of Justice 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?

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

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 or took all steps available to it under national law to prevent the contract from being awarded to another bidder and so to secure the award of the contract to itself?'

The jurisdiction of the Court

19 On the basis of the order for reference made by the Bundesvergabeamt on 11 July 2001 in another case concerning public procurement, registered at the Court Registry under number C-314/01 and currently pending before the Court, the Commission expresses doubts as to the judicial nature of the body making the reference on the ground that it acknowledged in the order that its decisions 'do not contain binding, enforceable directions addressed to the contracting authority'. In those circumstances, the Commission has doubts as to the admissibility of the questions referred for a preliminary ruling by the Bundesvergabeamt in the present proceedings in the light of the case-law of the Court, in particular Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14, and Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraph 14, according to which a national court or tribunal may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

20 It should be noted in that regard, first, that after the award of the contract the Bundesvergabeamt is competent, under Paragraph 113(3) of the BVergG, to determine whether as a result of an infringement of the relevant national legislation the contract has not been awarded to the best tenderer.

21 Secondly, it is apparent from the express wording of Paragraph 125(2) of the BVergG that a declaration made by the Bundesvergabeamt under Paragraph 113(3) of that Law not only constitutes a condition for admissibility of any claim for damages brought before the civil courts by reason of a culpable breach of that legislation but also binds the parties to the proceedings before the Bundesvergabeamt and the civil court hearing the case.

22 In those circumstances, neither the binding nature of a decision taken by the Bundesvergabeamt under Paragraph 113(3) of the BVergG nor, accordingly, the judicial nature of the latter can reasonably be called into question.

23 It follows that the Court has jurisdiction to reply to the questions raised by the Bundesvergabeamt.

The questions referred

24 In its order for reference, the Bundesvergabeamt points out, first, that under Paragraph 115(1) of the BVergG an undertaking may apply for review of a decision by a contracting authority where it claims to have an interest in the conclusion of a contract in a public procurement procedure and that the unlawfulness which it alleges causes it or risks causing it harm.

25 Secondly, the provisions of Paragraph 109(1), (6) and (8) of the BVergG are designed to ensure that no contract may be concluded while the mediation procedure is going on. In the event that a mediation procedure does not lead to amicable settlement the undertaking may, before the contract is concluded, apply for annulment of any decision of a contracting authority, including a decision to award the contract.

26 The national court therefore considers that for the purposes of reaching a decision in the main proceedings it is important to know whether the combined provisions of Paragraph 115(1) and 109(1), (6) and (8) of the BVergG,

interpreted in the light of Article 1(3) of Directive 89/665, must be interpreted as meaning that a tenderer which, before the conclusion of the contract, has been informed by the contracting authority that the contract has been awarded to a competitor, and which has failed to avail itself of the review procedures available under national law to delay the conclusion of a contract and possibly to have the award decision amended in its favour, may reasonably claim that it has an interest in the conclusion of the contract and, accordingly, institute a review procedure for a declaration that the award decision is unlawful and to claim damages.

27 As regards Article 1(3) of Directive 89/665, the Bundesvergabeamt points out that in a judgment of 12 June 2001 (B 485/01-12, B 584/01-9, B 685/01-6) the Austrian Verfassungsgerichtshof (Constitutional Court) held, referring to its judgment of 8 March 2001 (B 707/00), that in accordance with the case-law of the Court (see Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraphs 34 and 35), *locus standi* for bringing a review procedure under Article 1(3) of Directive 89/665 is to be interpreted widely and must therefore be accorded to any person wishing to be awarded a particular public contract which has been put out for tender. The national court therefore considers that the question arises whether this must also be the case if that person has not availed itself of the opportunity afforded by the awarding authority of exhausting all remedies available under national public procurement law (first question) or whether a failure to exhaust all possible domestic remedies results in its forfeiting that interest (second question).

28 In the light of the foregoing considerations, the two questions referred for a preliminary ruling must be understood as seeking to ascertain whether Article 1(3) of Directive 89/665 must be interpreted as meaning that it precludes an undertaking which has participated in a public procurement procedure from being considered as having lost its interest in obtaining that contract on the ground that, before bringing a review procedure under that directive, it failed to apply to a conciliation commission such as the B-VKK.

29 It is in the light of the aims of Directive 89/665 that it is necessary to consider whether Article 1(3) allows a Member State to make a tenderer's interest in obtaining a specific contract, and therefore its right to have access to the review procedures established by that directive, dependent on the condition that it has beforehand applied to a conciliation commission such as the B-VKK.

30 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, *Alcatel Austria*, cited above, paragraphs 33 and 34, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 74).

31 The inevitable conclusion is that making access to the review procedures provided for by Directive 89/665 conditional on prior application to a conciliation commission such as the B-VKK is contrary to that directive's objective of speed and effectiveness.

32 First, prior application to such a conciliation commission inevitably has the effect of delaying the introduction of the review procedures which Directive 89/665 requires Member States to establish.

33 Secondly, a mere conciliation commission, such as the B-VKK, has none of the powers which Article 2(1) of Directive 89/665 requires Member States to grant

the bodies responsible for carrying out those review procedures, so that referral to it does not ensure the effective application of the Community directives on public procurement.

34 It should be added that the fact that 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 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 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 (see, to that effect, *Universale-Bau*, cited above, paragraph 72).

35 In the light of the above, the answer to be given to the questions referred for a preliminary ruling is that Article 1(3) of Directive 89/665 precludes an undertaking which has participated in a public procurement procedure from being considered as having lost its interest in obtaining that contract on the ground that, before bringing a review procedure under that directive, it failed to apply to a conciliation commission, such as the B-VKK established by the BVergG.

Costs

36 The costs incurred by the Austrian and French Governments 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 8 October 2001, hereby rules:

Article 1(3) of 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, precludes an undertaking which has participated in a public procurement procedure from being considered as having lost its interest in obtaining that contract on the ground that, before bringing a review procedure under that directive, it failed to apply to a conciliation commission, such as the Bundes-Vergabekontrollkommission established by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Austrian Federal Law on Public Procurement).

Puissochet Schintgen Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 19 June 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber