JUDGMENT OF THE COURT (Fifth Chamber)

18 October 2001 *

In Case C-19/00,

REFERENCE to the Court under Article 234 EC by the Supreme Court of Ireland for a preliminary ruling in the proceedings pending before that court between

SIAC Construction Ltd

and

County Council of the County of Mayo,

on the interpretation of Article 29 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1),

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, A. La Pergola, L. Sevón, M. Wathelet and C.W.A. Timmermans, Judges,

Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— SIAC Construction Ltd, by B. Shipsey SC, instructed by McCann Fitzgerald and Philip Lee, Solicitors,

— the County Council of the County of Mayo, by M. Finlay SC, M. Boyce BL and N. Hyland BL, instructed by King & McEllin, Solicitors,

— the Irish Government, by L.A. Farrell, acting as Agent, assisted by A. O Brolchain SC and A.M. Collins BL,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Commission of the European Communities, by R.B. Wainwright, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of SIAC Construction Ltd, represented by B. Shipsey; of the County Council of the County of Mayo, represented by M. Finlay and N. Hyland; of the Irish Government, represented by D.J. O'Hagan, acting as Agent, assisted by A. O Brolchain; of the French Government, represented by S. Pailler, acting as Agent; and of the Commission, represented by R.B. Wainwright, at the hearing on 8 March 2001,

after hearing the Opinion of the Advocate General at the sitting on 10 May 2001,

gives the following

Judgment

1 By order of 30 July 1999, received at the Court on 24 January 2000, the Irish Supreme Court referred to the Court for a preliminary ruling under Article 234 EC a question concerning the interpretation of Article 29 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1) (hereinafter referred to as 'Directive 71/305, as amended').

2 That question has been raised in a dispute between SIAC Construction Ltd ('SIAC') and the County Council of the County of Mayo ('the County Council') with regard to the procedure governing the award of a public works contract.

The legal framework

3 Article 29(1) and (2) of Directive 71/305, as amended, provides:

'1. The criteria on which the authorities awarding contracts shall base the award of contracts shall be:

— either the lowest price only;

— or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the latter instance, the authorities awarding contracts shall state in the contract documents or in the contract notice all the criteria they intend to apply to the award, where possible in descending order of importance.'

The dispute in the main proceedings and the question submitted

4 On 20 February 1992 the County Council advertised in the *Official Journal of the European Communities* for tenders for a public works contract to be awarded by open procedure and involving, *inter alia*, the laying of sewers, storm

overflows, ventilating columns, storm water drains, rising mains and water supply pipes.

5 This contract was a measure-and-value contract, under which the quantities estimated for each item are set out in the bill of quantities. For this type of contract, the tenderer completes the bill of quantities by filling in a rate for each item and a total price for the estimated quantity. The price payable is determined by measuring the actual quantities on completion of the work and valuing them at the rates quoted in the tender.

6 Under the heading 'Award criteria (other than price)', the contract notice provided that:

'the contract shall be awarded to the competent contractor submitting a tender which is adjudged to be the most advantageous to the Council in respect of cost and technical merit, subject to the approval of the Minister for the Environment'.

7 The tendering documentation sent to tenderers consisted of, *inter alia*, instructions to tenderers, the bill of quantities and schedule of basic prices, the specifications and terms and conditions of the contract.

8 Twenty-four contractors submitted tenders. The three lowest tenders were submitted by SIAC, Mulcair and Pierce Contracting Ltd. Following arithmetic checking and correcting, the tender totals were IEP 5 378 528 for SIAC, IEP 5 508 919 for Mulcair, and IEP 5 623 966 for Pierce Contracting Ltd.

9 In his report, the consulting engineer appointed by the County Council to judge the tenders stated, among other things, that the three lowest tenders were equal from the point of view of their technical merit.

10 On the other hand, he stated that he had serious reservations regarding the tender submitted by SIAC and that the pricing system which it had used 'certainly greatly reduces the freedom of the consulting engineer to properly and fully administer the contract in a way that, in his view, is the most economically advantageous to the Mayo County Council'.

11 He also pointed out that, under the heading 'Materials', a provisional sum of IEP 90 000 was included to which each tenderer was instructed to add a percentage for overheads, profit, and so on. SIAC, however, deducted this provisional sum in the amount of 100%. The consulting engineer took the view that SIAC was not entitled to make such a deduction.

12 The consulting engineer's report went on to state that the approach adopted by SIAC greatly reduced control over all the items in the bill of quantities, which would in one way or another vary on final measurement. More specifically, SIAC had zero-rated 27.5% of the items, whereas Mulcair, for example, had zero-rated only 18% of the items and had, according to the consulting engineer, priced all major items of measured work.

13 The report of the consulting engineer concluded that Mulcair had submitted a tender that was 'more balanced' than that of SIAC, and that Mulcair's tender might give better value for money and might even cost less.

14 In his recommendations, the consulting engineer stated that the tender submitted by Pierce Contracting Ltd had to be rejected simply on the ground that its price, as corrected, came to IEP 115 047.33 more than that of Mulcair. He recommended that the tender submitted by SIAC should not be accepted on the following grounds:

— SIAC's failure to submit a 'time for completion' at the date of tender;

— SIAC's withdrawal, by means of a 100% reduction, of a provisional sum of IEP 90 000 against which it was allowed only to add a percentage for overheads, profit, and so forth;

— SIAC's failure to price major items of measured work throughout the various bills of quantities, which distorted its bill of quantities and rendered proper management and control extremely difficult, if, indeed, not impossible.

15 The consulting engineer recommended for those reasons that Mulcair's corrected tender be accepted.

16 The County Council accordingly entered into a contract with Mulcair. This contract has now been completed.

17 In response to a request by SIAC, the County Council informed it, by letter of 30 August 1993, of the reasons why it had not accepted its tender.

18 SIAC thereupon instituted two sets of proceedings before the Irish High Court challenging the County Council's decision to award the contract in question to Mulcair.

19 By judgment and order of the High Court of 17 June 1997, SIAC's two actions were dismissed.

20 The High Court ruled that, in choosing criteria which were stipulated in the contract notice and amplified in other documents, the County Council had exercised a discretionary power of selection which was largely predicated on the exercise of professional judgment.

21 The High Court considered that it had to confine itself to examining whether the County Council's decision was unreasonable. It concluded that this was not the case.

22 SIAC appealed to the Supreme Court against the judgment and order of the High Court.

23 SIAC submitted in its appeal that the County Council was required to accept the lowest-priced tender, which happened to be that which SIAC itself had submitted. Since it had been accepted that all tenderers had the requisite technical merit, the only relevant criterion could be cost, which had to be understood as synonymous with the tender price. The criterion of cost/price could not, in any event, have referred to the ultimate cost to the County Council.

24 By purporting to take account of ultimate cost, the County Council had, according to SIAC, departed from the criteria that had been specified as award criteria. In so doing, it infringed the principles of transparency, foreseeability of the adjudication process, and equality of tenderers.

25 Against this, the County Council claimed that it was entitled to exercise a discretion and to award the contract on the basis of a recommendation from its consulting engineer as to which tender the latter adjudged to be the most advantageous in respect of cost and technical merit. It also submitted that, in the particular context of a measure-and-value contract, the cost should be understood as being the cost of the contract to the County Council, that is to say, the contract price.

26 The County Council further submitted that it followed, *inter alia*, from the specifications that, in examining the bills of quantities, the consulting engineer was entitled to make comparisons between the prices quoted and his own estimates of cost. SIAC, it contended, was also aware from the outset that the criterion of cost referred to the probable cost of the contract to the County Council.

27 In those circumstances, the Supreme Court decided to stay proceedings and to submit the following question to the Court of Justice for a preliminary ruling:

'In a situation where an authority is awarding a contract pursuant to the provisions of the second indent of Article 29(1) of Council Directive 71/305/EEC, Chapter 2, of 26 July 1971 as applied in the national law of a Member State, and where the authority shall have specified the "*Award criteria (other than price)*" as being that the contract would be awarded to "*the competent contractor submitting a tender which is adjudged to be the most advantageous to the*" (awarding authority) "*in respect of cost and technical merit*", and where the three lowest tenderers shall have been contractors of accepted competence and shall have submitted valid tenders of accepted technical merit, and where the tender prices of the three lowest tenderers shall not have diverged greatly, is the

awarding authority obliged to award the contract to the contractor who shall have tendered the lowest price or is the awarding authority entitled to award the contract to the contractor with the second lowest price on the basis of the professional report of its consulting engineer that the ultimate cost of the contract to the awarding authority is likely to be less if the contract is awarded to the contractor who tendered the second lowest price than it would be if the contract were awarded to the contractor who tendered the lowest price?'

The question submitted for preliminary ruling

28 By its question, the national court is asking essentially whether Article 29(1) and (2) of Directive 71/305, as amended, must be construed as allowing an awarding authority which has chosen to award a contract to the most economically advantageous tender to award that contract to the tenderer who has submitted the tender the ultimate cost of which is likely to be the lowest according to the professional opinion of an expert.

29 It should be noted at the outset that the parties to the main proceedings disagree as to whether the terms 'price' and 'cost' used in the tender documentation refer to the total price of the tender or to the ultimate cost of the contract. The High Court confined itself in this regard to holding that the terms 'price' and 'cost' had been used interchangeably.

30 In proceedings under Article 234 EC, the Court cannot resolve differences concerning the interpretation of terms used in tender documents, such interpretation being a matter for the national court.

31 It is, however, common ground that the requirements of Article 29(1) and (2) of Directive 71/305, as amended, must be examined in the light of the fact that the contract at issue in the main proceedings was awarded to a tenderer in consideration of the fact that its tender was, in the opinion of an expert, liable to represent the lowest ultimate cost.

32 The Court has held in this regard that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, *inter alia*, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16).

33 In accordance with that objective, the duty to observe the principle of equal treatment of tenderers lies at the very heart of Directive 71/305, as amended (Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 33).

34 More precisely, tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority (see, to this effect, Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 54).

35 As for the criteria which may be accepted as criteria for the award of a public works contract to what is the most economically advantageous tender, Article 29(1), second indent, of Directive 71/305, as amended, does not list these exhaustively.

36 Although that provision thus leaves it to the adjudicating authorities to choose the criteria on which they propose to base their award of the contract, that choice may relate only to criteria aimed at identifying the offer which is economically the most advantageous (Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 19).

37 Further, an award criterion having the effect of conferring on the adjudicating authority an unrestricted freedom of choice as regards the awarding of the contract in question to a tenderer would be incompatible with Article 29 of Directive 71/305, as amended (*Beentjes*, cited above, paragraph 26).

38 The mere fact that an award criterion relates to a factual element which will be known precisely only after the contract has been awarded cannot be regarded as conferring any such unrestricted freedom on the adjudicating authority.

39 The Court has already ruled that reliability of supplies is one of the criteria which may be taken into account in determining the most economically advantageous tender (Case C-324/93 *Evans Medical and Macfarlan Smith* [1995] ECR I-563, paragraph 44).

40 However, in order for the use of such a criterion to be compatible with the requirement that tenderers be treated equally, it is first of all necessary, as indeed Article 29(2) of Directive 71/305, as amended, provides, that that criterion be mentioned in the contract documents or contract notice.

41 Next, the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified (see, by analogy, Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31).

42 More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.

43 This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure (see, along these lines, *Commission* v *Belgium*, cited above, paragraphs 88 and 89).

44 Finally, when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers. Recourse by an adjudicating authority to the opinion of an expert for the evaluation of a factual matter that will be known precisely only in the future is in principle capable of guaranteeing compliance with that condition.

45 In the light of all the foregoing, the answer to the question submitted is that Article 29(1) and (2) of Directive 71/305, as amended, must be interpreted as permitting an adjudicating authority which has chosen to award a contract to the most economically advantageous tender to award that contract to the tenderer who has submitted the tender the ultimate cost of which, in the professional opinion of an expert, is likely to be the lowest, provided that the equal treatment of tenderers has been ensured, which presupposes that the transparency and objectivity of the procedure have been guaranteed and in particular that:

— this award criterion was clearly stated in the contract notice or contract documents; and

— the professional opinion is based in all essential points on objective factors regarded in good professional practice as relevant and appropriate to the assessment made.

Costs

46 The costs incurred by the Irish, French and Austrian 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Supreme Court of Ireland by order of 30 July 1999, hereby rules:

Article 29(1) and (2) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, as amended by Council Directive 89/440/EEC of 18 July 1989, must

be interpreted as permitting an adjudicating authority which has chosen to award a contract to the most economically advantageous tender to award that contract to the tenderer who has submitted the tender the ultimate cost of which, in the professional opinion of an expert, is likely to be the lowest, provided that the equal treatment of tenderers has been ensured, which presupposes that the transparency and objectivity of the procedure have been guaranteed and in particular that:

— this award criterion was clearly stated in the contract notice or contract documents; and

— the professional opinion is based in all essential points on objective factors regarded in good professional practice as relevant and appropriate to the assessment made.

Jann La Pergola Sevón

Wathelet Timmermans

Delivered in open court in Luxembourg on 18 October 2001.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber