OPINION OF ADVOCATE GENERAL LÉGER

delivered on 23 September 1999 *

1. This reference for a preliminary ruling concerns the right of a company which participates in a tender procedure, in accordance with Directive 92/50/EEC [1] of 18 June 1992 on the co-ordination of procedures for the award of public service contracts (hereinafter 'the Directive'), to rely on the technical and financial qualifications of another company, to which the first-mentioned company is linked as a subsidiary to the parent company.

I — The Community legislation

2. Under Article 3(1) of the Directive, in awarding public service contracts contracting authorities are to apply procedures adapted to the provisions of the directive.

3. Article 26 of the Directive provides:

'1. Tenders may be submitted by groups of service providers. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.

2. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to carry out the relevant service activity, shall not be rejected solely on the grounds that, under the law of the Member State in which the contract is awarded, they would have been required to be either natural or legal persons.

3. Legal persons may be required to indicate in the tender or request for participation the names and relevant professional qualifications of the staff to be responsible for the performance of the service.'

4. Article 31 of the Directive provides:

'1. Proof of the service provider's financial and economic standing may, as a general

* Original language: French.

1 — 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).

rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or evidence of relevant professional risk indemnity insurance;

(b) the presentation of the service provider's balance sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the service provider is established;

(c) a statement of the undertaking's overall turnover and its turnover in respect of the service to which the contract relates for the previous three financial years.

2. The contracting authorities shall specify in the contract notice or in the invitation to tender which reference or references mentioned in paragraph 1 they have chosen and which other references are to be produced.

3. If, for any valid reason, the service provider is unable to provide the reference requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

5. Article 32 of the Directive provides:

'1. The ability of the service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

2. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided:

(a) the service provider's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the service;

(b) a list of the principal services provided in the past three years, with the sums,

dates and recipients, public or private, of the services provided;

— where provided to contracting authorities, evidence is to be in the form of certificates issued or countersigned by the competent authority,

— where provided to private purchasers, delivery is to be certified by the purchaser or, failing this, simply declared by the service provider to have been effected;

(c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;

(d) a statement of the service provider's average annual manpower and the number of managerial staff for the last three years;

(e) a statement of the tool, plant or technical equipment available to the service provider for carrying out the services;

(f) a description of the service provider's measures for ensuring quality and his study and research facilities;

(g) where the services to be provided are complex, or, exceptionally, are required for a specific purpose, a check carried out by the contracting authority or on its behalf by a competent official body of the country within which the service provider is established, subject to that body's agreement, on the technical capacities of the service provider and, if necessary, on his study and research facilities and quality control measures;

(h) an indication of the proportion of the contract which the service provider may intend to sub-contract.

3. The contracting authority shall specify, in the notice or in the invitation to tender, which references it wishes to receive.

4. The extent of the information referred to in Article 31 and in paragraphs 1, 2 and 3 of this Article must be confined to the subject of the contract; contracting authorities shall take into consideration the legitimate interests of the service providers as regards the protection of their technical or trade secrets.'

II — Facts and the main proceedings

6. For the purposes of the award of a three-year contract for the management of the waste water purification plant of 'Is Arenas' and the water collection stations situated at 'Is Arenas', 'San Bartolomeo' and 'Borgo Sant'Elia', the Municipality of Cagliari issued an invitation to tender. This was published in the *Official Journal of the European Communities* on 3 January 1997. In order to tender, interested undertakings had to provide proof of an average annual turnover of not less than ITL 5 000 million, in the field of management of water purification and sewage disposal plants, and also actual management of at least one domestic water purification plant for a period of two consecutive years during the previous three years.

7. The companies Holst Italia AG (Holst Italia) and Ruhrwasser AG International Water Management SpA (Ruhrwasser) were permitted to participate in the call for tenders. By a decision of the contract-awarding committee of 13 June 1997, approved by a decision of the town council on 17 August 1997, the contract was awarded to Ruhrwasser, which provided the most advantageous offer for the contracting authority.

8. Ruhrwasser is a German limited liability company whose share capital is held by a consortium of six German companies, each owning one sixth of the company shares. The object of Ruhrwasser is to enable the consortium to win contracts, particularly abroad, in the field of water supply and waste water purification. One of the companies forming part of the consortium, RWG Ruhr-Wasserwirtschafts-Gesellschaft mbh (RWG), has as its only shareholder Ruhrverband, a public-law body responsible in Germany for public service tasks in the field of the management of waste water. It is established that this body has references which would have been sufficient to qualify it for the call for tenders by the Municipality of Cagliari.

9. It is also established, however, that Ruhrwasser did not directly possess the required qualifications to tender properly, being a newly constituted company which was entered on the register of companies only on 9 July 1996. For this reason, Ruhrwasser relied on the technical and financial qualifications of Ruhrverband which, through its subsidiary RWG, participated in the joint venture from the outset of the creation of Ruhrwasser. The con-

tracting authority accepted the validity of these indirect references.

10. Holst Italia commenced proceedings before the Tribunale Amministrativo Regionale (Regional Administrative Court) per la Sardegna (Italy) for annulment of the award of the contract to its competitor, principally on the ground that the contested decision infringed the rule in the invitation to tender according to which only the qualifications of companies interested in the contract could be taken into account to assess their eligibility to participate in the procedure. Ruhrwasser lodged an interlocutory application disputing the content of the invitation to tender, on the ground that it did not permit a service provider to rely on, by any appropriate document, the qualifications which it did not possess directly but which it nevertheless had at its disposal.

III — The question referred for a preliminary ruling

11. Considering that, in order to rule on this point it was necessary to determine whether Directive 92/50 permits a candidate participating in a tender procedure to rely on the technical and financial qualifications of another legal person to which it is linked, the national court stayed proceedings in the main action and referred the following question to the Court:

'Does Council Directive 92/50/EEC of 18 June 1992, relating to the coordination of procedures for the award of public service contracts, permit a company to prove that it possesses the technical and financial qualifications laid down for participation in a procedure for the award of a public service contract by relying on the references of another company, which is the sole shareholder of one of the companies having a holding in the first-mentioned company?'

IV — Answer to the question referred for a preliminary ruling

12. The national court is asking essentially whether an undertaking which submits a tender to secure a public service contract must itself fulfil the technical and financial conditions required by the contracting authority, or whether it may rely indirectly on compliance with those conditions by another company to which it belongs in part.

13. In order to answer the question referred, it is necessary to examine the rules and provisions of Community law, as they are contained in Directive 92/50 and as they

have been supplemented by the case-law of the Court.

Aims and relevant provisions of Directive 92/50

14. Directive 92/50 has two main objectives, the free movement of services [2] and free competition [3] in this sector. Economic operators should be able to move and supply services without any restriction on the basis of their nationality or their place of residence, thus contributing, by the multiplicity and the comparison of services offered, to the improvement in the quality of services offered and the economic conditions under which they are performed in the Community.

15. In order to establish an internal market comprising an area without internal frontiers within which the free movement of services is ensured, [4] Directive 92/50 lays down rules designed to remove obstacles to this freedom. [5]

16. According to Article 3(2) of Directive 92/50: 'Contracting authorities shall ensure that there is no discrimination between different service providers.' It is necessary to determine whether the non-admission of a tenderer on the ground that he does not personally fulfil the technical and financial capacity conditions set by the contracting authority constitutes such discrimination.

17. Directive 92/50 cites a certain number of criteria which could identify discriminatory conduct. It states that '... services providers may be either natural or legal persons', [6] which suggests that the legal form of undertakings should not constitute an obstacle to their freedom to tender. This factor is referred to in Article 26(2), which prohibits the rejection of a tender on the sole ground that it was submitted by a natural person or by a legal person.

18. The requirement for a specific legal structure in order for a contract to be awarded could therefore be perceived as an unjustified restriction on the right of economic operators to compete under the same conditions.

19. Article 26(1) of Directive 92/50 confirms this point in relation to the case

2 — Sixth recital.
3 — Twentieth recital.
4 — Second recital.
5 — Sixth recital.
6 — Ibid.

where several undertakings intend to respond jointly to an invitation to tender. Under this provision, groups of service providers are expressly permitted to tender and the contracting authority may not require these groups 'to assume a specific legal form in order to submit the tender'.

20. These various provisions make it clear that the Community legislature is less concerned with the legal form which service providers assume than with their ability to carry out the tasks entrusted to them upon the award of public contracts, or to gather together the resources for the performance of the contract regardless of their own organisation. The elimination of obstacles linked to the legal status of operators constitutes a means of increasing tenders, particularly those from undertakings from Member States of the Community other than the State in which the contract awarding procedure takes place, without compromising the substantive requirements for proper performance of services.

21. Therefore, the approach to adopt in interpreting Directive 92/50 should be more functional than strict. Accordingly, although they seem to reflect a certain formalism, some of the obligations laid down by Directive 92/50 are specifically intended to promote the proper performance of public contracts, limiting the risks to which contracting authorities are exposed.

22. A significant example of this type of requirement is provided by Article 26(3), which permits the contracting authority to require legal persons to '... indicate ... the names and the relevant professional qualifications of the staff to be responsible for the performance of the service'. If it cannot be prohibited to award a contract to a legal person on the sole pretext of its legal form, it is just as important not to deprive the contracting authority of information which will enable it to evaluate the capability of a service provider to carry out the contract under the conditions laid down.

23. The Community legislature has therefore ensured that the full exercise of the freedom of movement does not compromise the proper performance of the services, an element without which the Community legislation loses all its meaning. Directive 92/50, like the interpretation to be applied to it, pivots between the two essential requirements of providing for a sufficient liberalisation of contract-awarding procedures and of setting standards which assure contracting authorities that they receive quality services.

24. Contracting authorities should be in a position to assess the capability of tenderers to carry out the contracts in the required manner.

25. This is the objective of Articles 31 and 32 of Directive 92/50. The first article lists the financial and economic proof which can be required from service providers, states how it can be provided and gives an alternative solution in the event that a service provider is unable to produce the requested references. The second article lays down a number of criteria for determining the capability of service providers to supply the services requested, draws up a list of the means of evidence of their technical capacity and indicates how the contracting authority may request them.

26. It is not necessary to discuss the reasons for these provisions at any length, the object of these articles evidently being to protect the interests of the contracting authority against applications from economic operators more concerned about securing lucrative contracts than about the main task, that is to say, performing them scrupulously.

27. Nevertheless, from their terms we can draw two indications also relevant in the analysis of the question referred in this case.

28. First, although an abundance of tenders is in itself in the interests of the contracting authority, this should not be achieved at the cost of mediocre services. Such a requirement legitimates those safeguards and justifies that the interpretation given to the provisions establishing them should take account of the risks of fraud liable to stifle their protective effect. The consequences of accepting that the legal conditions laid down by Directive 92/50 can be fulfilled by persons other than the tendering undertaking should, therefore, be carefully assessed.

29. Secondly, although the reference made by those two articles to the service provider could prompt an interpretation to the effect that the production of proof is limited to the service provider himself,[7] other passages militate in favour of a less strict reading.

30. Thus, Article 31(3) allows the service provider to prove, under certain conditions, his economic and financial standing '... by any other document which the contracting

7 — Articles 31 and 32 refer to the service provider's financial, economic and technical capacity, thus referring only to the tenderer himself. Similarly, Article 32 states: 'The ability of service providers may be evaluated in particular with regard to their skills, efficiency, experience and reliability.' It mentions 'the service provider's educational and professional qualification and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services' and '... the service provider's average annual manpower and the number of managerial staff for the last three years.' The provision appears to set out only factors specific to the undertaking.

authority considers appropriate', which, by giving the contracting authority a certain degree of discretion, allows it to accept proof produced by persons other than the service provider as long as they offer the same guarantees. Likewise, Article 32(2)(c) expressly refers to the case where the technicians or the technical bodies on which the service provider relies do not belong directly to the service provider. Still other provisions go in this direction, such as Article 32(2)(h), which accepts the possibility of the service provider using a subcontractor, or Article 32(2)(e), which provides for 'a statement of the tool, plant or technical equipment *available* to the service provider for carrying out the services', [8] thus not limiting the statement to the undertaking's own equipment.

31. 'Personalisation' of the capacities required by the contracting authority from the tenderer is therefore called into question by the very wording of Directive 92/50, as it makes several references to availability of means external to the undertaking. This circumstance, confirming what is suggested by the aims pursued by Directive 92/50, prompts a flexible interpretation of the provisions regarding proof of tenderers' standing.

8 — My emphasis.

The Ballast Nedam Groep *cases*

32. The Court's judgments of 14 April 1994 [9] and 18 December 1997 [10] in the *Ballast Nedam Groep* cases confirm this approach.

33. In *Ballast Nedam Groep I*, the question was whether a holding company could be excluded from participating in the procedures for public works contracts because it did not carry out the work itself — in that case by the refusal to renew the approval which it had been awarded until then — and, if not, under which conditions it could prove the necessary standing for such participation. [11]

9 — Case C-389/92 [1994] ECR I-1289, hereinafter '*Ballast Nedam Groep I*'.

10 — Case C-5/97 [1997] ECR I-7549, hereinafter '*Ballast Nedam Groep II*'.

11 — *Ballast Nedam Groep II* interprets the first ruling on the question of the obligatory or discretionary character of taking into account references of third party companies by the authority responsible for deciding on the application for registration. The Court stated '... the authority competent to decide on an application for registration submitted by a dominant legal person of a group is *under an obligation*, where it is established that that person actually has available to it the resources of the companies belonging to the group that are necessary to carry out the contracts, to take account of the references of those companies in assessing the suitability of the legal person concerned ...' (point 14, my emphasis). This judgment is of less direct interest to the current case than *Ballast Nedam Groep I* since, in the main case which gave rise to the question in the present case, the very existence of a right — and not its obligatory or discretionary character — to have account taken of references external to the tenderer which the contracting authority has recognised is in issue.

34. The Court held that the directives applicable in this case [12] '... must be interpreted as meaning that they permit, for the purposes of the assessment of the criteria to be satisfied by a contractor when an application for registration by the dominant legal person of a group is being examined, account to be taken of companies belonging to that group, provided that the legal person in question establishes that it *actually has available the resources* of those companies which are necessary for carrying out the works' and that '[it] is for the national court to assess whether such proof has been produced in the main proceedings'. [13]

35. The Court therefore accepted that an economic operator not in a position to carry out the contract himself because he does not fulfil the qualitative selection criteria required by the provisions may rely on the resources of other companies, provided that those resources are actually available to him for his use.

36. Two points enabling the exact effect of this ruling to be ascertained, and therefore also enabling its application to the present case to be determined, must now be examined.

37. First of all, in *Ballast Nedam Groep I*, the Court ruled on the interpretation of the Community legislation regulating public works contracts, whilst the present reference for a preliminary ruling concerns Community law governing public service contracts. It is therefore quite legitimate to examine whether that which applies to one sector is also applicable to the other.

38. The differences between the two bodies of legislation result in more explicit references, in the area of public works contracts, [14] to the right for contractors to entrust performance of contracts to other operators. If they are added to the arguments in favour of this right in the works sector, these differences do, in my view, detract from the factors advanced above [15] supporting the possibility of tenderers in the area of services having the same right.

39. In order to refuse to transpose *Ballast Nedam Groep I* to the area of public service contracts, on the ground that the subject-matter of the contract is not the same, it would be necessary to show that,

12 — Directive 71/304/EEC of 26 July 1971 concerning abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (OJ, English Special Edition 1971 (II), p. 678) and 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).

13 — Paragraph 18, my emphasis.

14 — According to the wording of Directive 71/304, '... public works contracts may be awarded to persons covered by that directive who carry out the work through agencies or branches' (*Ballast Nedam Groep I*, paragraph 10). Council Directive 89/440/EEC of 18 July 1989, amending Directive 71/305 (OJ 1989 L 210, p. 1), provides, moreover, that public works contracts '... have as their object either the execution, or both the execution and design, of works or a work, or "the execution by whatever means of a work corresponding to the requirements specified by the contracting authority"' (*Ballast Nedam Groep I*, paragraph 14).

15 — Paragraphs 14 to 31 of this Opinion.

by their nature, provisions of services do not lend themselves to the use of external resources as much as works contracts.

40. However, there is no evidence of this. Moreover, I have difficulty accepting the reasons which would dictate that the technical and financial conditions required by the tenderers should be fulfilled by the operator himself in the area of services when they cannot be so fulfilled in the area of works contracts. Those reasons are all the less evident in relation to the proof of an undertaking's economic and financial standing since the strictly financial and quantitative guarantee which they seek to establish bears no relation to the subject-matter of the contract. As regards evidence of the technical capability of the service provider, it is sufficient to recall the terms of Article 32(2)(c) of Directive 92/50, under which the contracting authority may be informed of the involvement of any technicians or technical bodies external to the service provider. This provision explicitly confirms that, in the area of public service contracts, external support can be relied upon by tenderers in support of their bids.

41. The ruling in *Ballast Nedam Groep I* is, therefore, in my view, fully applicable in this respect.

42. The second point concerns the position of the tendering company in relation to the companies upon whose standing and capability it wishes to rely. As the Italian Government and Holst Italia have observed, the tenderer, Ruhrwasser, does not have any dominant influence over the undertaking holding the required qualifications in the present case, Ruhrverband. In *Ballast Nedam Groep I*, on the other hand, the Court took the point that the holding company claiming the right to tender was the dominant legal person in the group.

43. One could conclude that the dominant position of an undertaking is a necessary condition for recognition of a company's right to rely on standing and capabilities which are not its own. It is clear, in fact, that the wider the power of decision conferred on the tenderer in relation to other companies, the more it guarantees the contracting body that those companies' resources will be at the contractor's disposal for the needs of the contract.

44. However, I do not think that the making available of resources needed for the proper performance of the contract, but external to the service provider, necessarily supposes a position of subordination, with regard to the tenderer, of the undertakings having the capacities or some of the capacities claimed by the tenderer. As we have seen, the objective of Directive 92/50 dictates an interpretation favourable to the general access of undertakings to public

contracts, provided that their selection is made on the basis of proof of the competence actually available to the undertaking and on the solidity of the guarantees which they offer.

45. It is in that sense that the principles contained in *Ballast Nedam Groep I* should be read and applied to the present case.

46. The Court stated that the performance of works by legal persons separate from the holding company to which they are awarded does not warrant the latter's exclusion from the procedures for participating in the award of public contracts. The Court added that the nature of the legal link between a company and its subsidiaries did not matter [16] and that it was for the national court to assess, in the light of the factual and legal circumstances before it, whether proof, by the company, of the actual availability of resources of its subsidiaries had been adduced in the main proceedings. [17]

47. It is striking that no account was taken in that judgment of the relevance, as regards the question of being certain that the resources sought by the competent authority are actually available, of the decision-making power held by the holding company by virtue of its position as parent company. On the contrary, the emphasis is placed on the irrelevance, for the purposes in view, of its legal organisation and on the real importance of direct review by the court of the effectiveness of that making available of resources.

48. That finding and the factors explained above, which can be derived from the objectives pursued by Directive 92/50 and its tenor, suggest that the ruling in *Ballast Nedam Groep I* should be applied to the relationships between Ruhrwasser and Ruhrverband, although these connections of ownership are reversed in comparison with that decided case and, instead of being 'dominant', the company in question is in a subordinate position.

49. Of course, it is not a question of drawing from such two different legal situations the conclusion that the contracting authority will have, in both cases, the same guarantee that resources external to the tenderer undertaking will actually be made available.

50. I am only pointing out that the nature of the legal link between two undertakings should not be allowed to prejudge the question whether the making available of resources, for which Directive 92/50 permits contracting authorities to require proof, is certain to take place. In other words, if the national court is at liberty to consider that, in view of the characteristics of that link or of other factual and legal circumstances specific to the case, the

16 — *Ballast Nedam Groep I*, paragraph 17.
17 — Ibid.

contracting authority has no certainty of being able to call on the skills needed for the performance of the contract, it appears to me excessive to hold that, as a matter of principle, the fact that an undertaking, in responding to an invitation to tender, relies on the technical, financial and economic resources of a company to which it belongs wholly or in part should prevent it from tendering. The method used to ensure the actual availability of the resources and guarantees required by the contracting authority does not matter, as long as that availability can be verified.

51. There are, in fact, no considerations on the basis of which it could be argued that the nature of the legal relations between Ruhrwasser and Ruhrverband necessarily and a priori exclude the existence of obligations, of a statutory or contractual nature, incumbent on the latter party, of which the binding force would provide the Municipality of Cagliari with the certainty that resources necessary for the performance of the contract would actually be available. The answer to this question depends on consideration of the facts reported in the file and on the elements of national law applicable, on which only the national court can carry out an assessment.

Appraisal by the national court of certain elements of fact and of law

52. In order to satisfy itself that the tenderer actually has available to it the external resources which it claims to have, the referring court is asked to carry out an assessment of elements of fact and of law which concern the content of the agreements possibly concluded between Ruhrwasser, RWG and Ruhrverband — or between the two companies concerned by the contract in question — or the relations statutorily established between them, and also the binding nature of the legal link binding these two companies together.

53. Ascertaining the *content of the obligation* binding the parent company to its subsidiary should make it certain that the technical abilities and financial guarantees relied upon by the latter will properly contribute to the achievement of the operations envisaged for the performance of the public contract.

54. In the present case, the economic and financial proof required by the contracting authority relates to the level of annual average turnover in the area of management of sewage treatment plants and water collection. That requirement, which falls under Article 31(1)(c) of Directive 92/50, cannot, in my view, be satisfied unless it is proven that the tenderer is in a position to rely, in a significant manner, on the services of the company to which it refers.

55. That reference guarantees, in the present case, the contracting authority the

benefit of minimal professional experience, which, in order to be really useful, must be directly employed in the performance of the contract. Therefore, it is essential to ascertain that the company whose experience is relied upon will be the one which, whilst not carrying out the entire range of activities described by the contracting authority, will at least provide the management, thus making its technical ability available. [18]

56. This reasoning is capable of being applied to the second guarantee sought by the contracting authority, which concerns experience of actual management of a domestic sewage treatment plant for two consecutive years during the previous three years. Likewise, laying down such a criterion does not make sense unless the tenderer who wins the contract relying on the experience of another company is in a position to prove that the latter company will be involved in performance of the contract to a significant degree.

57. Secondly, in assessing whether the resources relied upon will actually be available, it is appropriate to ascertain whether the legal instrument used for this purpose is not only in order but also ensures the intended effects by conferring a *binding force* on them. [19]

58. It will be legitimate for the national court to investigate, for example, whether an agreement has been concluded under which the parent company undertakes to make available to its subsidiary a certain number of technical resources and financial guarantees, whether this agreement is truly binding on the parent company and whether, in the case of non-performance, the parent company could be sued before the competent courts.

59. Let me make it clear that the relationship between the two companies can be more or less close and the economic autonomy of the subsidiary in relation to its parent company more or less wide, according to the level of participation of one company in the share capital of the

18 — For the sake of completeness, it should be observed that the referring court cannot always confer the same meaning on the proofs required by Directive 92/50, when they concern an external operator. So the information concerning the financial soundness of a company, when relied upon by the tenderer undertaking before the contracting authority, can hardly be considered to be a real guarantee when the company which has won the contract is not itself viable. In the absence of a direct contractual relation between the contracting authority and the third party, the financial standing of the latter party might be inadequate to safeguard the interests of the entity awarding the contract. The idea of 'actually making available' does not have therefore the same virtues, as far as financial and economic standing is concerned, and it is not certain that, in that circumstance, the contracting authority would be well advised to satisfy itself with proof external to the tenderer. This difference cannot be without effect on the freedom of contracting authorities to rely on this type of guarantee or on the interpretation which can be made of applicable Community law. Furthermore, it is important to know the content of commitments which link the tenderer undertaking to the third-party undertaking and which can bind the latter to the contracting authority.

19 — It follows from the information in the file that Ruhrverband carries out a public service task in Germany and does not have the right to carry out its task outside Germany. The delimitation of its objects, on which its freedom of action depends, can thus assist the assessment by the national court of its ability actually to make available to the contracting authority the resources on which Ruhrwasser is counting.

other, which is not without effect on the guarantees and resources which will be available to the contracting authority.

60. Indeed, if the parent company was behind the decision to respond to the invitation to tender — although this decision is formally attributed to the subsidiary — it is unlikely that it will refuse to make available the resources at its disposal.

61. However, it cannot be totally excluded that the subsidiary tenderer, being the only party legally bound to the contracting authority, encounters a change of policy by the decision-making parent company.

62. It is to be feared that the contracting authority, which stands to suffer most from the unforeseen effects of a poorly performed or non-performed contract and faced with the impossibility of obtaining from its co-contractor prompt and satisfactory performance of the contract or financial compensation for the latter's default, would have no right of action against the parent company.

63. Without prejudging the position in national law, I would say that it is likely that the contractual non-performance could not be declared or compensated if the parent company, owing but not performing the obligation to make resources available, entirely controls the decision making within its subsidiary. Alone disposing of the power to secure performance of the obligations in question through the courts, it thus holds the power to undo its own commitments. The guarantees provided to the contracting authority then risk being no more than a veil masking the tenderer's inability to fulfil the obligations of the contract.

64. The disadvantage for the contracting authority is, therefore, that the company which holds the power to decide to make available the resources and guarantees necessary for the contract and the company which assumes responsibility as co-contractor are two separate legal persons. Nor must it be overlooked that any proceedings brought against the subsidiary will not be without consequences for the parent company.

65. In the present case, however, Ruhrwasser appears to have relative autonomy in relation to Ruhrverband since, as we have seen, its capital is divided in equal parts between six companies of which only one, RWG, is wholly owned by Ruhrverband.

66. Before determining that Ruhrwasser actually has the power to assert its rights against the parent company, the national court will have to satisfy itself that the legal means exist on the basis of which the tenderer can properly claim to have the standing relied upon.

67. What is important therefore, in this case, is that the legal instruments which bind Ruhrwasser to Ruhrverband must have a binding legal force enabling the tenderer to be certain of the parent company's assistance.

Conclusion

68. In the light of these considerations, I propose that the Court answer the question referred for a preliminary ruling by the Tribunale Amministrativo Regionale per la Sardegna as follows:

Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts is to be interpreted as not precluding a contracting authority from taking account, for the assessment of the selection criteria of the financial and technical standing which a company must satisfy upon examination of a bid made during a tendering procedure for the award of a public service contract, of the standing of another company which is the sole shareholder of one of the companies having a shareholding in the first-mentioned company, provided that the latter company proves that it actually has available the resources of the company on which it relies.

It is for the national court to assess whether the requisite proof in that regard has been adduced in the main proceedings.

For that purpose, the national court must, in particular, make sure that the company whose standing is taken into account is obliged to take an appropriate part in the performance of the contract, having regard to the purpose of the references relied upon.