ORDER OF THE COURT (Sixth Chamber)

4 October 2007 *

In Case C-492/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by decision of 21 February 2006, received at the Court on 28 November 2006, in the proceedings

Consorzio Elisoccorso San Raffaele

v

Elilombarda Srl,

Azienda Ospedaliera Ospedale Niguarda Ca' Granda di Milano,

THE COURT (Sixth Chamber),

composed of P. Kūris, President of the Chamber, L. Bay Larsen (Rapporteur) and J.-C. Bonichot, Judges,

Advocate General: Y. Bot,
Registrar: R. Grass,

* Language of the case: Italian.

the Court, proposing to give its decision by reasoned order in accordance with the first subparagraph of Article 104(3) of its Rules of Procedure,

after hearing the Advocate General,

makes the following

Order

1 This reference for a preliminary ruling concerns the interpretation of Article 1 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 (OJ 1992 L 209, p. 1), ('Directive 89/665').

2 The reference has been made in the course of proceedings between Consorzio Elisoccorso San Raffaele ('the Consorzio') and Elilombarda Srl ('Elilombarda'), the leader of a consortium in the process of being formed, regarding a procedure for the award of a public contract.

Legal context

Community legislation

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 conditions 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(1) of Directive 89/665 provides:

'The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

...

(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;

...'

5 In the words of Article 26(1) of Directive 92/50:

'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.'

National legislation

6 The national legislation relating to the award of public supply, public works and public services contracts (see, respectively, Law No 109 of 11 February 1994 (GURI No 41, 19 February 1994), Legislative Decree No 358 of 24 July 1992 (GURI No 188, 11 August 1992) and Legislative Decree No 157 of 17 March 1995 (GURI No 104, 6 May 1995)) does not preclude or limit the right of the individual companies forming part of a 'consortium' or a 'group of undertakings' to bring an action individually.

7 According to the settled case-law of the Consiglio di Stato (Council of State), undertakings which are members of a consortium or of a group of undertakings have the right to challenge individually the measures relating to the public contract for which they have tendered.

The dispute in the main proceedings and the question referred for a preliminary ruling

8 On 30 November 2004, the Azienda Ospedaliera Ospedale Niguarda Ca' Granda di Milano published, as contracting authority, a contract notice in respect, inter alia, of a helicopter rescue service by reference to a ceiling of EUR 25 900 000.

9 Two bids were submitted. The first was submitted by Elilombarda acting as leader of a consortium which was in the process of being formed between itself and Helitalia SpA and the second was submitted by the Consorzio, consisting of Elilario Italia SpA and Air Viaggi San Raffaele Srl.

10 On 28 April 2005, the contracting authority awarded the contract to the Consorzio to which the decision was notified by registered letter of 10 May 2005.

11 Elilombarda brought an action against that decision, among others, on its own behalf and acting individually, before the Tribunale amministrativo regionale della Lombardia (Lombardy Regional Administrative Court, 'the TAR Lombardia').

12 In the context of those proceedings, the Consorzio raised a plea of inadmissibility submitting that the action had been brought not by the consortium in the process of being formed which, according to the Consorzio, alone had standing to bring an action before the court in order to defend its interest in being the successful tenderer for that contract, but an individual economic operator which formed part of that consortium.

13 The TAR Lombardia rejected the plea of inadmissibility, citing the case-law of the Consiglio di Stato, and upheld the action, annulling the measures adopted by the contracting authority.

14 The Consorzio lodged an appeal before the Consiglio di Stato which, as a preliminary point, had to examine the decision of the TAR Lombardia relating to the admissibility of the action brought by Elilombarda.

15 In its order for reference, the Consiglio di Stato states, first, that the national legislation relating to the award of public contracts does not preclude or limit the right of the individual undertakings which form part of a consortium to bring an

action independently and, secondly, that the TAR Lombardia did apply the principles set out in that regard in the case-law of the Consiglio di Stato.

16 However, the Consiglio di Stato raises the issue of whether, given the Court's judgment in Case C-129/04 *Espace Trianon and Sofibail* [2005] ECR I-7805, Article 1 of Directive 89/665 precludes an action brought by an individual member of a tendering consortium against a decision awarding a contract.

17 Against that background, the Consiglio di Stato decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Where a consortium without legal personality has participated as such in a procedure for the award of a public contract and has not been awarded that contract, is Article 1 of Council Directive 89/665 ... to be interpreted as precluding the possibility under national law for an individual member of that consortium to bring an action against the decision awarding the contract?'

The question referred for a preliminary ruling

18 Under the first subparagraph of Article 104(3) of the Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, give its decision by reasoned order.

19 By its question, the national court asks whether Article 1 of Directive 89/665 is to be interpreted as precluding the possibility under national law for an individual member of a consortium without legal personality which has participated as such in a procedure for the award of a public contract and has not been awarded that contract to bring an action against the decision awarding that contract.

20 In that regard, it must be borne in mind that, under Article 1(3) of Directive 89/665, Member States are required to ensure that the review procedures provided for by the Directive are available 'at least' 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 of the Community law concerning public contracts or of the national rules transposing that law.

21 It follows that Directive 89/665 lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of Community law concerning public contracts (see Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 45 and the case-law cited).

22 In its judgment in *Espace Trianon and Sofibail*, the Court interpreted Article 1 of Directive 89/665 with regard to a situation in which the national legal order required that an action for annulment of a decision awarding a public contract be brought by all the members forming a tendering consortium.

23 By reference to a situation such as that covered by the questions which had been referred to it for a preliminary ruling, the Court pointed out, in paragraphs 19 to 21 of that judgment, that:

— a consortium may be considered to be a person having an interest in obtaining a public contract within the meaning of Article 1(3) of Directive 89/665, as it has demonstrated its interest in obtaining the public contract at issue by tendering for it and that

— nothing in the case in the main proceedings prevented the members of the consortium from together bringing, in their capacity as associates or in their own names, an action for annulment of the disputed decisions.

24 The Court thus arrived at the conclusion, in paragraph 22 of that judgment, that the national procedural rule in question did not limit the availability of an action in a way contrary to Article 1(3) of Directive 89/665.

25 Consequently, the Court held that Article 1 of Directive 89/665 is to be interpreted as not precluding the national law of a Member State from providing that only the members of a consortium without legal personality which has participated, as such, in a procedure for the award of a public contract and has not been awarded that contract, acting together, may bring an action against the decision awarding the contract.

26 By so doing, the Court, as correctly observed by Elilombarda and the Commission of the European Communities in their written observations, only established a minimum threshold for the availability of review procedures concerning calls for tender which is guaranteed by Directive 89/665.

27 It in no way precluded other Member States from making those review procedures more widely available under their national laws by enshrining a concept of standing to bring proceedings which is wider than the minimum guaranteed by the directive.

28 In the absence of a specific provision in that regard, it is for the national legal order of each Member State to establish in particular whether and under which conditions standing to bring review proceedings may be extended to companies which are part of a consortium which has tendered as such.

29 In that regard, it must be stated that since there are detailed procedural rules governing the remedies intended to protect rights conferred by Community law on candidates and tenderers harmed by decisions of contracting authorities, they must not compromise the effectiveness of Directive 89/665 (see Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 72), the objective of which is to ensure that decisions taken unlawfully by contracting authorities may be reviewed effectively and as rapidly as possible.

30 However, contrary to the submission of the Cypriot Government, an interpretation of Article 1 of Directive 89/665 which permits the capacity to bring an action to be extended to each of the members of a consortium which has tendered in a procedure for the award of a public contract does not undermine that objective, but, on the contrary, seems capable of aiding its attainment.

31 Therefore, the answer to the question referred must be that Article 1 of Directive 89/665 is to be interpreted as not precluding the possibility, under national law, for an individual member of a consortium without legal personality which has participated as such in a procedure for the award of a public contract and has not been awarded that contract to bring an action against the decision awarding that contract.

Costs

32 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

Article 1 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, as amended by Council Directive 92/50/EEC of 18 June 1992 is to be interpreted as not precluding the possibility, under national law, for an individual member of a consortium without legal personality which has participated as such in a procedure for the award of a public contract and has not been awarded that contract to bring an action against the decision awarding that contract.

[Signatures]