JUDGMENT OF THE COURT (Sixth Chamber)
27 November 2001 *

In Joined Cases C-285/99 and C-286/99,

REFERENCE to the Court under Article 234 EC by the Consiglio di Stato (Italy) for a preliminary ruling in the proceedings pending before that court between

Impresa Lombardini SpA — Impresa Generale di Costruzioni

and

ANAS — Ente nazionale per le strade,
Società Italiana per Condotte d'Acqua SpA (C-285/99),
and between
Impresa Ing. Mantovani SpA

and

ANAS — Ente nazionale per le strade,
Ditta Paolo Bregoli (C-286/99),
intervener:
Coopsette Soc. coop. arl (C-286/99),

* Language of the case: Italian.

on the interpretation of Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54),

THE COURT (Sixth Chamber),

composed of: N. Colneric, President of the Second Chamber, acting as President of the Sixth Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen (Rapporteur) and V. Skouris, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Impresa Lombardini SpA — Impresa Generale di Costruzioni, by A. Cinti, R. Ferola and L. Manzi, avvocati,

— Impresa Ing. Mantovani SpA, by A. Cancrini, avvocato,

— Coopsette Soc. coop. arl, by S. Panunzio, avvocato,

— the Italian Government, by U. Leanza, acting as Agent, assisted by P.G. Ferri, Avvocato dello Stato,

— the Austrian Government, by W. Okresek, acting as Agent,

— the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by M. Moretto, avvocato,

having regard to the Report for the Hearing,

after hearing the oral observations of Impresa Lombardini SpA — Impresa Generale di Costruzioni, represented by R. Ferola, of Impresa Ing. Mantovani SpA, represented by C. De Portu, avvocato, of Coopsette Soc. coop. arl, represented by S. Panunzio, of the Italian Government, represented by D. Del Gaizo, Avvocato dello Stato, and of the Commission, represented by M. Nolin, assisted by M. Moretto, at the hearing on 3 May 2001,

after hearing the Opinion of the Advocate General at the sitting on 5 June 2001,

gives the following

Judgment

1 By two orders of 26 May 1999, received at the Court Registry on 30 July 1999, the Consiglio di Stato referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Article 30(4) of Council

Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54; 'the Directive').

2 The questions have been raised in two cases between the Italian companies Impresa Lombardini SpA — Impresa Generale di Costruzioni ('Lombardini') (C-285/99) and Impresa Ing. Mantovani SpA ('Mantovani') (C-286/99) and ANAS — Ente nazionale per le strade (National Road Agency; 'ANAS'), the contracting authority under public law in Italy, concerning the rejection of tenders submitted by Lombardini and Mantovani in two restricted public works tendering procedures on the ground that those tenders were abnormally low.

Legal background

3 The directive was adopted on the basis of Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC), Article 66 of the EC Treaty (now Article 55 EC) and Article 100A of the EC Treaty (now, after amendment, Article 95 EC).

4 According to the second recital in its preamble, 'the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts'.

5 Article 30 of the Directive, which appears in Chapter 3, headed 'Criteria for the award of contracts', of Title IV, headed 'Common rules on participation', provides:

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

(a) either the lowest price only;

(b) 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.

...

4. If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

If the documents relating to the contract provide for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it considers to be too low.

However, until the end of 1992, if current national law so permits, the contracting authority may exceptionally, without any discrimination on grounds of nationality, reject tenders which are abnormally low in relation to the works, without being obliged to comply with the procedure provided for in the first subparagraph if the number of such tenders for a particular contract is so high that implementation of this procedure would lead to a considerable delay and jeopardise the public interest attaching to the execution of the contract in question....'

National legislation

6 Article 30(4) of the directive was transposed into Italian law by Article 21(1a) of Law No 109 of 11 February 1994 (GURI No 41 of 19 February 1994, p. 5), the framework law on public works.

7 In the version as amended by Article 7 of Decree-Law No 101 of 3 April 1995 (GURI No 78 of 3 April 1995, p. 8), ratified by Law No 216 of 2 June 1995 (GURI No 127 of 2 June 1995, p. 3), that provision reads as follows:

'In cases of awards of contracts for works worth ECU 5 million or more on the basis of the lowest-bid criterion mentioned in paragraph 1, the authority

concerned must assess the irregularity, for the purposes of Article 30 of Council Directive 93/37 of 14 June 1993, of any tender which offers a higher discount than the percentage fixed before 1 January of each year by decree of the Minister of Public Works, after hearing the views of the Osservatorio (Monitoring Authority) for public works, having regard to the tenders admitted in the procedures held in the previous year.

To that end, the public administration may take account only of explanations based on the economy of the construction method or the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer, but not of explanations relating to all those elements for which minimum values are laid down by legislation, regulations or administrative provisions or for which minimum values can be ascertained from official data. Tenders must be accompanied, when submitted, by explanations concerning the most significant price components, indicated in the tender notices or the letters of invitation, which together add up to not less than 75% of the basic contract value.'

8 By ministerial decrees of 28 April 1997 (GURI No 105 of 8 May 1997, p. 28) and 18 December 1997 (GURI No 1 of 2 January 1998, p. 26), both issued under the first subparagraph of Article 21(1a) of Law No 109/94, as amended, and determining the threshold at which tenders in tender notices were to be regarded as abnormal, the Minister of Public Works, having recognised the impossibility of setting a single threshold for the whole country and in view of the fact that the *Osservatorio* had not been established, decided that the percentage discount giving rise to the obligation on the contracting authority to undertake an examination of abnormal tenders would be fixed for 1997 and 1998 at 'a measure equal to the arithmetic mean of the discounts, in percentage terms, in the case of all tenders admitted, increased by the average arithmetic divergence of the discounts, in percentage terms, which exceed the said mean'.

The main proceedings and the questions referred for a preliminary ruling

Case C-285/99

9 In 1997, Lombardini took part in a restricted procedure for the award of a public works contract issued by the ANAS, with a view to carrying out works widening a section of motorway to three lanes, with a basic contract value of ITL 122 250 216 000.

10 Both the contract notice and the letter of invitation to submit tenders stated that the contract would be awarded in accordance with Article 21 of Law No 109/94, amended by Law No 216/95, the criterion to be applied being the maximum discount on the price schedule and on the cost of the rough work contracted for, and that the contracting authority would determine which tenders were to be considered as being abnormally low by applying the criterion laid down by the ministerial decree of 28 April 1997.

11 In accordance with Article 21(1a), the letter of invitation required tenderers to include with their bids explanations concerning the most significant price components equivalent to 75% of the basic contract value mentioned in the tender notice. The tender and the explanations as to its composition were, under threat of exclusion, to be drafted in accordance with the rules attached to that invitation and included in the envelope containing the administrative documentation. It was also stipulated, again under threat of exclusion, that the explanatory documentation necessary to check the soundness of the prices bid for the significant components of the contract was to be inserted into a separate sealed envelope, which was to be opened and its contents examined only in respect of tenders offering a discount higher than the arithmetical anomaly threshold. In the event that the contract was awarded to a tenderer whose bid

offered such a discount, it was further provided that the price analyses and explanations produced in support of the tender were to form an integral part of the latter and were to be attached to the contract with contractual force.

12 Having fixed the anomaly threshold for the contract in question at 28.004%, in accordance with the detailed rules set out in the ministerial decree of 28 April 1997, the competent authority opened only envelopes containing the explanatory documentation in respect of those tenders offering a discount shown to be above that threshold, which included the tender by Lombardini.

13 Following the examination of that documentation, the authority declared all tenders offering a discount above that threshold inadmissible, without however giving the undertakings concerned the opportunity to submit other explanations after their tenders had been judged to be abnormally low and before the final awarding of the contract.

14 Lombardini's tender, which offered a discount of 29.88%, was thus excluded and the contract was awarded to Società Italiana per Condotte d'Acqua SpA, whose tender, offering a discount of 27.70%, was the lowest of the bids not regarded as being abnormally low.

15 Lombardini then brought an action before the Tribunale Amministrativo Regionale del Lazio (Regional Administrative Court, Lazio, Italy), arguing that the Italian legislation did not comply with the requirements of the Directive inasmuch as, in order to remove any suspicion of abnormality, it was not sufficient to assess the explanations supplied on the submission of the tender, which might, moreover, concern only 75% of the basic contract price, but that, in

the light of the directive, it was essential for the contracting authority then to ask the undertaking in question for details and clarifications in the context of a genuine exchange of information and argument.

16 The Administrative Court having dismissed its action by a decision of 1 July 1998, Lombardini brought the dispute before the Consiglio di Stato.

17 The Consiglio makes the point that Italian legislation and administrative practice require undertakings participating in a tender procedure, on the submission of their tenders, to provide explanations, on forms prepared for the purpose, and corresponding to at least 75% of the basic contract value, under threat of automatic exclusion from the tender, even though those operators are not able to know, at the time they submit their file and before the examination of all the tenders admitted to the procedure, the level of discount which the contracting authority will regard as abnormal. The Consiglio di Stato takes the view that resolution of the dispute requires it to be determined whether that legal situation complies with the Directive or whether, on the contrary, the Directive requires the contracting authority to exchange information and argument after the submission of the tenders, by means of an individual review in discussion with the operator concerned, without any time-limit for the provision by the latter of evidence capable of corroborating the credibility of his tender.

18 The Consiglio di Stato further questions the compatibility of the Italian legislation with Community law in so far as that legislation excludes any explanation relating to those elements for which minimum values are laid down by law, regulation or administrative provision or for which minimum values can be ascertained from official data. The provision in question might prove incompatible with Community law in so far as it risked hindering the operation of free competition and infringing the principle of finding the undertakings which submit the best tender, a principle which should be regarded as fundamental in Community law.

19 Considering that resolution of the case thus required interpretation of Community law, the Consiglio di Stato decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Are clauses in calls for tenders for public works contracts which prevent the participation of undertakings which have not submitted with their tenders explanations in respect of the price indicated, being equal to at least 75% of the basic contract value, incompatible with Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts?

2. Is a mechanism for automatically calculating the anomaly threshold of tenders to be subjected to a check on their authenticity, based on a statistical criterion and an arithmetical mean, such that undertakings are unable to ascertain that threshold in advance, incompatible with Article 30(4) of Directive 93/37?

3. Is provision for a prior exchange of views, without the undertaking which has allegedly submitted an abnormal tender having the opportunity to state its reasons after the opening of the envelopes and before the adoption of the decision excluding that tender, incompatible with Article 30(4) of Directive 93/37?

4. Is a provision whereby the contracting authority may take account only of explanations relating to the economy of the construction method or the technical solutions adopted or the exceptionally favourable conditions available to the tenderer incompatible with Article 30(4) of Directive 93/37?

5. Is the exclusion of explanations relating to items for which minimum figures can be ascertained from official lists incompatible with Article 30(4) of Directive 93/37?'

Case C-286/99

20 In 1997, Mantovani took part in a restricted tendering procedure initiated by the ANAS for construction work on a stretch of country road. That contract notice indicated that the contract would be awarded to the tendering undertaking which allowed the largest discount in relation to the basic contract value, amounting to ITL 15 720 000 000.

21 The anomaly threshold having been fixed at 40.865%, Mantovani's tender, which involved a discount of 41.460%, above that threshold, was excluded for reasons similar to those which led to the exclusion of Lombardini's tender in Case C-285/99.

22 The works were awarded to the undertaking Paolo Bregoli, whose tender was the lowest amongst those not regarded as abnormally low.

23 Mantovani's action before the Tribunale Amministrativo Regionale del Lazio was dismissed by a decision of 26 June 1998.

24 Mantovani having brought the dispute before the Consiglio di Stato, the latter, basing its argument on considerations similar to those set out in connection with Case C-285/99, decided to stay proceedings and refer five questions to the Court of Justice for a preliminary ruling, worded identically with those in Case C-285/99.

25 Coopsette Soc. coop. arl has been given leave to intervene in the main proceedings in support of Mantovani.

26 By Order of the President of the Court of Justice of 14 September 1999, Cases C-285/99 and C-286/99 were joined for the purposes of the written and oral procedure and the judgment.

The questions referred for a preliminary ruling

27 It must be borne in mind at the outset that, although the Court may not, under Article 234 EC, rule upon the compatibility of a provision of domestic law with Community law or interpret domestic legislation or regulations, it may nevertheless provide the national court with an interpretation of Community law on all such points as may enable that court to determine the issue of compatibility for the purposes of the case before it (see, for example, Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 8; Case C-28/99 *Verdonck and Others* [2001] ECR I-3399, paragraph 28; Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 48).

28 In those circumstances, the questions referred, which it will be convenient to examine together, should be understood as asking essentially whether Article 30(4) of the Directive is to be interpreted as precluding legislation and administrative practice of a Member State which:

— first, allow the contracting authority to reject as abnormally low tenders offering a discount exceeding the anomaly threshold — calculated in accordance with a mathematical formula by reference to the whole of the tenders received for the procedure in question, so that tenderers are not in a position to know that threshold at the time they lodge their file —, where that authority makes its decision taking account only of explanations of the proposed prices, relating to at least 75% of the basic contract value referred to in the contract notice, which the tenderers were required, under threat of being excluded from participation, to attach to their tender, without giving them the opportunity to express their point of view, after the opening of the envelopes, concerning the elements of the prices proposed which gave rise to suspicions, and

— second, require the contracting authority to take into consideration, for the purposes of checking abnormally low tenders, only explanations based on the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, but not explanations relating to all those elements for which minimum values are laid down by law, regulation or administrative provision or can be ascertained from official data.

29 The orders for reference and the documents before the court show that, under the legislation and administrative practice applicable in the main proceedings in the two cases, every tender had to be accompanied, at the time of submission, by explanations of the most significant price components representing at least 75% of the basic value of the contract in question. That information had to be submitted in a separate sealed envelope, the contents of which were to be

examined only if the tender of the undertaking concerned offered a discount exceeding the anomaly threshold, which is fixed for each contract by reference to all the bids made by the tenderers, so that the latter do not know that threshold at the time they submit their file.

30 The facts show that the contracting authority sets aside as abnormally low those tenders offering a discount greater than the anomaly threshold so calculated, and systematically awards the contract to the undertaking whose tender is the lowest amongst the other tenders. The exclusion of abnormally low tenders and the award of the contract take place solely on the basis of an assessment by the competent authority of the explanations submitted at the same time as the tenders themselves and relating to only 75% of the basic contract value, without that authority asking the undertakings concerned for further details and without the latter having the possibility of supplying other explanations after their tender has been suspected of being abnormal.

31 The relevant national legislation further provides, first, that the contracting authority may take into account only explanations based on the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, while, secondly, precluding the contracting authority from basing its decision on explanations relating to any element for which a minimum values is laid down by law, regulation or administrative provision or which can be ascertained from official data.

32 It is in the light of those legal and factual characteristics that the Court must answer the questions referred for a preliminary ruling, as reformulated in paragraph 28 of this judgment.

The detailed rules for identifying, verifying and excluding abnormally low tenders

33 As regards this first aspect of the questions referred, the title of the Directive and the second recital in its preamble show that its aim is simply to coordinate national procedures for the award of public works contracts, although it does not lay down a complete system of Community rules on the matter.

34 The Directive nevertheless aims, as is clear from its preamble and second and tenth recitals, to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition between entrepreneurs in the Member States (*Ordine degli Architetti*, paragraph 52).

35 The primary aim of the Directive is thus to open up public works contracts to competition. It is exposure to Community competition in accordance with the procedures provided for by the Directive which avoids the risk of the public authorities indulging in favouritism (*Ordine degli Architetti and Others*, paragraph 75).

36 The coordination at Community level of procedures for the award of public works contracts is thus essentially aimed at protecting the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State and, to that end, to avoid both the risk of preference being given to national tenderers or applicants whenever a

contract is awarded by the contracting authorities and the possibility that a body governed by public law may choose to be guided by considerations other than economic ones (see, to that effect Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraphs 16 and 17; Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraphs 41 and 42).

37 The contracting authority is therefore required to comply with the principle that tenderers should be treated equally, as indeed is expressly shown by Article 22(4), the fourth subparagraph of Article 30(4) and Article 31(1) of the Directive.

38 In addition, the principle of non-discrimination on grounds of nationality implies, in particular, an obligation of transparency in order to allow the contracting authority to ensure that it has been complied with [see, by analogy, in relation to Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31].

39 It is in that perspective that, as the twelfth recital in its preamble shows, the Directive provides common rules for participation in public works contracts, including both qualitative selection criteria and criteria for the award of the contract.

40 More particularly concerning those criteria for the award of the contract, these are defined in particular in Article 30 of the Directive.

41 As the first recital in its preamble shows, the Directive constitutes a consolidation 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) and subsequent amendments thereto. As the Court has already held in paragraph 13 of its judgment in Case C-304/96 *Hera* [1997] ECR I-5685), Article 30(4) of the Directive corresponds to Article 29(5) of Directive 71/305, as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1).

42 In its initial version, Article 29(5) of Directive 71/305 was worded as follows:

'If, for a given contract, tenders are obviously abnormally low in relation to the transaction, the authority awarding contracts shall examine the details of the tenders before deciding to whom it will award the contract. The result of this examination shall be taken into account.

For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable.

...'

43 The Court has already held that when, in the opinion of the authority awarding a public works contract, a tenderer's offer is obviously abnormally low in relation to the transaction, Article 29(5) of Directive 71/305 requires the authority to seek

from the tenderer, before coming to a decision as to the award of the contract, an explanation of his prices or to inform the tenderer which of his tenders appear to be abnormal and to allow him a reasonable time within which to submit further details (Case 76/81 *Transporoute* [1982] ECR 417, paragraph 18).

44 In paragraph 17 of that judgment, the Court held that the contracting authority may not in any circumstances reject an abnormally low tender without even seeking an explanation from the tenderer, since the aim of Article 29(5) of Directive 71/305, which is to protect tenderers against arbitrariness on the part of the authority awarding contracts, could not be achieved if it were left to that authority to judge whether or not it was appropriate to seek explanations.

45 Similarly, the Court has consistently held that Article 29(5) of Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the Directive (Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraphs 19 and 21; Case C-295/89 *Donà Alfonso* [1991] ECR I-2967 (Summary publication), paragraphs 1 and 2 of the operative part).

46 The Court thus held that Article 29(5) of Directive 71/305 requires the awarding authority to examine the details of tenders which are obviously abnormally low, and for that purpose obliges it to request the tenderer to furnish the necessary explanations (*Fratelli Costanzo*, paragraph 16).

47 According to the Court, a mathematical criterion in accordance with which tenders which exceeded the basic value fixed for the price of the work by a percentage more than 10 points below the average percentage by which the tenders admitted exceeded that amount would be considered anomalous and consequently eliminated, deprives tenderers who have submitted particularly low tenders of the opportunity to demonstrate that those tenders are genuine ones, so that application of such a criterion is contrary to the aim of Directive 71/305, namely to promote the development of effective competition in the field of public contracts (*Fratelli Costanzo*, paragraph 18).

48 The Court also observed that it was in order to enable tenderers submitting exceptionally low tenders to demonstrate that those tenders were genuine ones, and thus to ensure the opening up of public works contracts, that the Council, in Article 29(5) of Directive 71/305, laid down a precise, detailed procedure for the examination of tenders which appear to be abnormally low, and that that aim would be jeopardised if Member States were able, when implementing that provision, to depart from it to any material extent (*Fratelli Costanzo*, paragraph 20).

49 It added, finally, that the examination procedure under Article 29(5) of Directive 71/305 had to be applied whenever the awarding authority was contemplating the elimination of tenders because they were abnormally low in relation to the transaction, so that tenderers could be sure that they would not be disqualified from the award of the contract without first having the opportunity of furnishing explanations regarding the genuine nature of their tenders (*Fratelli Costanzo*, paragraph 26).

50 Since the requirements laid down by both the initial and the amended version of Article 29(5) of Directive 71/305 are in substance identical to those imposed by Article 30(4) of the Directive, the foregoing considerations apply equally in relation to the interpretation of the latter provision.

51 In consequence, Article 30(4) of the Directive necessarily presupposes the application of an *inter partes* a procedure for examining tenders regarded by the contracting authority as abnormally low, placing the latter under an obligation, after it has inspected all the tenders and before awarding the contract, first to ask in writing for details of the elements in the tender suspected of anomaly which gave rise to doubts on its part in the particular case and then to assess that tender in the light of the explanations provided by the tenderer concerned in response to that request.

52 Apart from the fact that, under the legislation and administrative practice applicable in the main proceedings, the tendering undertakings are required at the time they submit their file to provide explanations in respect of only 75% of the value of the contract, whereas it is necessary for them to be able to prove the genuine nature of their tender in respect of all its constituent elements, such prior explanations are not in any event in accordance with the spirit of the *inter partes* examination procedure established by Article 30(4) of the Directive.

53 It is essential that each tenderer suspected of submitting an abnormally low tender should have the opportunity effectively to state his point of view in that respect, giving him the opportunity to supply all explanations as to the various elements of his tender at a time — necessarily after the opening of all the envelopes — when he is aware not only of the anomaly threshold applicable to the contract in question and of the fact that his tender has appeared abnormally low, but also of the precise points which have raised questions on the part of the contracting authority.

54 The above interpretation is, moreover, the only one which complies with both the wording and the purpose of Article 30(4) of the Directive.

55 It is apparent from the very wording of that provision, drafted in imperative terms, that the contracting authority is under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders. It is therefore not possible to regard the requirements inherent in the *inter partes* nature of the procedure for examining abnormally low tenders, within the meaning of Article 30(4) of the Directive, as having been complied with unless all the steps thus described have been successively accomplished.

56 Moreover, it is only subject to strict conditions laid down in the fourth subparagraph of Article 30(4) that the Directive allows the contracting authority to dispense with that *inter partes* procedure for examining abnormally low offers. Here there is no dispute that, in both sets of main proceedings, that derogatory provision is inapplicable *ratione temporis*.

57 Furthermore, the existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer constitutes a fundamental requirement of the Directive, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings.

58 Having regard to the foregoing considerations, it must be held that Article 30(4) of the Directive precludes legislation and administrative practice, such as that applicable in the cases referred, which allow the contracting authority to exclude a tender as abnormally low solely on the basis of explanations of the most significant price components, produced at the same time as the tender itself, without carrying out any *inter partes* examination of the suspect tenders by requesting clarification on points of doubt emerging on first examination and giving the undertakings concerned the opportunity to put forward their arguments in that regard before the final decision is taken.

59 In the tendering procedures at issue in the main proceedings, at the time when the tenderer submits his tender, which must be accompanied by explanations covering 75% of the basic contract value mentioned in the contract notice, he is not aware of the precise aspects of his tender which will be suspected of being abnormal, so that, at that stage of the procedure, he is not in a position to supply useful and complete explanations in support of the various elements constituting his tender.

60 The national court also asks whether Article 30(4) of the Directive similarly precludes legislative provisions and administrative practice of a Member State, such as those at issue in the main proceedings, whereby, first, tenderers are required, under threat of being excluded from participation in the contract, to accompany their tender with price explanations, covering at least 75% of the basic value of that contract, using forms designed for the purpose and, second, the anomaly threshold for tenders is calculated, in respect of each contract, on the basis of a mathematical formula which is a function of all the tenders actually lodged in the tendering procedure in question.

61 It should be noted that the Directive does not contain specific requirements in the matter.

62 More particularly concerning the first of the rules on matters of detail referred to in paragraph 60 of this judgment, this appears to be a requirement which affects all tenderers without distinction and appears to be intended to ensure a certain uniformity in the presentation of tenders, likely to facilitate an initial examination by the contracting authority and to allow a *prima facie* assessment to be made of the seriousness of the tender. It may indeed happen that, on the basis of those explanations alone, the contracting authority becomes convinced that, although the tender appears abnormally low, it is serious and the authority therefore accepts it. In that way, this rule contributes to accelerating the procedure for verifying tenders.

63 It is true that, as the Commission has rightly pointed out, a national procedure for awarding public works contracts would be incompatible with the requirements of Article 30(4) of the Directive if it did not ensure that the *inter partes* examination of abnormally low tenders required by that provision took place.

64 That would in particular be the case, as has already been held in paragraphs 58 and 59 of this judgment, if the contracting authority rejected a tender as abnormally low basing its argument solely on the explanations submitted at the time the tender was lodged, without carrying out *inter partes* examination required by the Directive, after the opening of the envelopes and before the final decision.

65 However, such a defect would originate not in the obligation itself to submit certain explanations together with the lodging of the tender, but rather in the disregard of the requirements of the Directive at a subsequent stage of the procedure for examining abnormally low tenders.

66 Article 30(4) of the Directive does not therefore preclude a requirement to provide explanation in advance, such as that at issue in the main proceedings, taken in isolation, provided that all the requirements arising from that provision are otherwise complied with by the contracting authorities.

67 As regards the second rule referred to in paragraph 60 of this judgment, it is undisputed that the Directive does not define the concept of an abnormally low tender and, *a fortiori*, does not determine the method of calculating an anomaly threshold. That is therefore a task for the individual Member States.

68 As for the anomaly threshold applied in the cases in the main proceedings, this results from a calculation carried out for each contract notice and is based essentially on the average of the tenders submitted for that contract.

69 Such a method of calculation appears at first sight to be objective and non-discriminatory.

70 The mere fact, cited by some of the tenderers involved in the main proceedings, that the anomaly threshold is not known to the undertakings at the time when they make their tender — since it is not determined until all the tenders have been submitted — is in any event not capable of affecting its compatibility with the Directive. At that stage of the procedure, all the tenderers, like the contracting authority itself, are unaware of what that threshold will be.

71 Some of the tenderers involved in the main proceedings have, however, argued that a method for calculating the anomaly threshold based on the average of the tenders for a given contract risks being falsified by tenders not corresponding to a

genuine wish to contract but merely seeking to influence the result of that calculation. Competition might also be distorted, with tenderers seeking to submit not the best tender possible but that which, particularly on the basis of statistical criteria, stood the best probability of being the first amongst the non-suspect tenders, to which the contract is automatically awarded.

72 It is true that the result reached by a method for calculating the anomaly threshold based on the average of tenders may be significantly influenced by practices such as those described in the previous paragraph, which would be contrary to the aims of the Directive, as defined in paragraphs 34 to 36 of this judgment. That is why, for the effectiveness of the Directive to be fully preserved, that result must not be beyond challenge and must be capable of being reconsidered by the contracting authority should that prove necessary having regard in particular to the level of the anomaly threshold for tenders applied in comparable contracts and to the lessons derived from common experience.

73 It follows that, although, as stated in paragraphs 45 and 47 of this judgment, it is settled case-law that Community law precludes the automatic exclusion from public works contracts of certain tenders determined in accordance with a mathematical criterion, Community law does not in principle preclude a mathematical criterion, such as the anomaly threshold applied in the cases referred, from being used for the purposes of determining which tenders appear to be abnormally low, so long as the result to which application of that criterion leads is not beyond challenge, and the requirement for *inter partes* examination of those tenders in accordance with Article 30(4) of the Directive is complied with.

74 Some of the tenderers involved in the main proceedings have also argued, without having their allegations credibly refuted by the Italian government, that the two

rules of Italian tendering procedure referred to in paragraph 60 of this judgment cannot be examined in isolation, given that the various aspects of that procedure are indissolubly interlinked.

75 They have argued in particular that the condition concerning the provision of explanations at the time of submission of the tender itself finds its justification only in the fact that the contracting authority takes its decision on the acceptance or rejection of the tender on the basis of those explanations alone, without allowing the undertakings to provide fuller explanations later. Moreover, they argue that that condition does not apply to the tenderers without distinction, in that only the envelopes of undertakings whose tenders appear abnormally low are opened, so that a tenderer not suspected of making an anomalous bid could be awarded the contract even if he submitted, as explanations, an envelope containing nothing at all. Finally, a distortion of competition between undertakings might result, because the obligation to accompany the tender with voluminous explanatory documentation entails for tenderers offering a particularly advantageous price not only a heavier administrative burden but also the inconvenience of having first to reveal information which might be confidential, and because it places undertakings from other Member States at a disadvantage in any event.

76 As regards those assertions, it is sufficient to observe that, whilst all the requirements imposed by Community law must unquestionably be complied with in the context of the various aspects of the national procedures for awarding public works contracts, which must moreover be applied in such a manner as to ensure compliance with the principles of free competition and equal treatment of tenderers and the obligation of transparency, the fact remains that the Court of Justice is not in a position to rule on those assertions.

77 To determine whether they are well founded requires findings and assessments of fact and an interpretation of domestic law which falls within the sole jurisdiction of the national court. The principles of interpretation concerning the scope of

Article 30(4) of the Directive and the spirit and purpose of the latter, set out in paragraphs 34 to 40 of this judgment, provide that court with all the guidance necessary to enable it to assess the compatibility of the national provisions in question with Community law for the purposes of judging the cases before it.

The taking into account of explanations for abnormally low tenders

78 In relation to the second aspect of the questions referred, as reformulated in paragraph 28 of this judgment, it should be pointed out that, in the words of the second subparagraph of Article 30(4) of the Directive, the contracting authority 'may' take into consideration explanations relating to the economy of the construction method, the technical solutions chosen, the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

79 As is apparent from its very wording, that provision simply gives the contracting authority the possibility of basing its decision on certain types of objective explanation of the price proposed by a given tenderer, and does not impose upon it any obligation to do so.

80 Put back into its context, that provision is designed only to add further precision to the rule set out in the first subparagraph of Article 30(4) of the Directive, whereby the contracting authority is to request from the tenderer concerned details of the constituent elements of the tender which it considers relevant and verify those constituent elements taking account of the explanations received.

81 In that respect, the Court has already underlined, in paragraphs 51 to 59 of this judgment, the importance of the principle whereby, before the contracting authority can reject a tender as abnormally low, the tenderer must have a proper opportunity, in an *inter partes* procedure, to put forward his point of view on each of the various price components proposed.

82 Since, with a view to the development of effective competition in the area of public contracts, it is essential for that opportunity to be as full and as wide as possible, the tenderer must be able to submit in support of his tender all the explanations, and in particular those set out in the second subparagraph of Article 30(4) of the Directive, which, bearing in mind the nature and characteristics of the contract in question, he considers appropriate, without any limitation in that respect. The contracting authority is required to take into consideration all the explanations put forward by the undertaking before adopting its decision whether to accept or reject the tender in question.

83 It follows that, having regard to both its wording and its purpose, the second subparagraph of Article 30(4) of the Directive does not establish an exhaustive catalogue of explanations that are capable of being submitted, but merely gives examples of explanations which the tenderer may provide in order to demonstrate the genuineness of the various price elements proposed. *A fortiori*, the provision in question does not authorise the exclusion of certain types of explanation.

84 As the Austrian Government and the Commission have argued in their observations, and the Advocate General has emphasised in paragraphs 50 and 51 of his Opinion, any limitation in that regard would clearly contradict the Directive's aim of facilitating the operation of free competition between the tenderers as a whole. Such a limitation would involve the outright exclusion of tenders explained by considerations other than those allowed by the applicable national legislation, despite a price which may be more advantageous.

85 It follows that Article 30(4) of the Directive precludes national legislation, such as that applicable in the main proceedings, which, first, requires the contracting authority, for the purposes of verifying abnormally low tenders, to take into account only certain explanations exhaustively listed, that listing omitting moreover explanations relating to the originality of the tenderer's proposed works, even though such explanations are expressly referred to in the second subparagraph of the above provision, and, second, expressly excludes certain types of explanation, such as those relating to any elements for which minimum values are laid down by law, regulation or administrative provision or for which minimum values can be ascertained from official data.

86 In view of all the foregoing considerations, the answer to the questions referred must be that Article 30(4) of the Directive is to be interpreted as follows:

— it precludes a Member State's legislation and administrative practice which allow the contracting authority to reject tenders offering a greater discount than the anomaly threshold as abnormally low, taking into account only those explanations of the prices proposed, covering at least 75% of the basic contract value mentioned in the contract notice, which tenderers were required to attach to their tender, without giving the tenderers the opportunity to argue their point of view, after the opening of the envelopes, on those elements of the prices proposed which gave rise to suspicions;

— it precludes a Member State's legislation and administrative practice which require the contracting authority to take into consideration, for the purposes of examining abnormally low tenders, only explanations based on the economy of the construction method, technical solutions chosen, or

exceptionally favourable conditions available to the tenderer, but not explanations relating to all those elements for which minimum values are laid down by law, regulation or administrative provision or can be ascertained from official data;

— however, provided all the requirements it imposes are otherwise complied with and the aims pursued by the Directive are not defeated, it does not in principle preclude a Member State's legislation and administrative practice which, in the matter of identifying and examining abnormally low tenders, first, require all tenderers, under threat of exclusion from participation in the contract, to accompany their tender with explanations of the prices proposed, covering at least 75% of the basic value of that contract, and, second, apply a method of calculating the anomaly threshold based on the average of all the tenders received for the tender procedure in question, so that tenderers are not in a position to know that threshold at the time they lodge their file; the result produced by applying that calculation method must, however, be capable of being reconsidered by the contracting authority.

Costs

87 The costs incurred by the Italian 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 (Sixth Chamber),

in answer to the questions referred to it by the Consiglio di Stato by orders of 26 May 1999, hereby rules:

Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts must be interpreted as follows:

— **it precludes a Member State's legislation and administrative practice which allow the contracting authority to reject tenders offering a greater discount than the anomaly threshold as abnormally low, taking into account only those explanations of the prices proposed, covering at least 75% of the basic contract value mentioned in the contract notice, which tenderers were required to attach to their tender, without giving the tenderers the opportunity to argue their point of view, after the opening of the envelopes, on those elements of the prices proposed which gave rise to suspicions;**

— **it also precludes a Member State's legislation and administrative practice which require the contracting authority to take into consideration, for the purposes of examining abnormally low tenders, only explanations based on**

the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, but not explanations relating to all those elements for which minimum values are laid down by law, regulation or administrative provision or can be ascertained from official data;

— however, provided all the requirements it imposes are otherwise complied with and the aims pursued by Directive 93/37 are not defeated, it does not in principle preclude a Member State's legislation and administrative practice which, in the matter of identifying and examining abnormally low tenders, first, require all tenderers, under threat of exclusion from participation in the contract, to accompany their tender with explanations of the prices proposed, covering at least 75% of the basic value of that contract, and, second, apply a method of calculating the anomaly threshold based on the average of all the tenders received for the tender procedure in question, so that tenderers are not in a position to know that threshold at the time they lodge their file; the result produced by applying that calculation method must, however, be capable of being reconsidered by the contracting authority.

Colneric Gulmann Puissochet

Schintgen Skouris

Delivered in open court in Luxembourg on 27 November 2001.

R. Grass F. Macken

Registrar President of the Sixth Chamber