JUDGMENT OF THE COURT (Fifth Chamber)

2 December 1999 *

In Case C-176/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunale Amministrativo Regionale per la Sardegna, Italy, for a preliminary ruling in the proceedings pending before that court between

Holst Italia SpA

and

Comune di Cagliari,

intervener:

Ruhrwasser AG International Water Management,

on the interpretation of 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),

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Sixth Chamber, acting as President of the Fifth Chamber, L. Sevón, C. Gulmann, J.-P. Puissochet (Rapporteur) and M. Wathelet, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Holst Italia SpA, by C. Colapinto, of the Rimini Bar, P. Leone, of the Rome Bar, and A. Tizzano and G.M. Roberti, of the Naples Bar,

— the Municipality of Cagliari, by F. Melis and G. Farci, of the Cagliari Bar,

— Ruhrwasser AG International Water Management, by M. Vignolo and G. Racugno, of the Cagliari Bar, and R.A. Jacchia, of the Milan Bar,

— the Italian Government, by Professor U. Leanza, Head of the Contentious Diplomatic Affairs Department in the Ministry of Foreign Affairs, acting as Agent, assisted by F. Quadri, Avvocato dello Stato,

— the Netherlands Government, by T.T. van den Hout, acting Secretary-General of the Ministry of Foreign Affairs, acting as Agent,

— the Austrian Government, by W. Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,

— the Commission of the European Communities, by P. Stancanelli, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Holst Italia SpA, represented by C. Colapinto, P. Leone, G.M. Roberti and F. Sciaudone, of the Naples Bar; of the Municipality of Cagliari, represented by F. Melis and G. Farci; of Ruhrwasser AG International Water Management, represented by M. Vignolo and R.A. Jacchia; of the Italian Government, represented by F. Quadri; and of the Commission, represented by P. Stancanelli, at the hearing on 20 May 1999,

after hearing the Opinion of the Advocate General at the sitting on 23 September 1999,

gives the following

Judgment

1 By order of 10 February 1998, received at the Court on 11 May 1998, the Tribunale Amministrativo Regionale per la Sardegna (Regional Administrative Court for Sardinia) referred to the Court for a preliminary ruling under

Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of 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).

2 That question was raised in proceedings between Holst Italia SpA ('Holst Italia') and the Municipality of Cagliari concerning the award by the latter to Ruhrwasser AG International Water Management ('Ruhrwasser'), by negotiated tender procedure, of a contract for the collection and purification of domestic waste water.

The Community legislation

3 Directive 92/50 lays down qualitative selection criteria for the determination of candidates admitted to take part in procedures for the award of a public service contract.

4 Article 31 of that directive provides:

'1. Proof of the service provider's financial and economic standing may, as a general 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 services 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 references 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 Directive 92/50 is in the following terms:

'1. The ability of 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 services;

(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 to be in the form of certificates issued or countersigned by the competent authority,

— where provided to private purchasers, delivery 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 special purpose, a check carried out by the contracting authority or on its behalf by a competent official body of the country in 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 subcontract.

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.'

6 Article 25 of Directive 92/50 further provides:

'In the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties.

This indication shall be without prejudice to the question of the principal service provider's liability.'

7 Lastly, Article 26 of Directive 92/50 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 the request for participation the names and relevant professional qualifications of the staff to be responsible for the performance of the service.'

The main proceedings

8 In 1996 the Municipality of Cagliari conducted a negotiated tendering procedure for the award, on the basis of the most advantageous tender submitted, of a three-year contract for the management of water purification and sewage disposal plants.

9 The invitation to tender, published in the *Official Journal of the European Communities* on 3 January 1997, provided that interested undertakings were to provide proof, in particular, of (a) an average annual turnover equal to or greater than ITL 5 000 million during the period from 1993 to 1995 in the field of the management of water purification and sewage disposal plants and (b) actual management of at least one domestic waste water purification plant for a period of two consecutive years during the previous three years, and that, in the absence of such proof, such undertakings were to be excluded from the tendering procedure.

10 Ruhrwasser, which had been registered as a company since only 9 July 1996, was unable to show any turnover whatsoever for the period from 1993 to 1995 or to

show that it had actually managed at least one domestic waste water purification plant during the previous three years.

11 In order to establish its standing to take part in the tendering procedure, on the conclusion of which it was awarded the contract, Ruhrwasser provided documentation relating to the financial resources of another entity, the German public-law body Ruhrverband. That body is the sole shareholder in the undertaking RWG Ruhr-Wasserwirtschafts-Gesellschaft, which, together with five other companies, set up Ruhrwasser as a joint venture undertaking in the form of a company limited by shares and governed by German law, owned as to one sixth by each of the parent companies, the object of which is to enable those companies to win contracts abroad for the collection and treatment of water.

12 Holst Italia also took part in the procedure, but its offer was regarded as less advantageous by the committee awarding the contract. It thereupon brought proceedings before the Tribunale Amministrativo Regionale per la Sardegna for annulment of the decision of the Cagliari Municipal Council approving the award of the contract to Ruhrwasser, on the ground that the latter had not produced the documentation needed in order to be eligible to submit a tender.

13 Ruhrwasser intervened in the proceedings before the Tribunale and lodged an interlocutory application for a declaration that the invitation to tender was illegal in so far as it prohibited a candidate undertaking from producing references concerning another undertaking with a view to establishing its own standing to submit a tender.

14 Following examination of the relationship between Ruhrwasser and the companies by which it had been formed, the Tribunale considered that there was a 'close connection between Ruhrverband and Ruhrwasser which allows the latter to avail itself of the facilities and organisation of the former'. In those

circumstances, it took the view that it was necessary to verify whether Directive 92/50 was to be interpreted as meaning that references concerning an entity connected with the candidate undertaking could be accepted as proof of the latter's standing.

15 According to the Tribunale, although the Court accepted, in its judgments in Case C-389/92 *Ballast Nedam Groep* v *Belgian State* [1994] ECR I-1289 (*'Ballast Nedam Groep I'*) and Case C-5/97 *Ballast Nedam Groep* v *Belgian State* [1997] ECR I-7549 (*'Ballast Nedam Groep II'*) that an undertaking may prove that it has the necessary standing by furnishing references in respect of other companies within the same group, the situation at issue in those judgments is to be distinguished from that in the present case, inasmuch as, first, it concerned public works contracts governed by Council Directive 71/304/EEC of 26 July 1971 concerning the 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 co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), and not public service contracts, and, second, the company concerned in *Ballast Nedam Groep I* and *Ballast Nedam Groep II*, unlike Ruhrwasser, enjoyed a dominant position within the group of companies which, it claimed, had the requisite standing as the parent company of its subsidiaries.

16 In order to ascertain whether, despite those differences of law and fact, the decision reached by the Court in its previous judgments was also applicable to a situation such as that in issue in the main proceedings, the Tribunale Amministrativo Regionale per la Sardegna decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'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?'

The question referred for a preliminary ruling

17 According to Holst Italia, references concerning an entity other than the candidate undertaking may be relied on, in the context of Directive 92/50, only if that company can show the existence of a clear structural link connecting it with the company possessing the standing needed for performance of the contract.

18 Such a structural link, constituting, according to the plaintiff in the main proceedings, a fundamental guarantee for the contracting authority, presupposes, according to the Court's case-law, that the company submitting the tender exerts a dominant influence on the entity whose references it uses and actually has at its complete disposal all the latter's resources. That is not the case where the tenderer merely relies on obligations of a commercial nature entered into by an entity indirectly holding a minority share of its capital. To accept, in such circumstances, that the standing of a third party may be taken into account would mean that the standing claimed would cease to be personal in character.

19 The Italian Government likewise doubts that a subsidiary indirectly owned by an entity is capable of claiming that it has at its disposal the technical and financial resources of that entity. It acknowledges, however, that it is for the national court to assess the evidence provided in that connection by the tenderer.

20 By contrast, Ruhrwasser, like the Netherlands and Austrian Governments, considers that the legal nature of the link established between associated

undertakings cannot in any circumstances be asserted against those undertakings as a ground for refusing to take into account, in favour of one member of the group, the standing of another member. Irrespective of the nature of the organisation found to exist, the only relevant consideration is the consequences to which it gives rise in terms of the availability of its resources.

21 It follows, according to Ruhrwasser, that where, in addition to structural links relating, in particular, to possession of the capital, there exist mandatory obligations requiring resources to be made available to the subsidiary participating in the tendering procedure, that effectively proves actual possession of the resources needed to perform the contract.

22 According to the Commission, the basic ruling arrived at by the Court in its judgments in *Ballast Nedam Groep I* and *Ballast Nedam Groep II* is applicable by analogy to a situation such as that in the present case. However, it emphasises that a tenderer cannot be presumed actually to have at its disposal the resources necessary for the performance of the contract, whatever the nature of its legal relationship with the members of the group of which it forms part, and that the availability of those resources must be the subject of a careful examination by the national court of the evidence which the party concerned is required to provide. The order for reference does not conclusively show that any such examination has been carried out in the main proceedings on the basis of adequate documentation.

23 The Court observes first of all that, as is apparent from the sixth recital in the preamble thereto, Directive 92/50 is designed to avoid obstacles to freedom to provide services in the award of public service contracts, just as Directives 71/304 and 71/305 are designed to ensure freedom to provide services in the field of public works contracts (*Ballast Nedam Groep I*, paragraph 6).

24 To that end, Chapter 1 of Title VI of Directive 92/50 lays down common rules on participation in procedures for the award of public service contracts, including

the possibility of subcontracting part of the contract to third parties (Article 25) and of the submission of tenders by groups of service providers without their being required to assume a specific legal form in order to do so (Article 26).

25 In addition, the criteria for qualitative selection laid down in Chapter 2 of Title VI of Directive 92/50 are designed solely to define the rules governing objective assessment of the standing of tenderers, particularly as regards financial, economic and technical matters. One of those criteria, provided for in Article 31(3), allows tenderers to prove their financial and economic standing by means of any other document which the contracting authority considers appropriate. A further provision, contained in Article 32(2)(c), expressly states that evidence of the service provider's technical capability may be furnished by an indication of the technicians or technical bodies, whether or not belonging directly to the service provider, on which it can call to perform the service (see, to the same effect, as regards Directive 71/305, *Ballast Nedam Groep I*, paragraph 12).

26 From the object and wording of those provisions, it follows that a party cannot be eliminated from a procedure for the award of a public service contract solely on the ground that that party proposes, in order to carry out the contract, to use resources which are not its own but belong to one or more other entities (see, to the same effect, as regards Directives 71/304 and 71/305, *Ballast Nedam Groep I*, paragraph 15).

27 It is therefore permissible for a service provider which does not itself fulfil the minimum conditions required for participation in the procedure for the award of a public service contract to rely, *vis-à-vis* the contracting authority, on the standing of third parties upon whose resources it proposes to draw if it is awarded the contract.

28 However, such recourse to external references is subject to certain conditions. As stated in Article 23 of Directive 92/50, the contracting authority is required to verify the suitability of the service providers in accordance with the criteria laid

down. That verification is intended, in particular, to enable the contracting authority to ensure that the successful tenderer will indeed be able to use whatever resources it relies on throughout the period covered by the contract.

29 Thus, where, in order to prove its financial, economic and technical standing with a view to being admitted to participate in a tendering procedure, a company relies on the resources of entities or undertakings with which it is directly or indirectly linked, whatever the legal nature of those links may be, it must establish that it actually has available to it the resources of those entities or undertakings which it does not itself own and which are necessary for the performance of the contract (see, to the same effect, as regards Directives 71/304 and 71/305, *Ballast Nedam Groep I*, paragraph 17).

30 It is for the national court to assess the relevance of the evidence adduced to that effect. In the context of that assessment, Directive 92/50 does not permit the exclusion, without due analysis, of specific types of proof or the assumption that the service provider has available to it resources belonging to third parties merely by virtue of the fact that it forms part of the same group of undertakings.

31 Consequently, the answer to be given to the question referred must be that Directive 92/50 is to be interpreted as permitting a service provider to establish that it fulfils the economic, financial and technical criteria for participation in a tendering procedure for the award of a public service contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the

resources of those entities which are necessary for performance of the contract. It is for the national court to assess whether the requisite evidence in that regard has been adduced in the main proceedings.

Costs

32 The costs incurred by the Italian, Netherlands and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Tribunale Amministrativo Regionale per la Sardegna by order of 10 February 1998, hereby rules:

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 permitting a service provider to establish that it fulfils the economic, financial and

technical criteria for participation in a tendering procedure for the award of a public service contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities which are necessary for performance of the contract. It is for the national court to assess whether the requisite evidence in that regard has been adduced in the main proceedings.

Moitinho de Almeida Sevón Gulmann

Puissochet Wathelet

Delivered in open court in Luxembourg on 2 December 1999.

R. Grass D.A.O. Edward

Registrar President of the Fifth Chamber