OPINION OF ADVOCATE GENERAL MISCHO

delivered on 25 February 2003 [1]

1. The Bundesvergabeamt (Federal Public Procurement Office) (Austria) is seeking an interpretation from the Court of Article 1(3) 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, [2] as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [3] ('Directive 89/665').

2. In a case in which a trader has failed to avail itself of the conciliation procedure provided for under Austrian law, the Bundesvergabeamt is seeking to ascertain whether the abovementioned provision must be interpreted as meaning that a trader has no interest in obtaining a contract unless it has taken all steps available under national law to prevent the contract from being awarded to another tenderer and so to secure the award of the contract to itself.

I — Legal background

A — *Community legislation*

3. Article 1(1) and (3) 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.

...

1 — Original language: French.
2 — OJ 1989 L 395, p. 33.
3 — OJ 1992 L 209, p. 1.

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) and (6) of Directive 89/665 reads:

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

(a) take interim measures, at the earliest opportunity and by way of interlocutory procedures, with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(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;

(c) award damages to persons harmed by an infringement.

...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

...'

B — *National legislation*

5. Directive 89/665 was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz 1997) (1997 Federal Public Procurement Law, BGBl. I, 1997/56, 'the BVergG'). The BVergG provides for the creation of a Bundes-Vergabekontrollkommission (Federal Public Procurement Control Commission, 'the B-VKK') and of a Bundesvergabeamt (Federal Public Procurement Office).

6. Paragraph 109 of the BVergG sets out the powers of the B-VKK. It contains the following provisions:

'1. The B-VKK shall be competent:

(1) until such time as the contract is awarded, to reconcile any differences of opinion between the awarding body and one or more candidates or tenderers concerning the application of the present federal law or its implementing regulations.

...

6. A request for the B-VKK to take action made under paragraph 1(1) must be submitted to the directors of the Commission as soon as possible after the difference of opinion comes to light.

7. If the B-VKK does not take action following a request from the awarding body it must inform that body immediately it does take action.

8. The awarding body may not award the contract until four weeks after... it has been informed in accordance with paragraph 7, failing which the tendering procedure shall be declared void...'

7. Paragraph 113 of the BVergG lays down the powers of the Bundesvergabeamt. It provides:

'1. The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

2. To preclude infringements of this Federal Law and of the regulations implement-

ing it, the Bundesvergabeamt is authorised until the time of the award: (1) to adopt interim measures and (2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer....'

8. Paragraph 115(1) of the BVergG provides:

'Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.'

9. Under Paragraph 122(1) of the BVergG,

'[i]n the event of a culpable breach of the Federal Law or its implementing rules by the organs of an awarding body, an unsuccessful candidate or tenderer may bring a claim against the contracting authority to which the conduct of the organs of the awarding body is attributable for reimbursement of the costs incurred in drawing up its bid and other costs borne as a result of its participation in the tendering procedure.'

10. Under Paragraph 125(2), first sentence, of the BVergG a claim for damages to be brought before the civil courts is admissible only if the Bundesvergabeamt has previously made a declaration under Paragraph 113(3).

II — The main proceedings

11. In the autumn of 1999 Autobahnen- und Schnellstraßen-Finanzierungs-AG ('Asfinag') invited tenders prior to the award of a public services contract for 'site management in respect of the construction of principal and subsidiary toll barriers, including electrical, internal and technological work, and the introduction of a data-transmission facility as part of the "LKW Maut Österreich" project'. The tenders were opened on 18 November 1999.

12. Together with a number of partners, Fritsch, Chiari & Partner Ziviltechniker GmbH ('the applicant') submitted its tender as a consortium. By letter of 28 January 2000 the applicant was informed that its tender had been placed second in the evaluation of the tenders and was therefore unsuccessful. On 8 February 2001 it was told that the contract had been awarded to a competitor and was informed of the amount of the contract.

13. The applicant then instituted a procedure under Paragraph 113(3) of the BVergG for a review by the Bundesvergabeamt, seeking a declaration that the contract had not been awarded to the best tenderer because the award criteria laid down by the contracting authority infringed the requirement contained in Paragraph 53 of the BVergG that the best tenderer must be determined in a comprehensible manner.

14. Before the Bundesvergabeamt, Asfinag stated that, under Paragraph 115(1) of the BVergG, only an undertaking claiming an interest in obtaining a contract falling within the scope of the BVergG is entitled to apply for review of a decision of the contracting authority on the ground of unlawfulness, where the alleged unlawfulness has caused or risks causing it harm. According to Asfinag, the applicant clearly had no interest in obtaining the contract since it had not submitted an application for conciliation to the B-VKK, as it was entitled to do under Paragraph 109(1) of the BVergG.

15. In support of its view, Asfinag maintains that public procurement law does not exist for its own sake but rather serves to determine where pre-contractual liability lies amongst the various parties to public procurement procedures, including the tenderers. If a tenderer considers that the award criteria do not comply with the law, it is required, as provided in Paragraph 109(6) of the BVergG, to inform the B-VKK as soon as possible, even before the tenders are opened. The principle of competition prohibits allowing a tenderer who considers that the award criteria do not comply with the law, first to submit a tender in order to ascertain whether it is the best tenderer and then to decide on its actions according to how the contract is awarded: if it is the best tenderer it does not make an application, but if it fails to obtain the contract, or is not the best tenderer, it applies to the competent authorities in order to have 'a second bite at the cherry' as a result of the invitation to tender being revoked.

16. According to Asfinag, Paragraph 109(6) of the BVergG therefore imposes a time-limit for claims, so that the submission of a tender without any preliminary application being made to the B-VKK means that no claim may be brought in respect of defects in the invitation to tender

which, if it had exercised due care, the tenderer should have been aware of at the time it prepared its tender. If in the present case the applicant had applied to the B-VKK before preparing its tender bid and had drawn Asfinag's attention to the alleged errors, no costs would have been incurred in preparing the tender.

17. The applicant denied the allegation that it had no interest, stating that according to the consistent practice of the public procurement supervisory bodies, submission of a tender within the time-limit was sufficient to establish an interest in obtaining a contract.

III — The questions referred for a preliminary ruling

18. Considering that the Austrian legislation applying to the case before it should be interpreted in the light of Article 1(3) of Directive 89/665 and that a decision in the case therefore required an interpretation of that provision, the Bundesvergabeamt, by order of 11 July 2001, decided to stay proceedings pending a preliminary ruling by the Court of Justice on the following questions:

'1. Is Article 1(3) of Directive 89/665 to be interpreted as meaning that the review procedure must be available to any undertaking which has submitted a bid, or applied to participate, in a public procurement procedure?

(2) In the event that the answer to Question 1 is no:

Is the abovementioned provision to be understood as meaning that an undertaking only has or had an interest in a particular public contract if, in addition to its participating in the public procurement procedure, it takes or took all steps available to it under national law to prevent the contract from being awarded to another bidder and so to secure the award of the contract to itself?'

19. In the order for reference the Bundesvergabeamt points out that in a judgment of 12 June 2001 (B 485/01-12, B 584/01-9, B 685/01-6) the Verfassungsgerichtshof (Austrian Constitutional Court) stated, referring to its judgment of 8 March 2001 (B 707/00), that according to the case-law of the Court of Justice, [4] the capacity to institute a review procedure under Article 1 of Directive 89/665 must be interpreted broadly and should therefore belong to any

4 — See Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraphs 34 and 35.

person seeking to obtain a specific public contract which is the subject of an invitation to tender. The question therefore arises whether that should be the case irrespective of whether that person has or has not availed himself of the opportunity afforded him by the contracting authority of exhausting all remedies available under domestic public procurement law (first question) or whether failure to exhaust all possible domestic remedies results in him forfeiting that interest (second question).

IV — Analysis

A — *Whether the Court has jurisdiction to answer the questions referred by the Bundesvergabeamt*

20. The Commission questions in its written observations whether the Court has jurisdiction to answer the questions referred for a preliminary ruling since it considers that decisions of the Bundesvergabeamt are not of a judicial nature.

21. It should be pointed out, however, that this issue has in the meantime been settled by the Court in Case C-411/00 *Swoboda*, [5] at least as regards questions referred by the Bundesbegabeamt in the exercise of its powers during the period after the award of the contract. The Court held in that context that it was a court or tribunal within the meaning of Article 234 EC. [6]

22. It is clear from the order for reference that in the main proceedings the Bundesvergabeamt is also exercising its powers during the period after the award of the contract. The case was brought on the basis of Paragraph 113(3) of the BVergG, [7] which provides: '*[a]fter the award of the contract* or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer.' [8]

23. It must therefore be concluded that the Court has jurisdiction to answer the questions referred for a preliminary ruling by the Bundesvergabeamt.

5 — [2002] ECR I-10567.
6 — See *Swoboda*, cited above, paragraphs 26 to 28.
7 — See point 13 above.
8 — Emphasis added.

B — *On the questions*

24. Like the French Government, I propose to deal with both the questions together.

25. Each question corresponds to the view put forward by one of the parties in the main proceedings on the point at issue, namely, the meaning of 'an interest in obtaining a contract': the first question reflects the applicant's view that the submission of a tender during a contract procedure or the request to participate in such a procedure are sufficient in order to establish that a tenderer has, once and for all, an interest in obtaining the contract, whilst the second question refers to Asfinag's view that the fact that a tenderer does not take or has not taken all steps available to it under national law to prevent the contract from being awarded to another tenderer, namely in this case the fact that it did not make an application to the B-VVK, demonstrates that that tenderer has forfeited an interest in obtaining the contract.

26. The applicant and the Austrian Government confirmed at the hearing that at the material time there was no statutory obligation on the applicant to make an application to the B-VKK after being informed by letter of 28 January 2000 that its tender had been placed second in the evaluation of the tenders and was therefore unsuccessful.

27. The order for reference does not contain any information from which I may conclude that this view is incorrect.

28. In essence, the questions amount to the single question of whether Directive 89/665 must be understood as meaning that a tenderer has or had an interest in obtaining a public contract only if it made a preliminary application to an advisory committee although such application was optional.

29. In my view the answer to that question is no.

30. First, it is clear straight away that Directive 89/665 does not specify any circumstances in which a tenderer forfeits an interest in obtaining a contract.

31. Second, to answer yes would mean that one inferred from the directive that the tenderer was under an obligation to make

an application to an advisory committee although such application is optional under national law, otherwise it would forfeit an interest in obtaining the public contract. Such an inference cannot be made.

32. It is true that the directive does not preclude certain obligations being imposed on traders under national law.

33. This is clear, for example, from the last sentence of Article 1(3) of Directive 89/665, which provides '... 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.'

34. It is also clear from Case C-470/99 *Universale-Bau and Others*, [9] in which the Court held that extinctive time-limits at national level were compatible with Directive 89/665 provided they were reasonable.

35. However, the directive itself does not impose such obligations on traders, and moreover could never do so where it has no direct effect on individuals. [10]

36. I therefore suggest that the answer to the questions referred for a preliminary ruling should be that, in itself, Article 1(3) of Directive 89/665 *does not mean* that an undertaking has or had an interest in obtaining a particular public contract only if, in addition to its participation in the public procurement procedure, it takes or took all steps available to it under national law to prevent the contract from being awarded to another tenderer and so to secure the award of the contract to itself.

37. In the alternative I should like, however, to consider the questions again from another angle.

38. They could also be interpreted as meaning that the Bundesvergabeamt is seeking to ascertain whether Directive 89/665 *precludes* a rule of national law under which a tenderer forfeits its interest in obtaining the contract if it has not taken all steps available to it under national law to prevent the contract from being awarded to another tenderer.

9 — [2002] ECR I-11617.

10 — Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraphs 22 to 25; Case C-456/98 *Centrosteel* [2000] ECR I-6007, paragraph 15, and Case C-443/98 *Unilever* [2000] ECR I-7535, paragraphs 50 and 51.

39. I stress that I have not found in the order for reference any express reference to a rule of Austrian law which states that although an application to the B-VKK is optional, failure to make such application would cause a tenderer to forfeit an interest in obtaining the contract. However, since only the referring court has jurisdiction to interpret its national law, one cannot exclude a priori that such a rule does exist. Therefore, in an attempt to provide an answer to the Bundesvergabeamt which is as useful as possible, I suggest that an answer should also be given to the questions as I have reworded them in the alternative.

40. At the hearing the French and Austrian Governments and the Commission rightly submitted that the answer to the questions worded in that way should be based on the judgment in *Universale-Bau and Others*, cited above, which was delivered after they had submitted their written observations.

41. In that case, in which reference had likewise been made by the Bundesvergabeamt, the Court held as follows:

'Directive 89/665 does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time-limit in question is reasonable.' [11]

42. Like the abovementioned interveners, I take the view that that ruling may be transposed to the present case.

43. As in *Universale-Bau*, cited above, in which the Court held that Directive 89/665 contains no provision specifically covering time-limits for the application for review which it sought to establish, [12] the directive in question does not either, as I stated above, [13] contain any provision concerning circumstances in which a tenderer might forfeit an interest in obtaining a contract.

44. Article 1(3) of Directive 89/665 indeed requires review procedures to be made available 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', although it does not

11 — *Universale-Bau*, cited above, paragraph 79.
12 — *Universale-Bau*, cited above, paragraph 71.
13 — See point 30 above.

define more fully either the concept of 'interest' or any circumstances in which failure on the part of the tenderer to exercise due care may cause it to forfeit an interest in obtaining a contract since it is considered as not having or never having had such an interest. It is therefore for the national legal system of each Member State, where appropriate, to make such provision. [14]

45. Having reached this stage in the reasoning, I should like to quote *in extenso* paragraphs 72 to 76 of *Universale-Bau and Others*, cited above, which seem to me to apply *mutatis mutandis* to the question before us:

'72 None the less, 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.*

73 It is therefore appropriate to determine whether, in light of the purpose of that directive, national legislation such as that at issue in the main proceedings does not adversely affect rights conferred on individuals by Community law.

74 In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in its preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community levels, to ensure the effective application of the directives relating to public procurement, in particular at a stage when infringements can still be corrected. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible.

75 The full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringement of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements.

76 Moreover, the setting of reasonable limitation periods for bringing proceedings must be regarded as satisfying,

14 — See, by analogy, *Universale-Bau*, cited above, paragraph 71 *in fine*.

in principle, the requirement of effectiveness under Directive 89/665, since it is an application of the fundamental principle of legal certainty (see, by analogy, in relation to the principle of the effectiveness of Community law, Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 28, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 33).' [15]

46. As in the case of the time-limits which were at issue in *Universale-Bau and Others*, cited above, I am of the view that a national rule which requires a tenderer to take all steps reasonably available to it to prevent the contract from being awarded to another tenderer, or else it would risk forfeiting an interest in obtaining the contract, is contributing towards achieving the objective of Directive 89/665 of establishing effective review procedures that are as rapid as possible. [16] In addition, it also meets the requirement of effectiveness contained in Directive 89/665 in so far as it is in the interest of legal certainty.

47. I should like to stress, however, that such forfeiture of an interest in obtaining the contract, in my view, cannot arise except where the tenderer has failed to take all the steps which are *reasonably* available to it, in the same way as the time-limits must also be reasonable. [17]

48. At the hearing the applicant stated that it had not had sufficient information to make a proper application to the B-VKK after being informed, by letter of 28 January 2000, that its tender had been placed second in the evaluation of the tenders and was therefore unsuccessful.

49. It is for the court making the reference to consider whether, in the light of such circumstances, the applicant had *reasonably* had available to it the step of making an application to the B-VKK. If that was not the case the applicant cannot be criticised for not having taken that step.

50. I therefore suggest that the answer to the questions referred for a preliminary ruling should, in the alternative, be that Article 1(3) of Directive 89/665 does not preclude a rule of national law under which an undertaking has or had an interest in obtaining a particular public contract only if, in addition to its participating in the public procurement procedure, it takes or took all steps reasonably available to it under national law to prevent the contract from being awarded to another bidder and so to secure the award of the contract to itself.

15 — Emphasis added.

16 — See also *Alcatel Austria and Others*, cited above, paragraph 34, and Case C-92/00 *HI* [2002] ECR I-5553, paragraph 52.

17 — *Universale-Bau*, cited above, paragraph 79.

V — Conclusion

51. In the light of the above considerations, I suggest that the answer to the questions referred by the Bundesvergabeamt should be as follows:

Article 1(3) 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 relating to the coordination of procedures for the award of public service contracts, does not mean that an undertaking has or had an interest in obtaining a particular public contract only if, in addition to its participation in the public procurement procedure, it takes or took all steps available to it under national law to prevent the contract from being awarded to another bidder and so to secure the award of the contract to itself;

Article 1(3) of Directive 89/665 does not, however, preclude a rule of national law under which an undertaking has or had an interest in obtaining a particular public contract only if, in addition to its participating in the public procurement procedure, it takes or took all steps reasonably available to it under national law to prevent the contract from being awarded to another bidder and so to secure the award of the contract to itself.