

Transporoute et Travaux SA v. Minister of Public Works.

(Case 76/81)

**Before the Court of Justice of the European
Communities**

ECJ

**(Presiding, Bosco P.C.; Touffait P.C.; Pescatore, Lord
Mackenzie Stuart,
O'Keefe, Koopmans, Everling, Chloros and Grevisse
JJ.) Herr Gerhard Reischl
Advocate General.**

10 February 1982

Reference from Luxembourg by the Comité Contentieux du Conseil d'Etat
(Judicial
Committee of the State Council) under Article 177 EEC.

Public works contracts. Tendering.

Articles 23 to 26 of the Public Works Directive 71/305 are exhaustive. An authority inviting tenders for a public works contract may therefore not require any other evidence of the tenderer's financial and economic standing than what is authorised in those Articles. Requirement that a foreign tenderer be in possession of an establishment permit issued by the host Government is thus not permissible. [9]-[15]

Supply of services.

To make the provision of services in one member-State by an enterprise established in another member-State conditional upon the possession of an establishment permit in the host State infringes Article 59 EEC. [14]

Public works contracts. Tenders.

When, in the opinion of the authority awarding a public works contract, a tender is obviously abnormally low the authority must, under Article 29 (5) of the Public Works Directive 71/305, before deciding to reject that tender, seek from the

tenderer an explanation of his prices or inform him which of his tenders appear to be abnormal and allow him a reasonable time within which to submit further details. It may not reject the tender without seeking an explanation on the *a priori* grounds that no acceptable explanation could possibly be given. [17]-[18]

The Court *interpreted* Articles 23 to 29 of the Public Works Directive 71/305 *in the context of* a tender by a Belgian firm for a Luxembourg public works contract which was rejected out of hand because, although it was the lowest tender, it was considered to be abnormally low and because the firm did not have a Luxembourg*383 establishment permit, *to the effect that* the requirement of a Luxembourg establishment permit was illegal and the abnormally low tender might not be rejected until the firm has been invited and given an opportunity to give explanations.

Representation

Y. Hannequart, of the Liege Bar, for the plaintiff.

Jean Welter, of the Luxembourg Bar, for the defendant Minister.

G. Ferri, Avvocato dello Stato, for the Italian Government as *amicus curica*.

Rolf Wagenbaur, Legal Adviser to the E.C. Commission, for the Commission as *amicus curiae*.

A written amicus brief was also submitted by the Belgian Government.

The following case was referred to by the Advocate General:

1. [Van Binsbergen v. Bestuur Van de Bedrijfsvereniging voor de Metaalnijverheid \(33/74\)](#), 3 December 1974: [1974] E.C.R. 1299, [1975] 1 C.M.L.R. 298.

The following further case was referred to in argument:

2. *S. H. v. Belgium SA v. la Maison Ideale et Societe Nationale du Logement* (Belgian Conseil d'Etat), 27 June 1980.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Facts

In response to a notice of invitation to tender issued on 2 March 1979 by the Administration des Ponts et Chaussées (Bridges and Highways Authority) of the Grand Duchy of Luxembourg concerning a section of the Arlon motorway SA Transporoute et Travaux (hereinafter referred to as 'Transporoute'), a company incorporated under Belgian law, submitted the lowest tender.

The tender was rejected by the Minister of Public Works of the Grand Duchy of Luxembourg for the following reasons:

1. Transporoute was not in possession of the Government establishment permit provided for in section 1 of the Grand-Ducal Regulation of 6 November 1974 on (1) the drawing up of a list of the general specifications applicable to public works and supply contracts for the State; (2) the determination of the powers and *modus operandi* of the adjudication panel for tenders. [FN1]

FN1 *Memorial (Gazette) A*, 1974, p. 1660 *Et Seq.*

2. Some of the prices in Transporoute's tender were considered to be abnormally low within the meaning of the fifth and sixth*384 paragraphs of section 32 of the Grand-Ducal Regulation of 6 November 1974.

As a result the Minister of Public Works of the Grand Duchy of Luxembourg awarded the contract to a consortium of Luxembourg contractors whose tender was considered as being economically the most advantageous.

Transporoute sought to have the decision annulled by the Comite du Contentieux du Conseil d'Etat (Judicial Committee of the State Council). In support of its application it pleaded infringement of the provisions of Council Directive 71/305, in particular Articles 24 and 29 (5). Article 24 provides that:

'Any contractor wishing to take part in a public works contract may be requested to prove his enrolment in the professional or trade register under the conditions laid down by the laws of the Community country in which he is established: in Belgium, the *registre du commerce -- Handelsregister*; in Germany, the *Handelsregister* and the *Handwerksrolle*; in France, the *registre du commerce* and the *repertoire des metiers*; in Italy, the *Registro della Camera di commercio, industria, agricoltura e artigianato* and the *Registro delle commissioni provinciali per l'artigianato*; in Luxembourg, the *registre aux firmes* and the *role de la Chambre de metiers*; in the Netherlands, the *Handelsregister*.'

Article 29 (5) provides:

'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.

If the documents relating to the contract provide for its award at the lowest price tendered, the authority awarding contracts must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 the rejection of tenders which it considers to be too low.'

In the course of those proceedings, by judgment of 11 March 1981, the Comite du Contentieux of the Conseil d'Etat of the Grand Duchy of Luxembourg referred the following questions to the Court of Justice for a preliminary ruling:

(1) Is it contrary to the provisions of Directives 71/304/EEC and 71/305/EEC of 26 July 1971, in particular those of Article 24 of Directive 71/305, for the authority awarding the contract to require as a condition for the award of a public works contract to a tenderer established in another member-State that in addition to

being properly enrolled in the professional or trade register of the country in which he is established the tenderer must be in possession of an establishment permit³⁸⁵ issued by the Government of the member-State in which the contract is awarded?

(2) Do the provisions of Article 29 (5) of Directive 71/305/EEC require the authority awarding the contract to request the tenderer whose tenders, in the authority's opinion, are obviously abnormally low in relation to the transaction, to furnish explanations for those prices before investigating their composition and deciding to whom it will award the contract, or do they in such circumstances allow the authority awarding the contract to decide whether it is necessary to request such explanations?

Opinion of the Advocate General (Herr Gerhard Reischl)

In March 1979 the Luxembourg Administration des Ponts et Chaussées (Bridges and Highways Authority) issued a notice of invitation to tender concerning works to be carried out on the motorway to Arlon. Among the undertakings participating in this 'open' procedure within the meaning of Council Directive 71/305 was SA Transporoute et Travaux (hereinafter referred to as 'Transporoute'), a company established in Belgium, which apparently submitted the lowest tender. The contract was awarded by decision of the Ministre des Travaux Publics (Minister of Public Works) of 7 June 1979, not to Transporoute, but to a consortium led by a Luxembourg contractor, on the ground that its tender was the economically most advantageous one.

Transporoute contested this decision in proceedings which it brought before the Luxembourg Conseil d'Etat (State Council) in October 1979. Its action was principally founded on the complaint that the contested decision failed to have regard to section 33 (3) of the Grand-Ducal Regulation of 6 November 1974 (on (1) the drawing up of a list of the general specifications applicable to public works and supply contracts for the State; (2) the determination of the powers and *modus operandi* of the adjudication panel for tenders), which stipulates that in principle the contract must be awarded to the person who has submitted the economically most advantageous tender.

In its defence the administration also referred to section 33 of the Grand-Ducal Regulation according to which contracts may be awarded only to undertakings which meet the conditions laid down in section 1 of the regulation. It pointed out that the fourth paragraph of that section provides that foreign undertakings not established in the Grand Duchy are required to fulfil the same conditions prior to the award of the contract as those applicable under section 1 (1) to national undertakings, 'subject to the operation of different provisions contained in international conventions and in particular the provisions to be applied pursuant to the Treaty of Rome'. Section³⁸⁶ 1 (1) provided, however--and this condition was not fulfilled by the plaintiff, which never made the appropriate application--that public works contracts may only be awarded to undertakings in possession of a valid establishment permit issued by the Luxembourg Government.

As against that argument the plaintiff relied on Article 24 of the above-mentioned Council Directive 71/305 concerning the coordination of procedures for the award

of public works contracts, which states:

'Any contractor wishing to take part in a public works contract may be requested to prove his enrolment in the professional or trade register under the conditions laid down by the laws of the Community country in which he is established: in Belgium, the *registre du commerce--Handelsregister ...*'

It considers that the certificate of registration issued by the Belgian authorities produced by it ought to have been accepted by the Luxembourg authorities as equivalent for the purposes of section 1 (4) of the Grand-Ducal Regulation and that consequently those authorities should not have imposed any further requirements on it.

On the other hand, the defendant administration contended that the plaintiff's tender could not truthfully be considered to be economically the most advantageous one. On the contrary, it was rightly disregarded because a number of the prices stated in it were abnormally low and so unrelated to the extent of the works that, since it would have been unrealistic to expect the works to be carried out faultlessly, the tender had to be considered as inadequate within the meaning of section 32 of the Grand-Ducal Regulation of 6 November 1974. The plaintiff disagrees and submits that the Luxembourg administration has disregarded Article 29 (5) of Council Directive 71/305 in that respect because it did not, as is required in the case of abnormally low tenders, request the plaintiff to furnish the necessary explanations concerning individual items in the tender and did not indicate which explanations it found unacceptable.

By judgment of 11 March 1981 the Luxembourg Conseil d'Etat stayed the proceedings and referred the following questions for a preliminary ruling under Article 177 of the EEC Treaty:

[The Advocate General repeated the questions, and continued:]

My opinion on these questions is as follows.

1. First I must point out that the **grant** of an establishment permit under Luxembourg law, which is of crucial importance in the main action, and which is issued under the terms of a law of 2 June 1962, which was amended in 1964, is dependent in the case of undertakings which are not established in Luxembourg solely on an examination of what is referred to as their 'good standing' (section 6 in conjunction with section 20 of the Act). For that purpose an extract from the 'judicial record' and proof that no proceedings for a declaration of bankruptcy have been initiated are required. On the other hand there*387 is apparently no requirement concerning proof of qualifications in the case of individuals and undertakings who are not established in Luxembourg.

2. As to the first question, which relates in particular to Council Directive 71/304 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 [FN2] and to Council Directive 71/305 which I have already mentioned, and in particular to its Article 24, the following considerations are to be taken into account:

FN2 [1971] O.J.Spec.Ed. 678.

(a) The main question is whether it may be implied from Council Directive 71/305, in particular from Title IV, on common rules on participation, and Chapter I thereof (criteria for qualitative selection) that the enumeration which it gives of documents and other evidence production of which may be required is exhaustive, in the sense that it is not permissible for national authorities to require further documents and evidence even if such requirements are laid down in non-discriminatory rules.

As a general point it has rightly been observed that the intention behind the directive is, by co-ordinating national procedures, to remove restrictions and ensure the free movement of services in the context of the award of public works contracts. Not only the spirit of the directive but also the very detailed nature of the rules which it contains make it clear that the adoption by national authorities of additional and possibly disparate requirements for access to public invitations to tender is incompatible with the directive.

Thus Article 23 of the directive prescribes in detail conditions under which undertakings may be prevented from participating. This provision also stipulates in very precise terms what is to be considered as sufficient evidence in this connection. According to Article 24 contractors wishing to tender for a public works contract may be requested to prove their enrolment in a professional or trade register subject to the conditions laid down by the laws of the Community country in which they are established. Article 25 determines the manner in which proof of the financial and economic standing of contractors wishing to participate is to be furnished. Article 26 does the same in respect of proof of technical ability. In Article 28, finally, there are provisions concerning the questions how member-States, which have official lists of recognised contractors, are to adapt them to the provisions of the directive, what effect certified registration in such a list by the competent authorities has and what evidence may be required before contractors of other member-States may be registered in such lists.

That member-States may not impose additional conditions for participation in procedures for the award of public contracts is³⁸⁸ indicated by the actual wording of the introductory provision of Article 20, which states:

'Contracts shall be awarded on the basis of the criteria laid down in Chapter 2 of this Title, after the suitability of contractors not excluded under the provisions of Article 23 has been checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Article 25 to 28.'

Quite apart from the wording of Article 20 there is support for the view that the list of grounds for exclusion in Article 23 is an exhaustive one in the fact that, if this were not the case, paragraphs (2) to (4) of Article 28 would be meaningless.

Those paragraphs state what evidence is to be considered sufficient and it is particularly noteworthy that it consists in every case of certificates and documents from the participant's *home country*, and not documents which he would have to obtain in the country in which the invitation to tender is issued. It is also significant that only in Article 25 (dealing with evidence of financial and economic standing, which is irrelevant for the purposes of the establishment permit under Luxembourg law) is there mention of the fact that the authorities

awarding contracts must specify what references *other* than those mentioned under (a) to (c) are to be produced, whereas Article 26, which regulates the various ways in which proof of technical ability may be furnished, merely provides that the authorities awarding contracts are to specify in the notice or in the invitation to tender which of the references are to be produced. It is also particularly significant that in Article 27 authorities awarding contracts are expressly directed in regard to invitations to supplement or clarify certificates, to keep such invitations within the limits of Articles 23 to 26, and that Article 28 (4) provides, in regard to the registration of contractors of other member-States in official lists, that no further proofs and statements may be required other than those provided for under Articles 23 to 26.

The Luxembourg Government contends that the aim of Directive 71/305 is primarily the harmonisation of *substantive* rules, whereas *procedural* questions, as is apparent from the preamble and Article 2, may be determined by the member-States. The Luxembourg establishment permit must, however, as it constitutes a formal requirement, be assigned to the latter category. On the other hand, relying on the above-mentioned Article 28 of Directive 71/305, it expounds in greater detail the view that the establishment permit, which is also valid for further procedures for the award of public works contracts, is nothing more or less than the registration in a list referred to in Article 28, which precisely in the case of Luxembourg has the peculiarity that the list is composed of files which are published on a monthly basis.

However, there can be no overlooking the fact that, far from preserving national procedural provisions intact, Article 2 of Directive*389 71/305 on which the Luxembourg Government relies provides that in awarding public works contracts the authorities awarding contracts are to apply their national procedures *adapted* to the provisions of the directive. Furthermore, however it is classified, the establishment permit clearly belongs to the category of documents and other evidence which is the subject of the detailed provisions contained in Article 23 *et seq.* of the directive and which accordingly may no longer be considered as a matter for the member-States.

On the other hand, so far as Article 28 and the official national lists referred to therein are concerned, it is questionable whether it is in fact possible to interpret that provision as meaning that member-States may make participation in a procedure for the award of a public works contract conditional upon registration in such a list, thus making registration mandatory. In my view there are good reasons for taking the view that the provision merely creates an option (one need only consider the relevant phrase in paragraph (2): 'contractors ... may'), in other words that the purpose of the provision is to simplify for interested contractors the process of producing evidence for the purposes of the directive. It is quite certain, however, that such registration may not be required if the contractor in question has already been registered in a similar list in his home country; otherwise paragraphs (2) and (3) of Article 28, determining the legal effects of certificates of registration in official lists of other member-States, would be pointless.

Furthermore, it is difficult to maintain that the establishment permit is an instrument of the kind with which Article 28 is concerned. This is so not only for

purely external reasons--a number of establishment permits simultaneously can hardly be described as a 'list'--or because of the fact that an establishment permit is required for *all* contractors, in other words not only for those who wish to participate in an award procedure, and that Luxembourg has apparently never communicated to other member-States the information referred to in Article 28 (5). The important point is simply that the grant of an establishment permit to foreign contractors depends solely on a test of 'good standing'. There is no test of technical knowledge or ability, and therefore only specific proof of that, and of the contractor's financial and economic standing, make it possible to participate in the procedure for the award of a public works contract. Hence the establishment permit alone would not suffice.

(b) A second consideration which arises in connection with the first question relates to Article 59 of the Treaty, which according to the case law ([Case 33/74 Van Binsbergen v. Bestuur Van de Bedrijfsvereniging voor de Metaalnijverheid](#) [FN3]) has been directly applicable since the expiry of the transitional period and requires the abolition of restrictions on the freedom to provide services. It is also*390 connected with Directive 71/304, Articles 1 and 3 of which likewise impose an obligation to remove such restrictions. The Commission expressed the view that the requirement of an establishment permit under Luxembourg law may quite certainly be considered as constituting, for contractors established in other countries, a restriction of that kind and that therefore it is also unacceptable by virtue of the above-mentioned provisions.

FN3 [\[1974\] E.C.R. 1299](#), [\[1975\] 1 C.M.L.R. 298](#).

That is an argument which it is hard to ignore. It is irrelevant that section 1 of the Grand-Ducal Regulation referred to at the beginning of this opinion does not make any distinction on the basis of nationality and hence does not provide for discriminatory treatment within the meaning of Article 3 (1) (a) of Directive 71/304. The point is that Article 3 (1), which defines the duties of the member-States, requires not only the abolition of restrictions which are due to differences in the treatment of nationals and foreigners, but more importantly, it also covers, in sub-paragraph (c), restrictions 'existing by reason of provisions or practices which, although applicable irrespective of nationality, nonetheless hinder exclusively or principally the professional or trade activities of nationals of other member-States ...'. That the establishment permit at issue in this case constitutes a hindrance primarily to contractors not established in Luxembourg is, however, scarcely in doubt. They must, even to participate only once in a procedure for the award of a public works contract, procure such a document and submit themselves for the purpose to an administrative procedure conducted by a foreign authority, whereas contractors who are established in Luxembourg conduct all their normal business activities on the basis of such a permit so that in their case the restriction of its validity to two years has not the same importance which it has for foreign contractors.

Furthermore, the objection raised by the Luxembourg Government to the effect that only the fulfilment of simple, not particular obstructive formalities is required

is, in my view, not a valid one. Even if one does not take the view that restrictions on the freedom to provide services are abolished irrespective of the degree of their severity, one can scarcely maintain that the burdens imposed by the requirement of an establishment permit is wholly insignificant and in no way liable to discourage foreign contractors from participating in procedures for the award of public works contracts.

(c) Finally, reference may be made to Article 28 of Directive 71/305 which concerns the official lists of recognised contractors maintained by the member-States. Paragraph (2) of that Article provides that contractors registered in such lists may, for each contract, submit to the authority awarding contracts a certificate of registration issued by the competent authority. The first sub-paragraph of paragraph (3) provides that certified registration in such lists by³⁹¹ the competent bodies is to constitute, for the authorities of other member-States awarding contracts, a presumption of suitability for works corresponding to the contractor's classification as regards Articles 23 (a) to (d) and (g), 24, 25 (b) and (c) and 26 (b) and (d). According to the second sub-paragraph of paragraph (3) information which can be deduced from registration in official lists may not be questioned. The third sub-paragraph of paragraph (3) provides further that the authorities of other member-States awarding contracts are to apply the above provisions only in favour of contractors who are established in the country holding the official list.

It was submitted in the course of the proceedings that such lists are in existence both in Italy and in Belgium. In the latter country registration is covered by a law of 14 July 1976 which was adapted to the provisions contained in the directive and according to which the criteria to be met are precisely those set out in the directive, namely those concerning 'good standing' contained in Article 23. It was also submitted that the plaintiff in the main action was registered in such a list and had produced to the Luxembourg authorities awarding contracts a certificate of registration in accordance with Article 28 (2) of the directive.

If that is in fact the case--and it is for the court seised of the main action to enquire whether it is--then it is plain that the generally applicable (that is to say, in the absence of special factors) requirement of an establishment permit under Luxembourg law the grant of which is dependent solely on proof of the applicant's good standing is not compatible therewith. This state of affairs would be contrary to Article 28 (3) which states that certified registration in an official list constitutes a presumption that the requirements of Article 23 (a) to (d) and (g) have been met. It is, moreover, inconsistent with the second sub-paragraph of Article 28 (3) according to which information which can be deduced from registration in official lists may not be questioned, and which states that additional evidence may be required only with regard to the payment of social security contributions.

The plaintiff's registration in an official Belgian list and its production of the corresponding certificate under Directive 71/305 is therefore sufficient to entitle it to participate in a procedure for the award of a public works contract and accordingly there can be no question of requiring further documentary evidence, such as the Luxembourg establishment permit, covering the same aspects as the

certificate.

3. The second question raised by the Luxembourg Conseil d'Etat refers to Article 29 (5) of Directive 71/305, which reads as follows:

'If, for a given contract, tenders are obviously abnormally low in relation to the transaction, the authority awarding the contract shall examine the details of the tenders before deciding to whom it will*392 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'

The point to be clarified in relation to this question is whether the above provision places the authority awarding the contract under a duty to seek clarification from a tenderer whose tender is obviously abnormally low before examining the individual items in the tender and deciding to whom to award the contract or whether there is a discretion not to apply the provision if further enquiries appear to serve no useful purpose. The reason for the question is that the defendant in the main action based its assessment of the plaintiff's tender on section 32 of the Grand-Ducal Regulation of 6 November 1974 whereby the above-mentioned provision of the directive was supposed to be incorporated into Luxembourg law. According to that section a tender is not to be considered if the price stated therein bears so little relationship to the works in respect of which tenders are invited *qu'il ne permet pas de s'attendre raisonnablement a une execution impeccable* (that faultless execution of the work cannot reasonably be expected). Apart from that it is merely provided that where a tender appears to be 'suspect' or is contested by another participant the tenderer is to be required *a presenter sans retard les details de son analyse des prix d'unite suivant les elements de calcul du prix de revient enumeres a l'article 12 sous 1 a 7 ou suivant schema a lui communique par le commettant* (to submit without delay the details of his unit price analysis on the basis of the factors to be used in calculating the cost price which are set out in section 12 (1) to (7) or on the basis of a formula communicated to him by the awarding authority). Since those provisions clearly do not reproduce exactly the terms of Article 29 of Directive 71/305 the national court wishes to know, apparently (and rightly) on the assumption that that provision of the directive is directly applicable and takes precedence over national law, what direct effect the directive had in this regard.

In my view the very wording of the provision which has been quoted, especially the use of the indicative mood, makes it clear that the authority awarding the contract has a duty to examine the individual components of a tender before it makes its decision, to seek suitable justification from the tenderer, to take the result thereof into account and to indicate which explanations are to be considered to be unacceptable. That is the view which the Belgian Conseil d'Etat appears to have taken with regard to a corresponding provision of Belgian law adopted in implementation of the directive (section 25 of the Belgian *arrete royal* of 22 April 1977). On the other hand I do not see how there could be any justification, founded, for example, on the spirit of the directive, for drawing a distinction between 'normal' situations and abnormal ones in which it is not

considered necessary*393 to seek explanations on the ground that the prices contained in the tender represent a mere fraction of the usual delivery price and thus bear no relation to reality. In this respect it should be remembered that a situation which appears at first sight to be abnormal may create a different impression once the actual circumstances in which a tender is made, known often only to the tenderer, come to light. In addition, there is no doubt that a provision which lays down a duty of care and is intended to provide procedural guarantees for the protection of tenderers must be strictly interpreted.

Unambiguous criteria are necessary in the interests of legal certainty and it would therefore scarcely be acceptable if they could on occasion be ignored on the basis of such vague concepts as that of a 'normal situation' or lack of relation to reality, which merely amounts to converting a clear duty into a discretion.

1. Accordingly I suggest that the reply to the questions referred by the Luxembourg Conseil d'Etat for a preliminary ruling should be as follows:

(a) It is contrary to the provisions of Directives 71/304 and 71/305 for the authority awarding the contract to require a tenderer established in another member-State to be in possession of an establishment permit issued by the government of the member-State in which the contract is to be awarded.

(b) In particular, no such establishment permit may be required if the tenderer is registered in his home country in an official list within the meaning of Article 28 of Directive 71/305 and produces as evidence of that a certificate of registration in accordance with Article 28 (2) of the directive which raises a presumption that the conditions upon which the grant of an establishment permit depends have been met.

(c) Article 29 (5) of Directive 71/305 requires the authority awarding the contract to request the tenderer whose tender, in the authority's opinion, is obviously abnormally low in relation to the transaction, to furnish explanations for his prices before investigating their composition and deciding to whom the contract shall be awarded.

JUDGMENT

[1] By judgment of 11 March 1981 which was received at the Court on 7 April 1981 the Comite du Contentieux du Conseil d'Etat (Judicial Committee of the State Council) of the Grand Duchy of Luxembourg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions concerning the interpretation of Council Directives 71/304 and 71/305 of 26 July 1971 concerning, respectively, 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*394 or branches, [FN4] and the co-ordination of procedures for the award of public works contracts. [FN5]

FN4 [1971] O.J.Spec.Ed. 678.

FN5 [1971] O.J.Spec.Ed. 682.

[2] The questions arose in the course of a dispute the origin of which lay in a notice of invitation to tender issued by the Administration des Ponts et Chaussées (Bridges and Highways Authority) of the Grand Duchy of Luxembourg, in response to which SA Transporoute et Travaux (hereinafter referred to as 'Transporoute'), a company incorporated under Belgian law, had submitted the lowest tender.

[3] The tender was rejected by the Minister of Public Works because Transporoute was not in possession of the Government establishment permit required by section 1 of the *Reglement Grand-Ducal* (Grand-Ducal Regulation) of 6 November 1974 [FN6] and because the prices in Transporoute's tender were considered by the Minister of Public Works to be abnormally low within the meaning of the fifth and sixth paragraphs of section 32 of that regulation. As a result, the Minister of Public Works of the Grand Duchy of Luxembourg awarded the contract to a consortium of Luxembourg contractors whose tender was considered to be economically the most advantageous.

FN6 Memorial (Gazette) A, 1974, p. 1160 et seq.

[4] Transporoute brought an action before the Conseil d'Etat for the annulment of the decision. In support of its application it contended *inter alia* that the reasons given for rejecting its tender amounted to an infringement of Council Directive 71/305, in particular Articles 24 and 29 (5) thereof.

[5] Considering that the dispute thus raised questions concerning the interpretation of Community law, the Conseil d'Etat referred to the Court for a preliminary ruling two questions concerning the interpretation of Council Directives 71/304 and 71/305.

First question

[6] The first question asks whether it is contrary to the provisions of Council Directives 71/304 and 71/305, in particular those of Article 24 of Directive 71/305, for the authority awarding the contract to require as a condition for the award of a public works contract to a tenderer established in another member-State that in addition to being properly enrolled in the professional or trade register of the country in which he is established the tenderer must be in possession of an establishment permit issued by the Government of the member-State in which the contract is awarded.

[7] Directives 71/304 and 71/305 are designed to ensure freedom to provide services in the field of public works contracts. Thus the first of those directives imposes a general duty on member-States to*395 abolish restrictions on access to, participation in and the performance of public works contracts and the second directive provides for co-ordination of the procedures for the award of public works contracts.

[8] In regard to such co-ordination Chapter I of Title IV of Directive 71/30 5 is not limited to stating the criteria for selection on the basis of which contractors may be excluded from participation by the authority amending the contract. It also

prescribes the manner in which contractors may furnish proof that they satisfy those criteria.

[9] Thus Article 27 states that the authority awarding contracts may invite the contractor to supplement the certificates and documents submitted only within the limits of Articles 23 to 26 of the directive, according to which member-States may request references other than those expressly mentioned in the directive only for the purpose of assessing the financial and economic standing of the contractors as provided for in Article 25 of the directive.

[10] Since the establishment permit in question is intended, as the Luxembourg Government has acknowledged in its written observations, to establish not the financial and economic standing of undertakings but the qualifications and good standing of those in charge of them, and since the exception provided for in Article 25 of Directive 71/305 does not apply, the permit constitutes a means of proof which does not come within the closed category of those authorised by the directive.

[11] The Luxembourg Government submits, however, that the grant of an establishment permit is equivalent to registration of the contractor in question in a list of recognised contractors within the meaning of Article 28 of Directive 71/305 and therefore complies with the terms of that provision.

[12] It should be pointed out, in reply to that argument, that even if the establishment permit may be equated with registration in an official list of recognised contractors within the meaning of Article 28 of Directive 71/305, there is nothing in that provision to justify the inference that registration in such a list in the State awarding the contract may be required of contractors established in other member-States.

[13] On the contrary, Article 28 (3) entitles contractors registered in an official list in any member-State whatever to use such registration, within the limits laid down in that provision, as an alternative means of proving before the authority of another member-State awarding contracts that they satisfy the qualitative criteria listed in Articles 23 to 26 of Directive 71/305.

[14] It should be noted that the result of that interpretation of Directive 71/305 is in conformity with the scheme of the Treaty provisions concerning the provision of services. To make the provision of services in one member-State by a contractor established in another member-State conditional upon the possession of an*396 establishment permit in the first State would be to deprive Article 59 of the Treaty of all effectiveness, the purpose of that **Article** being precisely to abolish restrictions on the freedom to provide services by persons who are not established in the State in which the service is to be provided.

[15] Accordingly, the reply to the first question must be that Council Directive 71/305 must be interpreted as precluding a member-State from requiring a tenderer established in another member-State to furnish proof by any means, for example by an establishment permit, other than those prescribed in Articles 23 to 26 of that directive, that he satisfies the criteria laid down in those provisions and relating to his good standing and qualifications.

Second question

[16] The second question asks whether the provisions of Article 29 (5) of Directive 71/305 require the authority awarding the contract to request a tenderer whose tenders, in the authority's opinion, are obviously abnormally low in relation to the transaction, to furnish explanations for those prices before investigating their composition and deciding to whom it will award the contract, or whether in such circumstances they allow the authority awarding the contract to decide whether it is necessary to request such explanations.

[17] Article 29 (5) of Directive 71/305 provides that if a tender is obviously abnormally low the authority awarding the contract is to examine the details of the tender and, for that purpose, request the tenderer to furnish the necessary explanations. Contrary to the view expressed by the Luxembourg Government, the fact that the provision expressly empowers the awarding authority to establish whether the explanations are acceptable does not under any circumstances authorise it to decide in advance, by rejecting the tender without even seeking an explanation from the tenderer, that no acceptable explanation could be given. The aim of the provision, 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.

[18] The reply to the second question must therefore be 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.

***397 Costs**

[19] The costs incurred by the Government of the Kingdom of Belgium, the Government of the Italian Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As the proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action before the national court, the decision as to costs is a matter for that court.

Order

On those grounds, THE COURT, in answer to the questions referred to it by the Comite du Contentieux of the Conseil d'Etat of the Grand Duchy of Luxembourg by judgment of 11 March 1981,
HEREBY RULES:

Council Directive 71/305 must be interpreted as precluding a member-State from requiring a tenderer in another member-State to furnish proof by any means, for example by an establishment permit, other than those prescribed in Articles 23 to

26 of that directive that he satisfies the criteria laid down in those provisions and relating to his good standing and qualifications.

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.

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