OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 5 June 2001 [1]

I — Introduction

1. Five questions for preliminary ruling on the interpretation of Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [2] (hereinafter 'the Directive' or 'Directive 93/37/EEC') have been referred to the Court of Justice by the Fourth Chamber of the Consiglio di Stato (Council of State) della Repubblica Italiana, sitting as a judicial body, ruling on appeals lodged respectively against two judgments of the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio).

2. The question referred by the Consiglio di Stato to the Court of Justice is based on essential principles of Community law on public contracts, principles that cannot be renounced, concerning the setting of objective criteria for participation in calls for tender and the award of public contracts, as part of a transparent procedure in which any measures and provisions which may have discriminatory effects are prohibited. [3]

3. In cases of this kind, the emphasis is placed on abnormally low tenders in respect of a contract. Emphasis is placed, in particular, on the procedure for excluding such tenders, such a procedure being effected in order to clear the field prior to the award of contracts by rejecting proposals which do not display sufficient creditworthiness. One further principle of Community law on public contracts must be respected: the principle of efficiency. [4]

1 — Original language: Spanish.

2 — OJ 1993 L 199, p. 54.

3 — The principles referred to are those in the 'classical' directives concerning the coordination of procedures for the award of contracts for public supplies, services and works. For public supply contracts see Council Directive 77/62/EEC of 21 December 1976 (OJ 1977 L 13, p. 1) and Council Directive 93/36/EEC of 14 June 1993 (OJ 1993 L 199, p. 1). For public service contracts see Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1). Finally, publicity, as a means to administrative transparency, and the principle of non-discrimination are mentioned, with regard to public works contracts, in Council Directive 71/305/EEC of 26 July 1971 (OJ, English Special Edition 1971 (II), p. 682) and, since its repeal, in the Directive of which Article 30(4) is the subject of the questions for preliminary ruling herein.
The Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (OJ 2001 C 29 E, p. 11; hereinafter 'the Proposal for a Directive') which seeks to consolidate the three 'classical' directives and bring them together in a single text adheres to the principles of equality of treatment and transparency (see second recital).

4 — The principle of efficiency, in its broad sense, appears in recitals 19, 23 and 25 of the Proposal for a Directive mentioned in the footnote above. It also appears in a number of articles of Directive 93/37/EEC (see, for example, Articles 4, 7 and 14).

4. As regards abnormally low tenders, the Consiglio di Stato raises doubts concerning the compatibility of the following with Article 30(4) of the Directive:

(1) the establishment of a mechanism for automatically setting a threshold on the basis of which a tender is considered abnormally low which prevents undertakings from ascertaining the threshold level before submitting their tenders.

(2) the exclusion from the outset of tenders not accompanied by an explanation in respect of the price for an amount equal to at least 75% of the figure specified in the tender conditions and the fact that only certain explanations are admissible, with those referring to minimum figures which can be inferred from official lists being ruled out.

(3) provision for a procedure in which, after the opening of the envelopes, and before the adoption of the measure excluding an undertaking, those undertakings which have submitted irregular tenders have no opportunity to state their reasons and clarify their position.

II — Law

1. *Community law*

5. Directive 71/305/EEC which constituted a first step towards the coordination of laws of the Member States in respect of public works contracts had as its main purpose the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts. [5] That Directive took account of the possibility that abnormally low tenders might be submitted and Article 29(5) made provision for their possible exclusion.

6. Directive 71/305 was amended substantially and on a number of occasions, [6] for which reason its consolidation was appropriate, this being realised in Directive 93/37. [7] In Article 30(4) the new text simply reproduced, with minor amendments, the text of Article 29(5) of Directive 71/305 of the Directive as it stood following the 1989 amendment. Article 30(4) states that:

'If, for a given contract, tenders appear to be abnormally low in relation to the works,

5 — See first recital.

6 — One of those amendments, *inter alia*, was to Article 29(5) which was given a new wording in Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1).

7 — See first recital.

the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

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

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

...'

2. *Italian law*

7. Article 30(4) of the Directive was transposed into Italian law in Article 21(1a) of Law No 109 of 11 February 1994, outline law on the subject of public works, [8] appended to the original text in Article 7 of Law No 216 of 2 June 1995. [9] That law states that:

'In cases of awards of contracts for works of ECU 5 million or above on the basis of the lowest-bid criterion mentioned in paragraph 1, the authority concerned must assess the irregular nature of the tenders referred to in Article 30 of Council Directive 93/37/EEC of 14 June 1993 in relation to all tenders undercutting the indicative price by more than the percentage fixed by 1 January of each year by decree of the Minister of Public Works, after hearing the views of the Monitoring Authority, having regard to the tenders admitted to the procedures held in the previous year.

To that end the public administration may take account only of explanations based on the economy of the construction method or of the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer, but not of explanations relating to all those elements for which minimum values are laid down by legislation, regulations or administrative provisions or for which minimum values can be inferred from official data. Tenders must be

8 — *Gazzeta Ufficiale della Repubblica Italiana* ('GURI') No 41 of 19 February 1994, p. 5.

9 — GURI No 127 of 2 June 1995, p. 3. This is the law resulting from the adoption, with amendments, of the Statutory Order of 3 April 1995 No 101 on urgent regulations concerning public works (GURI No 78 of 3 April 1995, p. 8).

accompanied, when submitted, by explanations concerning the most significant price components, indicated in the tender notices or the letters of invitation, which together add up to not less than 75% of the amount indicated in the tender notice.

...' [10]

Public Works determined the irregularity threshold beyond which there would be an obligation on the part of the contracting authority to verify the tender in question: '... an extent equal to the arithmetical mean of the percentage discounts in all the tenders admitted, increased by the arithmetical mean of the difference in the percentage discounts which are in excess of the said mean.'

III — Facts and the main proceedings

8. By the Ministerial Decrees of 28 April 1997 [11] and 18 December 1997 [12] issued under the first subparagraph of Article 21(1a) of Law No 109/1994 for 1997 and 1998 respectively the Minister of

1. *Case C-285/99*

9. The Italian National Highways Authority (hereinafter 'the ANAS') published a notice calling for tenders, under a restricted procedure, for works described as 'RM 87/97 — GRA Motorway — stretch 19 — widening to three lanes in both directions from km 43,280 to km 46,500'.

10. The temporary association of undertakings constituted by Lombardini SpA — Impresa Generali di Costruzioni (herein-

10 — The provision was amended by Article 7 of Law No 415 of 18 November 1998 (GURI No 284 of 4 December 1998, ordinary supplement, p. 5). Following that amendment, which is not applicable to this case *ratione temporis*, the text of Article 21(1a) of Law 109/1994 reads: 'In awarding contracts for works of ECU 5 million or more according to the criterion of the lowest bid within the meaning of Article 1, the authority concerned shall assess irregularities inherent in tenders in accordance with Article 30 of Council Directive 93/37/EEC of 14 June 1993 for all tenders undercutting by an amount *equal or greater than the arithmetical average of the percentage discounts of all the bids accepted, excluding ten per cent, rounded up to the next unit, for bids undercutting by a large amount and those undercutting by a small amount, increased by the arithmetical average differential of the percentage discounts which exceed that average* (the italics indicate the differences with respect to the previous wording). To that end the public administration may take account only of explanations based on the economy of the construction method, or the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer in question, but not, however, of explanations relating to those elements for which minimum values have been set by laws, regulations or administrative measures, or for which minimum values can be inferred from official data. At the time of submission, tenders must be accompanied by explanations concerning the most significant price components, indicated in the tender notice or in the letter of invitation, which in total amount to no less than 75% of the figure specified in the tender notice... .'

11 — GURI No 105 of 8 May 1997, p. 28.

12 — GURI No 1 of 2 January 1998, p. 26.

after: 'Lombardini'), Collini — Impresa di Costruzioni SpA and Trevi SpA was invited to participate in the tender procedure by letter No 1723 of 15 October 1997. In so far as is relevant and in accordance with the provisions of Article 21(1a) of Law No 109/1994, the letter of invitation contained the following information:

A. The requirement upon applicants to include with their bids explanations concerning the most significant price indications equivalent to 75% of the figure specified in the tender. The explanations were to be drafted in accordance with the format attached to the letter of invitation and were to be included in the envelope containing the administrative documentation to be submitted.

B. The requirement to attach, in a separate envelope, the necessary documentation for verification of the data in the explanatory breakdown accompanying the bid. The envelope would be opened and its contents examined only if the bid exceeded the arithmetical threshold indicative of irregularity.

C. A warning that failure to respect any of the above requirements would mean exclusion of the bids.

D. Criteria on the basis of which tenders suspected of being irregular would be verified.

11. The bid by Lombardini was qualified as abnormally low, [13] by reason of which the envelopes containing the explanatory documentation were opened. After consideration, the bid was rejected and the contract awarded to Società Italiana per Condotte d'Acqua.

12. Lombardini immediately lodged a complaint with the Tribunale Administrativo Regionale per il Lazio regarding the contract notice, the letter of invitation, its own exclusion and the award of the contract. Its applications were dismissed by that court and Lombardini therefore lodged an appeal invoking amongst other arguments 'incorrect and inappropriate interpretation of Article 30 of Directive 93/37'. [14]

2. *Case C-286/99*

13. ANAS published a contract notice for the award, under restricted procedure, of a

13 — The irregularity threshold was set at 28.004% while the discount submitted by Lombardini was 29.88%.

14 — Third paragraph of the Chapter 'Facts' in the order for reference.

corresponding contract to complete the second stage of construction work of the Bergamo/Zanica stretch of provincial road No 115.

14. Mantovani SpA (hereinafter 'Mantovani'), in temporary association with another undertaking, was invited to participate in the tender procedure by a letter stating that the award would be made in accordance with Article 21(1a) of Law No 109/1994 in the version in Article 7 of Law No 216/1995, and stating that irregularity of the tenders would be assessed in accordance with Article 30(4) of the Directive and the criteria outlined in the Ministerial Decree of 28 April 1997. The letter of invitation set out the requirements for contractors and warnings about exclusion similar to those mentioned above in the description of the facts of Case C-285/99.

15. Mantovani submitted a figure which exceeded the irregularity threshold,[15] for which reason its application was considered irregular. After the bid had been examined in conjunction with the related explanations and the data submitted for analysis, it was declared inadmissible. The contract was awarded to the temporary association of undertakings Bregoli/Roda.

16. Contesting the inadmissibility of its bid, Mantovani lodged a complaint concerning the contract notice, the letter of invitation, the decision to exclude it from the awards procedure and the award itself. The Tribunale Amministrativo Regionale per il Lazio dismissed the action in Judgment No 1498 of 26 June 1998.

17. Mantovani appealed, alleging breach of Article 30(4) of the Directive 'in so far as the procedure for verifying admissibility of the bids... is in breach of Community principles which prohibit any automatic exclusion' and regarding '... improper conduct of the oral proceedings after it had been ascertained that the bid indicated irregularities'.[16]

IV — Questions for preliminary ruling

18. The Consiglio di Stato believes that in order to resolve both appeals, the exact scope of Article 30(4) of the Directive must be established as regards the reference to the procedure for verification of abnormally low bids, and it therefore puts the following questions to the Court of Justice:

'(1) Does recourse to a clause in calls for tenders for public works contracts which prevents the participation of

15 — The threshold was set at 40.865% and Mantovani submitted a discount of 41.460%.

16 — Chapter II of the order for reference.

undertakings which have not submitted with their tenders explanations in respect of the price indicated, being equal to at least 75% of the figure specified in the tender conditions, represent an obstacle to the application of Article 30(4) of Directive 93/37?

(2) Does the establishment of a mechanism for automatically identifying tenders which overstep a threshold indicative of irregularities and whose validity should therefore be checked, based on a case-by-case criterion and an arithmetical mean, which is such that undertakings are unable to ascertain that threshold in advance, represent an obstacle to the application of Article 30(4) of Directive 93/37?

(3) Does the fact that provision is made for a prior exchange of views, without the undertaking which has allegedly submitted an irregular tender having an opportunity to state its reasons, after the opening of the envelopes and before the adoption of the measure excluding it, represent an obstacle to the application of Article 30(4) of Directive 93/37?

(4) Does a provision under which the contracting authority may take account of explanations relating solely to the economy of the construction method or the technical solutions adopted or the exceptionally favourable conditions available to the tenderer represent an obstacle to the application of Article 30(4) of Directive 93/37?

(5) Does the exclusion of explanations relating to items for which minimum figures can be inferred from official lists represent an obstacle to the application of Article 30(4) of Directive 93/37?'

V — Proceedings before the Court of Justice

19. By Order of 14 September 1999, the President of the Court decided to join the two sets of proceedings given that they were, in objective terms, interrelated.

20. The Commission, the Italian and Austrian Governments, the applicants in the main action, Lombardini and Mantovani, and Coopsette (intervener in the dispute initiated by Mantovani), submitted written observations before the relevant deadline

established under Article 20 of the EC Statute of the Court of Justice.

21. At the hearing on 3 May 2001 all the parties, with the exception of the Austrian Government, appeared to put their submissions orally.

VI — Consideration of questions for preliminary ruling

22. The five questions referred by the Consiglio di Stato can be grouped, as indicated in paragraph 4 of this Opinion, into three categories:

(1) Automatic setting of the threshold indicative of irregularity. This refers to the second question.

(2) Explanations of the price submitted and the nature of those explanations. This refers to the first, fourth and fifth questions.

(3) No system of hearings for undertakings whose tenders are abnormally low before they are excluded. This concerns the third question in the order for reference.

23. My arguments will follow the above outline; however, there should initially be some consideration, even if only superficial, of the principles in Community law which underlie the system of awarding public contracts, in order better to understand the rules in Article 30(4) of the Directive.

1. *Principles underlying selection of a contractor*

24. The Directives on public contracts, each one concerned with a specific field, aim to promote the development of effective competition in the sector of public contracts [17] by realising three of the funda-

17 — Case 103/88 *Fratelli Costanzo* v *Comune di Milano* [1989] ECR 1839, end of paragraph 18 (hereinafter '*Fratelli Costanzo*').

mental freedoms of European integration (free movement of goods, freedom of establishment and the freedom to provide services).[18] Those directives aim to give effect to the requirements set out by the Community legislature in Articles 9, 52 and 59 of the EC Treaty (now, after amendment, Articles 23 EC, 43 EC and 49 EC).

25. Giving effect to those requirements and the pursuit of that objective can only be achieved if those who wish to be awarded public contracts can apply on an equal basis, without any discrimination whatsoever;[19] to this end, a system based on objectivity at all levels, in terms of both substance and form, is indispensable. Firstly, by setting objective criteria for participation in the tender and award of contracts.[20] Secondly, by making provision for open procedures in which transparency is the norm.[21]

26. The criteria for participation or selection on the basis of quality refer to the suitability of applicants, to their skills and experience, both professional, economic and technical. To rule out any discriminatory effect, it is necessary in each case to predetermine, within the framework of the law, rules governing the procedure, as well as the levels of skill and experience required.[22]

27. Once the tenderers qualifying for award of the contract have been selected upon application of the rules on participation, that award is also subject to objective parameters of assessment, whether the lowest bid or the most economically advantageous. If the second criterion is applied the awarding authority must set out in advance the selection criteria in the contract documents or contract notice, stating their respective importance.[23]

28. As can be seen, the system is intended to ensure that nothing is left to chance or subject to any arbitrary decision on the part of the body awarding the contract. The

18 — On the subject of works contracts see first recital of Directive 71/305 and second recital of Directive 93/37. See also the second recital of the Proposal for a Directive.

19 — This, however, means opening up national markets to public contracts, which is also a requirement of the EC Treaty (See Article 130f (2), now Article 163 EC) in the area of research and technological development in this case.

20 — The distinction between the criteria for participation and the criteria for award of contracts was highlighted by Advocate General Darmon in his Opinion in Case 31/87 *Beentjes* v *Netherlands* [1988] ECR 4635. Referring to Directive 71/305 he noted that the Directive 'draws a clear distinction between the criteria for checking the suitability of a contractor, which concern the qualities of the contractor as such, and those for awarding the contract, which relate to the qualities of the service which he offers, of the work which he proposes to carry out' (paragraph 36). That distinction is also made in the Proposal for a Directive (recitals 27 to 29).

21 — See above, paragraph 2 and footnote 2. See also recitals 27 to 30 of the Proposal for a Directive.

22 — See Articles 18 et seq. of the Directive and Articles 44 et seq. of the Proposal for a Directive.

23 — See Article 30(1) and (2) of the Directive and Article 53(1) and (2) of the Proposal for a Directive. The criteria used to determine the most economically advantageous tender must be directly linked to the purpose of the contract and may concern quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion (Article 53(1b) of the Proposal for a Directive).

system whereby tenderers apply on an equal footing, which must underlie the award of public contracts, means that any person who wishes to be awarded a contract of this kind must know beforehand what he must do to be awarded it, so that the awarding body is confined (given the discretion involved in the technical evaluation) to applying parameters set out in the rules, both those rules governing public contracts in a general sense, and those which involve in particular a specific contract, that is to say the contract documents or the contract notice. [24]

29. To ensure that such a system is effective and that there is no discrimination in the award of public contracts, it is not sufficient to set objective criteria for participation and award of the contracts, but application of the criteria must be based on transparency. This must apply from the time of the contract notice, in the contract documents and, finally, in the selection stage itself, as well as in the open procedures and restricted procedures. [25]

30. Those principles must be applied remembering that the award of public contracts is a way of managing public interests in which authorities invite persons — natural persons or legal persons — to collaborate in realising objectives asked of them which, in every instance, require an efficient response. On certain occasions, such efficiency is in conflict with the pace which a selection procedure, complete with guarantees, requires. For this reason the Directive excludes certain contracts from its field of application and, in particular cases, ordinary procedures for award of contracts and brings forward the time-limits in some instances. [26]

2. *Article 30(4) of the Directive*

31. Article 30(4) is part of the rules on award of the contract and, for the purpose of speeding up the process, authorises the rejection of tenders considered abnormally low in relation to the works. However, a rejection may not be made automatically as Community law requires the awarding authority: (1) before adopting its decision to give the tenderer the chance to provide details of the constituent elements of the tender, asking for any details it considers relevant, and (2) to that end, to take into

24 — For this reason the Proposal for a Directive states that no person may be excluded from the awards procedure on the basis of selection criteria or on the basis of level of skill and experience if not set out in the contract notice (Article 44(3)) and, conversely, that no person may be selected if he does not satisfy such criteria (Article 44(5)).

25 — See Articles 11 et seq. of the Directive and Articles 34 et seq. of the Proposal for a Directive. The Proposal for a Directive states in Article 41, expanding on Article 8 of the Directive, that awarding authorities shall inform any candidates of the decisions on the award of the contract, in particular, on any decisions rejecting their application, stating the reasons for the rejection. They must also communicate to all tenderers who have submitted an eligible tender the characteristics and the advantages of the tender selected and the name of the tenderer to whom the contract has been awarded. Similarly, the reasons for any decision not to award a contract or to start a new procedure must be made public.

26 — See, for example, Articles 4, 7 and 14.

consideration explanations submitted to it, especially those relating to the economy of the construction method, the technical solution chosen, the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed.

32. There are three consequences deriving from the above:

1a. The concept of an abnormally low tender is not an abstract concept; on the contrary, it is defined by reference to the contract to be awarded and to the work involved.

2a. The awarding authority must examine the tenders which it considers to be abnormally low [27] in order to be able to reject them.

3a. The decision to exclude may be adopted only after giving the tenderer the possibility of providing explanations regarding the tender, or after applying an oral verification procedure. [28]

3. *Automatic setting of the threshold indicative of irregularity*

33. As we have seen, Italian law sets out a mathematical, and thus automatic, system for setting the irregularity threshold. It consists of a percentage set by the Ministry of Public Works on 1 January each year. For the years 1997 and 1998, recognising that it was impossible to set a single threshold for the whole country, the Ministry used a mathematical formula, which varied according to the contract, consisting '... of an extent equal to the arithmetical mean of the percentage discounts in all the tenders admitted, increased by the arithmetical mean of the difference in the percentage discounts which are in excess of the said mean'. The contracting authority is required [29] to verify all tenders exceeding that threshold. [30]

27 — The Spanish version of Directive 71/305, and the version of 1989, mentioned 'ofertas que manifiesten un carácter anormalmente bajo' (the English version read 'if... tenders are obviously abnormally low...'. However, Directive 93/37 refers to tenders which appear to be abnormally low. This difference in the wording, in my opinion, dispels any doubts surrounding the interpretation of the 1971 text which obliged the Court of Justice in *Fratelli Costanzo* to state that the provision as construed referred to abnormally low tenders and not only to those which were obviously abnormally low.

28 — Ruling of the Court of Justice in *Fratelli Costanzo* (paragraphs 16, 18 and 19) and that precedent was subsequently confirmed in Case C-295/89 *Donà Alfonso* [1991] ECR I-2967. There was already a precedent in Case 76/81 *Transporoute* [1982] ECR 417. In Case C-304/96 *Hera* [1997] ECR I-5685 the Court stated that the verification procedure under Article 30(4) of the Directive must be applied, without exception, from 31 December 1992. In Case C-143/94 *Furlanis* [1995] ECR I-3633 the Court extended its decision regarding the 1971 directive (in the 1989 version) to the 1993 directive.

29 — Pursuant to *Fratelli Costanzo*, establishment of this requirement is in accordance with the Directive.

30 — See paragraphs 7 and 8 above.

34. A system such as that described above conforms to the requirements of Article 30(4) of the Directive and the principles underlying selection of the contractor.

35. I have stated that, according to Article 30(4), the concept of an abnormally low tender is very precise and must be determined for each contract according to the specific purpose it is intended to fulfil. In my view, an irregularity threshold based on a figure calculated using the bids submitted for a contract, bids which, by definition, are made in accordance with the purpose of the contract, is perfectly in line with the aims of the Directive. As the representative of Mantovani stated at the hearing, the system allows the market to establish the threshold, above which a tender may be considered irregular, for each contract. Moreover, given that the criterion represents an objective figure, all applicants are on an equal footing. No party has any advantage with respect to the others in submitting its bid.

36. However, this system suffers from an absence of transparency. Those parties wishing to participate in the award of the contract do not know when they submit their tender the threshold beyond which that tender may be considered as abnormally low. Furthermore, the awarding authority does not know that threshold either. This is the price which must be paid, however, if the legal concept of abnormally low tenders is to be a priori not predetermined, but perfectly capable of being determined in relation to each contract, in particular as required by Article 30(4) of the Directive.

37. Admittedly, automatic setting of the irregularity threshold, together with the requirement to submit explanations of the price with the tender and during the exclusion stage, before the verification procedure and without a hearing, of those tenders which are abnormally low may be incompatible with the requirements of the Directive. However, that consequence cannot *per se* be put down to the system of setting the irregularity threshold, but to the enforcement of that requirement or to implementation of the exclusion system.

38. In *Fratelli Costanzo* the Court did rule that the Directive [31] prohibits systems of automatic exclusion from procedures for the award of contracts, but the automatic exclusion procedure rejected by the Court is a procedure carried out without any oral verification procedure, not a procedure based on an irregularity threshold using mathematical criteria. [32]

39. In view of the foregoing I propose that the Court of Justice should answer the second question put by the Consiglio di Stato stating that Article 30(4) does not exclude a mathematical mechanism for setting an irregularity threshold such as to prevent tenderers from ascertaining that threshold before submitting tenders.

31 — Refers to Article 29(5) of Directive 71/305/EEC.

32 — Paragraph 19 of the judgment.

4. *Explanation of the price tendered*

A. Explanations which must be submitted with the tender

40. It can be seen from the principles to which selection in public contracts must conform, and which I have outlined above simply in descriptive terms, that there is nothing in the Directive in general nor in Article 30(4) which specifically prohibits a requirement, under threat of exclusion from the tender procedure, that the tender should be accompanied by an explanation of at least 75% of the price specified in the tender conditions. This constitutes an objective requirement which all applicants must satisfy.

41. The Directive does not require those wishing to be awarded a contract to indicate in advance the component parts and the contents of their tender, but there is nothing to prevent such a condition. A provision of this kind does not breach the principle of equality of conditions for those participating in the application procedure. Without exception, all of them must attach explanations on the biggest constituent elements of the price, equivalent to 75% of the figure specified in the tender conditions and enclose, in a separate, sealed envelope, the documents needed to verify the data on which the explanations are based.

42. In this way, therefore, the selection procedure is speeded up and efficiency increased which, as I said earlier, is also a requirement deriving from Community law on public contracts. In the course of the procedure described above, when a bid is considered abnormally low, the awarding authority can proceed, without further delay, to verification of the details and assessment of the explanations submitted, without having to wait for the tenderer to produce them; the tenderer may provide further explanations at the hearing which must take place before the tender is rejected.

In fact, it may happen that on viewing the documentation submitted alongside the tender and the clarifications provided at that point, the awarding authority decides to admit the tender.[33] The procedure for awarding the contract can be continued without the delay that would arise if no explanatory documentation had been submitted *ab initio* and it was necessary to hear the applicant in order for an explanation to be provided.

43. I therefore propose that the Court should answer the first question referred by the Consiglio di Stato stating that a provision in the contract notice according

33 — This is because the fact of a tender being considered as abnormally low does not entail its automatic exclusion. When the explanations submitted and explanatory documents have been assessed, the awarding authority may decide that, although it qualifies as abnormally low, the tender should be accepted. Article 30(4) would be devoid of meaning if, in all cases and whatever the explanations provided by the tenderer, his abnormally low bid were to be rejected.

to which undertakings which have not submitted with their tenders explanations in respect of the price indicated, being equal to at least 75% of the figure specified in the tender conditions, does not represent an obstacle to the application of Article 30(4) of the Directive. [34]

B. Nature of the explanations

44. The second indent of Article 30(4) provides that, to assess abnormally low tenders, the awarding authority may take into consideration explanations regarding the economy of the construction method or the technical solution chosen or the exceptionally favourable conditions available to the tenderer for the execution of the work or the originality of the work proposed by the tenderer.

45. The second indent does no more than enlarge upon the first indent of paragraph 4, according to which the awarding authority shall request from the tenderer details it considers relevant and, taking account of the explanations received, shall verify the constituent elements of the tender.

46. It appears from a joint interpretation of both indents that, before rejecting a tender by reason of the fact that it is abnormally low, the awarding authority must ask the applicant for any details and explanations it considers relevant. In response to this request, and to support his proposal, the tenderer must submit explanations he considers relevant, without any limitation, including those mentioned in the second indent.

All the explanations must be taken into consideration by the awarding authority when it makes its final decision on whether to accept or reject the tender, including the explanations outlined in the second indent. This provision is not a block rule, and does not set out a restrictive list of reasons and explanations which may be submitted, but, on the contrary, simply explains the general rules in the first indent.

47. Consequently, a provision limiting the category of explanations which the applicant in an abnormally low tender may

34 — A separate question, not referred to in any of the questions in this reference, concerns the fact that in practice (see paragraph 10(b) of this Opinion) there is a further requirement to submit in a sealed envelope documents which are used to verify the data included in the explanation and that the envelope is opened only if the tender exceeds the irregularity threshold and qualifies as abnormally low. In principle, in such an instance there is no different, unjustified treatment between tenders which are abnormally low and those which are not. Both are rejected if they do not meet the requirements in issue. The only situation of unjustified discrimination and legally inadmissible would be if both types of tenders were submitted and the envelope was empty in both cases or did not contain the necessary documentation. In fact, if there is an envelope but it does not contain documentation or if the contents are not the relevant documentation, the tender will automatically be rejected as inadmissible, in accordance with the rules on the contract notice (see paragraph 10(c) of this Opinion). In that case there would be unjustified inequality of treatment between tenders considered as abnormally low and those exceeding the irregularity threshold, the envelope being opened only in the first instance. Thus a tender which is not abnormally low may go through the selection procedure and, furthermore, reach the award stage without satisfying a requirement which, under the rules on the contract notice, constitutes a condition of admissibility for the tender.

provide to those categories listed in the second indent of Article 30(4) would be incompatible with the letter and the spirit of the Directive whose intention is that, before rejecting a tender because it is excessively low, the tenderer may provide explanations without any limitation. This rule, furthermore, is contained in Article 7 of Italian Law 216/1995. [35]

48. An applicant submitting a tender which exceeds the irregularity threshold must have the opportunity to put forward his arguments and, in order to support the worth of his proposal, to present any explanations he considers relevant. However, it is possible to provide clarifications only if the tenderer has sufficient flexibility, in a situation of free competition, to provide lower prices than his competitors and, thus, to put forward plans for the most advantageous contract in the general interest. Therefore, where there is no such flexibility, any explanation is redundant.

49. In principle, this would be the case if prices were officially fixed. Where prices are controlled, no explanation is necessary, as such explanation is provided by the rules. If a tenderer has put forward different prices in that instance, the proposal cannot be justified. In that case, exclusion of the explanations would not be incompatible with the Directive.

35 — See above, paragraph 7.

50. In my view, however, the above does not take account of two key ideas: one, that controlled prices are not synonymous with immutable prices, and the other, that the purpose of the Directive is to facilitate free competition between contractors.

51. Nothing can prevent an undertaking from offering a different price — a lower price — than that indicated as the minimum in official lists for particular elements of the work. A proposal made by a tenderer is complex in its content, it is not monolithic, which means the various elements can be combined to reach a price and conditions of execution which make it the most attractive option in the general interest. To deprive a person wishing to be awarded a contract of the possibility of justifying the reasons why a lower price is being offered than that set in official lists means ruling out the beneficial effects deriving from fair competition and condemning the tenderer to automatic exclusion of his tender.

52. In view of the foregoing I propose that the Court should answer the fourth and fifth question put by the Consiglio di Stato by stating that Article 30(4) of the Directive prohibits a national law requiring the awarding authority, as part of its verification of abnormally low tenders, to take into consideration only particular explanations and to exclude those explanations referring

to elements whose minimum values can be found on official lists.

5. Oral procedure for verification of tenders

53. In this Opinion I have repeatedly stated in different contexts that Article 30(4) of the Directive prohibits the automatic exclusion of tenders considered to be abnormally low. Before adopting a decision to exclude, the awarding authority must request, in writing, details of the constituent elements of the tender which it considers relevant. It was the intention of the Community legislature that no tender should be rejected without the applicant being able to provide ample explanation. The oral verification procedure is obligatory as the Court ruled in *Transporoute*, *Fratelli Costanzo* and *Donà Alfonso*. [36]

54. Due hearing of the parties is synonymous with dialogue, discussion and debate. The picture is one-sided only when the party affected by the decision may not provide explanations. This is what happens in the system under Italian law in which the decision to exclude is adopted taking account only of explanations submitted at the same time as the tender, without the awarding authority being in a position to request clarification and without giving the tenderer concerned the possibility of supplementing the explanations provided at the outset. [37]

55. Where a tender is considered abnormally low, after opening the envelope containing the documents with the supporting information for the explanations submitted at the outset, and before deciding on the outcome, the awarding authority is required to request any explanations it considers relevant. Taking into account the latter explanations, as well as those submitted initially and the supporting documents, it must make its decision on whether to exclude the tender or accept it.

56. To summarise, in response to the third question for preliminary ruling, any procedure of excluding abnormally low tenders where the applicant undertakings do not have the opportunity to provide explanations after the envelopes are opened, and before the decision to exclude is made, is in conflict with Article 30(4) of the Directive.

36 — The Proposal for a Directive takes the same line. The first indent of Article 54 provides that 'If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify, after due hearing of the parties, those constituent elements taking account of the explanations received.'

37 — It will be remembered that the tenderer is asked to submit with his tender explanations in respect of the most significant price components which in total amount to no less than 75% of the figure specified in the tender notice.

VII — Conclusion

57. On the basis of the foregoing I propose the following answers by the Court of Justice to the questions referred by the Consiglio di Stato della Repubblica Italiana of the Italian Republic with reference to Article 30(4) of the Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts:

(a) A mechanism for automatically identifying tenders which overstep a threshold indicative of irregularities which is such that undertakings are unable to ascertain that threshold in advance before submitting their tenders is not in conflict with Article 30(4) of the Directive;

(b) Article 30(4) of the Directive does not prohibit the call for tender containing a clause excluding undertakings who do not submit with their tenders explanations in respect of the price indicated, being equal to at least 75% of the figure specified in the tender conditions;

(c) Article 30(4) of the Directive prohibits a national law from requiring an awarding authority to verify abnormally low tenders by taking into account only certain explanations and from excluding those tenders referring to items for which minimum figures can be inferred from official lists; and

(d) Article 30(4) of the Directive does not permit an exclusion procedure for abnormally low tenders where the tenderers do not have the chance to provide explanations following the opening of the envelopes and before the adoption of the decision to exclude.