

CONCORDIA BUS FINLAND OY AB CASE STUDY

CONCORDIA BUS FINLAND OY
AB, FORMERLY STAGECOACH
FINLAND OY AB
V
HELSINGIN KAUPUNKI AND
HKL-BUSSILIIKENNE



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Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne

Summary

Article 36(1)(a) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

Moreover, the principle of equal treatment does not preclude the taking into consideration of such criteria solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.

Grounds

Questions were raised in proceedings between Concordia Bus Finland Oy Ab (Concordia) and Helsingin kaupunki (City of Helsinki) and HKL-Bussiliikenne (HKL) concerning the validity of a decision of the Liikepalvelulautakunta (commercial service committee) of the city of Helsinki awarding the contract for the operation of a route in the urban bus network of Helsinki to HKL.

It appeared from the order for reference that Helsinki city council decided on 27 August 1997 to introduce tendering progressively for the entire bus transport network of the city of Helsinki, in such a way that the first route to be awarded would start operating from the autumn 1998 timetable. Under the rules governing public transport in the city of

Helsinki, the planning, development, implementation and other organisation and supervision of public transport, unless provided otherwise, are the responsibility of the Joukkoliikennelautakunta (public transport committee) and the Helsingin kaupungin liikennelaitos (transport department of the city of Helsinki) which is subordinate to it.

According to the regulations applicable, the commercial service committee of the city of Helsinki is responsible for decisions on awarding public transport services within the city in accordance with the objectives adopted by Helsinki city council and the public transport committee. In addition, the purchasing unit of the city of Helsinki is responsible for carrying out operations relating to contracts for urban public transport services.

The transport department is a commercial undertaking of the municipality which is divided operationally and economically into four production units (buses, trams, metro, and track and property services). The production unit for buses is HKL. The department also includes a head unit, which consists of a planning unit and an administrative and economic unit.

The planning unit acts as an order-placing office concerned with the preparation of proposals for the public transport committee, the routes to be put out to tender, and the level of service to be required. The production units are economically distinct from the rest of the transport department and have separate accounting and balance sheets.

The tender procedure at issue in the main proceedings

By letter of 1 September 1997 and a notice published in the Official Journal of the European Communities of 4 September 1997, the purchasing unit of the city of Helsinki called for tenders for operating the urban bus

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PASS Procurement

Medius, 60 Pacific Quay,
Glasgow G51 1DZ

e: pass@passprocurement.co.uk
e: consultancy@passprocurement.co.uk
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network within the city of Helsinki, in accordance with routes and timetables described in a document in seven lots. The main proceedings concern lot 6 of the tender notice. It appeared from the documents in the case that, according to the tender notice, the contract would be awarded to the undertaking whose tender was most economically advantageous overall to the city. That was to be assessed by reference to three categories of criteria: the overall price of operation, the quality of the bus fleet, and the operator's quality and environment management. The commercial service committee decided on 12 February 1998 to choose HKL as the operator for the route in lot 6, as its tender was regarded as the most economically advantageous overall. According to the order for reference, Concordia (then Swebus) had submitted the lowest-priced tender, obtaining 81.44 points for its A offer and 86 points for its B offer. HKL obtained 85.75 points.

As regards the bus fleet, HKL obtained the most points, 2.94 points, Concordia (then Swebus) obtaining 0.77 points for its A tender and -1.44 points for its B tender. The 2.94 points obtained for vehicle fleet by HKL included the maximum points for nitrogen oxide emissions below 2 g/kWh and a noise level below 77dB. Concordia (then Swebus) did not receive any extra points for the criteria relating to the buses' nitrogen oxide emissions and noise level. HKL and Concordia obtained maximum points for their quality and environment certification. In those circumstances, HKL received the greatest number of points overall, 92.69. Concordia (then Swebus) took second place with 86.21 points for its A offer and 88.56 points for its B offer.

Concordia (then Swebus) made an application to the Kilpailuneuvosto (Finnish Competition Council) for the decision of the commercial service committee to be set aside, arguing inter alia that the award of additional points to a fleet with nitrogen oxide emissions and noise levels below certain limits was unfair and discriminatory. It

submitted that additional points had been awarded for the use of a type of bus which only one tenderer, HKL, was in fact able to offer.

Article 36(1)(a) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

Moreover, the principle of equal treatment does not preclude the taking into consideration of such criteria solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.

It would be no different if the procedure for the award of the public contract in question fell within the scope of Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

Since the Directives concerning public procurement, whose provisions relating to award criteria have substantially the same wording, aim to achieve similar objectives in their respective fields, and the duty to observe the principle of equal treatment lies at the very heart of those Directives, there is no reason to give them different interpretations.