

judgment

GRONINGEN DISTRICT COURT

Civil Section

case/cause-list number: 97093 / KG ZA 07-320

Judgment in preliminary relief proceedings of 23 November 2007

in the matter between

the private company with limited liability

DOUWE EGBERTS COFFEE SYSTEMS NETHERLANDS B.V.,

having its registered office in Joure, the Netherlands,

claimant in the main action,

respondent in the motion to intervene,

local counsel *mr.* T.S. Plas,

attorneys *mr.* A. Stellingwerff Beintema and *mr.* M. Semmekrot in Amsterdam, the Netherlands,

and

the legal entity under public law

THE PROVINCE OF GRONINGEN,

having its seat in Groningen, the Netherlands,

defendant in the main action,

respondent in the motion to intervene,

local counsel and attorney *mr.* E.F.A. Dams in Groningen, the Netherlands,

which case was intervened by:

the foundation

STICHTING MAX HAVELAAR,

having its registered office in Utrecht, the Netherlands,

intervening party,

local counsel *mr.* P.E. Mazel,

attorney *mr.* P.F.C. Heemskerk in Utrecht, the Netherlands.

The parties will hereinafter be referred to as Douwe Egberts, the Province of Groningen and Max Havelaar.

1. The proceedings

1.1. The course of the proceedings is evidenced by:

- the summons and exhibits;
- the exhibits of Douwe Egberts;
- the intervening party's motion to intervene of Max Havelaar;
- the oral hearing of 5 November 2007, at which appeared, on behalf of Douwe Egberts, Mr Schretlen with *mr.* Stellingwerff Beintema and *mr.* Semmelkrot, on behalf of the Province of

Groningen, *mr.* P. van der Burgh with *mr.* Dams, and on behalf of Max Havelaar, Mr C. de Ruiter with *mr.* Heemskerck;

- the written arguments of Douwe Egberts;
- the written arguments of the Province of Groningen;
- the written arguments of Max Havelaar.

1.2. Finally, judgment was rendered.

2. The facts

2.1. In the EU official journal of 24 July 2007, the Province of Groningen published the public European invitation to tender no. 2007/S 140-173300 in connection with the delivery of hot-beverage machines (including ingredients such as coffee, tea, cocoa and hot water) as well as the provision of maintenance and service.

2.2. The Province of Groningen is a contracting authority in the sense of the Dutch Public Procurement Decree for Government Tender (hereinafter: Bao), so that the Bao is applicable to the tendering procedure. The tendering procedure used is a public tendering procedure in accordance with the rules of Directive 2004/18/EC (hereinafter referred to as: the Directive). The Directive was implemented into Dutch legislation through the Framework Act EEC Tendering Provisions and the Bao.

2.3. All interested suppliers could directly submit a tender based on the Invitation to Tender from the Province of Groningen and the Summary of Additional Information until 2 p.m. on 1 October 2007 at the latest. Paragraph 2.2.16 of the Invitation to Tender reads:

“The Tenders will be assessed by representatives of the Province of Groningen based on Exclusion Criteria, Selection Criteria and Awarding Criteria. These criteria and the assessment methods were laid down in advance.

The offers are firstly assessed regarding:

- *compliance with the Formal Requirements for submitting the Tender;*
- *offers complying with the Formal Requirements will be assessed regarding compliance with the Exclusion Criteria. Failure to submit or not being able to submit the required documents will or could lead to exclusion from further participation in the procedure (Article 45 of the BAO);*
- *offers complying with the Exclusion Requirements will then be assessed regarding compliance with the Selection Criteria. Not being able to demonstrate compliance with the minimum requirements will result in exclusion from further participation in the procedure;*
- *offers complying with the Selection Criteria will then be assessed on the basis of the Awarding Criteria and as to the 'financially most competitive entry'.*”

According to the Invitation to Tender, there are two awarding criteria, namely price (up to 600 points) and quality (up to 400 points).

2.4. The Schedule of Requirements, included in the Invitation to Tender, lists the requirements imposed on the object of the assignment. Paragraph 3.6.3 of the Schedule of Requirements stipulates, *inter alia*:

“The coffee ingredient currently used is 100% Arabica of supreme quality. In addition, coffee and tea are Max Havelaar and EKO certified. It is a requirement that the qualities remain of this high standard.

Coffee: Max Havelaar and EKO

1. Tea: Max Havelaar and EKO

You are required to demonstrate that your products are allowed to bear both quality marks.

Answer

Compliance 5

Non-compliance KNOCK-OUT”

2.5. Douwe Egberts does not include any coffee or tea with the Max Havelaar quality mark in its product range. Douwe Egberts does include coffee in its range which is Utz Certified and is currently cooperating with Utz Certified in order to obtain this quality mark for its tea as well.

2.6. Paragraph 2.2.11 of the Invitation to Tender reads:

“The Contracting Authority reserves the right to amend the Schedule of Requirements following one or several written question rounds. If the Schedule of Requirements is amended as a result of this, the Tenderers will be informed of this in writing within 10 days before the closing date.”

2.7. On 28 August 2007, Douwe Egberts asked a number of written questions. The Summary of Additional Information of 12 September 2007 contains all the questions and the relevant answers. The questions and answers were anonymised and sent to all parties that had asked for the tender documents and had not yet withdrawn their entry. The Summary of Additional Information contains – insofar as this is currently important - the following question on page 16:

“Page 22 (paragraph 3.4) mentions the 'Max Havelaar quality mark' as a subcriterion. This implies that the Max Havelaar quality mark is a 'wish'. However, page 30 refers to the Max Havelaar quality mark as a knock-out criterion. We would like to know what the relation is between the two: Is the Max Havelaar quality mark a knock-out requirement or a wish?

Answer

The Max Havelaar quality mark is a knock-out requirement. The subcriteria section is hereby cancelled. The text 'The contract will be awarded based on the criterion of financially most competitive offer, in line with the following subcriteria. The subcriteria are listed in descending order of importance' will be cancelled and replaced by: The contract will be awarded based on the most competitive offer with a price/quality ratio of 60/40%. The quality will be assessed as to, inter alia, quality mark, fresh brew, user-friendliness, maintenance, etc., in accordance with the assessment of requirements and wishes in 3.6 et seq.”

and on page 20 the following questions:

“Is coffee which is Utz Certified comparable with EKO, in your opinion? Utz Certified is an international non-profit organisation, maintaining a code of conduct with criteria for social, environmentally friendly and economically responsible coffee production. Thanks to the certification, it is clear where the purchased coffee actually comes from and under which conditions it was cultivated.

Answer

Utz Certified is comparable with EKO as regards the environmental aspects.

In the event of a European procurement where a quality mark is required (which may be regarded as discriminatory), it is general practice to add: or equivalent. Would you accept it if we regard Utz Certified coffee as coffee equivalent to Max Havelaar certified coffee?

Answer

No, the basic premises / objective of Utz Certified are, in our view, not as far-reaching as those of Max Havelaar. We explicitly mentioned the Max Havelaar quality mark to clarify our objectives.”

2.8. By letter dated 18 September 2007, Douwe Egberts asked the Province of Groningen to reconsider its position with regard to requiring both coffee and tea to carry the Max Havelaar quality mark. Douwe Egberts contends:

“We are even more surprised by your actions, since the defect referred to could easily be remedied by changing the knock-out criterion 3.6.3 under 2: ‘Coffee: Max Havelaar and EKO’ to ‘Coffee: sustainably produced and certified’,

‘Tea: Max Havelaar and EKO’ to be replaced by ‘Tea: sustainably produced and certified’.”

2.9. The 2nd Summary of Additional Information of 25 September 2007 contains – insofar as this is currently relevant – the following:

Enclosed is a 2nd summary of additional information in response to a question asked in relation to the listed Max Havelaar quality mark.

(...)

Answer

The specifications ‘Hot-beverage facility for the Province of Groningen’ 2007/S 140-173300 state that the Max Havelaar quality mark is a knock-out requirement. The purpose of this requirement is to indicate that we pursue only the highest possible sustainability.

In addition, we referred to this quality mark to indicate which requirements should be met by the producer. However, other quality marks which also meet the basic premises applied by the province as regards sustainability will be considered for further assessment of the tender.

The basic premises are:

- *The supplier guarantees that the coffee is purchased directly from small farmer cooperatives.*
- *A cost-effective minimum price: The supplier guarantees a fixed minimum price to ensure that the costs for socially and environmentally friendly production are covered.*
- *Supplement on the world market price: If the world market price exceeds the guaranteed price, the world market price will be paid.*
- *Pre-financing: Coffee farmers may, if desired, receive a percentage of the selling price of their product before shipping, so that they can make the necessary investments.*
- *Long-term trade relations: The partnership is for the long term.*
- *Free entry to the support programme.*

The phrases ‘coffee, Max Havelaar’ and ‘Tea, Max Havelaar’ included in paragraph 3.6.3 should be read in conjunction with the foregoing. The basic premises listed above will be used for the assessment.”

2.10. The Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement COM (2001) 566 of 15 October 2001 mentions – insofar as currently important – on page 7:

"In general, any contracting authority is free, when defining the goods or services it intends to buy, to choose to buy goods, services or works which correspond to its concerns as regards social policy including through the use of variants, provided that such choice does not result in restricted access to the contract in question to the detriment of tenderers from other Member States."

2.11. The European Parliament (Draft) Report on Fair Trade and Development (2005/2245(INI)) mentions - insofar as currently important - on page 7:

"7. Calls on the Commission and the Council to promote Fair Trade, and other independently monitored trading initiatives contributing to raising social and environmental standards as effective tools to reach the MDGs and to recognize the important role of Fair Trade Organisations and other independently monitored trading initiatives contributing to raising social and environmental standards in supporting small and marginalized producers in developing countries and in increasing the awareness of European consumers with regard to sustainable and ethical North South trading relations in general and for Fair Trade in particular;"

and further on page 9:

"22. Calls on public authorities in Europe to integrate Fair Trade criteria into their public tenders and purchasing policies and asks the Commission to promote this by, e.g., producing guidelines for Fair Trade procurement;

23. (...)

24. Welcomes the increased efforts of, in particular, the European Parliament to offer Fair Trade products and stresses that all European institutions should use Fair Trade products in their internal services;

25. Emphasises that Fair Trade and other independently monitored trading initiatives contributing to raising social and environmental standards can be successful tools for making enterprises socially aware and responsible;"

2.12. In the 2015 Government Agenda on the realisation of the Millennium Development Goals of 29 June 2007, the Minister for Development Cooperation writes, on behalf of the government, on page 10:

"Nationwide sustainable purchasing and consumption

Consumer purchase behaviour has a direct impact on the MDGs. Not paying a fair price which takes into account the real costs of sustainable production (people, planet and profit) will prolong non-sustainable living. Over the years, many quality marks and certificates have been introduced. (...)

The Dutch government itself is a major consumer and should continue to serve as an example in this area. As central government, it is the government's ambition to only purchase sustainable goods by 2010. In anticipation of this, the government's national purchase policy for coffee, tea and cocoa will be reviewed in December 2007."

2.13. Five tenderers, including Douwe Egberts, submitted a tender to the Province of Groningen. Pending the decision in these preliminary relief proceedings, the Province of Groningen has not yet opened these tenders.

3. The dispute and the positions of the parties

3.1. Douwe Egberts asks that the Province of Groningen be required to terminate the European procurement 'Hot-beverage facility' (2007/S 140-173300) and insofar as it still intends to award the tendered contract to any party, to issue a new invitation to tender where neither (i) the Max Havelaar quality mark, nor (ii) specific conditions imposed on the methods in which sustainability is obtained and as a result of which quality marks in the field of sustainability granted by independent certifying institutions are excluded, are set as minimum requirements, or to grant preliminary relief as the Preliminary Relief Judge deems appropriate in the proper administration of justice and which does justice to its interests.

Douwe Egberts bases its claim on the following. The Province of Groningen is acting in contravention of the principles of transparency and equality by dropping a knock-out criterion (the Max Havelaar quality mark) and amending it in the 2nd Summary of Additional Information. The Province of Groningen is acting in contravention of the right to tender, because the Max Havelaar quality mark required by the Province of Groningen and the basic premises do not pertain to the object of the assignment. The Province of Groningen is acting in contravention of Article 23(3)(a) of the Bao, since the Max Havelaar quality mark and/or the Fair Trade quality mark are not international, European or national standards. The basic premises set by the Province of Groningen eliminate other, equally sustainably produced coffee, constituting a breach of Article 23(11) of the Bao and primary Community law, particularly the prohibition on discrimination and the provision on the free movement of goods of the EC Treaty. The Utz Certified quality mark does not meet the basic premises drawn up by the Province of Groningen. However, Utz Certified is equivalent to Max Havelaar with regard to sustainability. In addition, the requirements set by the Province of Groningen can be interpreted in various ways and for this reason alone, a new invitation to tender should be issued.

3.2. The Province of Groningen submitted the following defence. The basic premises it set are completely in accordance with tendering law. At both European and national level, it was already decided that fair trade must be integrated into the purchase policy and that, accordingly, requirements may be set which are equivalent to the requirements in the present tender. Article 23(3)(a) of the Bao is not applicable because the Max Havelaar quality mark is not a European or national standard. The Province of Groningen did not replace the awarding criterion by requiring a 'Fair Trade label'. Article 23(3)(b) of the Bao is not applicable. The view that only coffee or tea with the Max Havelaar quality mark may be supplied is based on an incorrect interpretation. The requirement is simply that the products to be delivered must comply with the quality requirements. Douwe Egberts has no interest in its claim for the Max Havelaar quality mark not to be set as a criterion, because it was not this quality mark, but the six basic premises that were prescribed. In addition, Douwe Egberts' assertions are inherently contradictory, since it first contends that no specific conditions should be attached to the methods by which sustainability is obtained and subsequently mentions in the summons that it would be willing to agree with another criterion, which it proposed itself. The Province of Groningen did not amend the awarding criterion, but explained, at Douwe Egberts' request, how it should be interpreted. Upon tendering, the tenderers were familiar with the 2nd Summary of Additional Information and could take it into account. In addition, the Province of Groningen explicitly stated in the specifications that it reserves the right to amend the Schedule of Requirements, in response to written questions. The six basic premises are related to the object of the assignment, because they are all aspects pertaining to the sustainability of the coffee/tea supplied. In addition, the requirements for the degree to which these premises should pertain to the object of the assignment should not be too strict. The basic premises are not so specific as to favour or eliminate particular companies or

particular producers. Douwe Egberts deliberately chooses to set other basic premises with regard to sustainability.

The contracting authority is considerably free in the formulation of awarding criteria, e.g. with regard to environmental aspects. The social aspect constitutes a difference between the basic premises of the Province of Groningen and those of Utz Certified and, accordingly, Douwe Egberts. Douwe Egberts' claim goes too far, because the Court would be taking up the role of (re)contracting authority if it were to allow the claim. Douwe Egberts' argument that the criteria are not clear, or are in any event open to various interpretations, is tardy.

3.3. Max Havelaar contended the following. Max Havelaar is not a trading party itself; it awards the international fair trade quality mark under the name of 'Fairtrade Max Havelaar' for the purpose of expanding and promoting trade under fair trade conditions in the Netherlands as much as possible. The basic premises set by the Province of Groningen should be regarded as 'technical specifications' in the sense of Article 23 of the Bao, or as 'other specifications', or as 'additional special conditions'. Setting such other specifications or additional conditions is expressly permitted in the framework of the Directive. In any event, the Directive does not prohibit the use of a fair trade quality mark. Member States are free to make their own decisions and stipulate material requirements in this respect. In the Netherlands, approximately 20 suppliers have a licence that complies with the basic premises put forward by the Province of Groningen. Max Havelaar is of the opinion that it is lawfully admissible and socially desirable, even in the event of purchases made by European procurement, to ask the market to offer products which meet the basic premises of fair trade.

4. The assessment

4.1. An urgent interest ensues from the nature of the claim.

4.2. Max Havelaar has made it sufficiently plausible that it has an interest in intervening. In view of this, as well as in view of the fact that both Douwe Egberts and the Province of Groningen have indicated that they do not object to the intervention, Max Havelaar will be admitted as intervening party.

4.3. Contrary to Douwe Egberts, the Preliminary Relief Judge is of the opinion that the Province of Groningen did not amend any awarding criterion, but instead rephrased it. Where the phrase that the products 'may bear both quality marks' perhaps implied that it is a requirement for the products to actually bear the Max Havelaar quality mark, this requirement was explained in more detail in the 2nd Summary of Additional Information so as to remove all doubt regarding the Province of Groningen assessing (only) the *basic premises* described in this document (and not whether the products actually bear the quality mark). Paragraph 2.2.11 of the Schedule of Requirements shows that all potential tenderers were informed of the possibility that such a further description could follow. Accordingly, the principles of transparency and equality were not violated; the Province of Groningen is therefore not obligated to cancel the present procurement procedure.

4.4. In this case, the central question is whether the Province of Groningen is entitled to use the basic premises it formulated in the public procurement procedure. The Preliminary Relief Judge states first and foremost that the disputed element of the Schedule of Requirements does not involve a technical specification, but European and national legislation do not preclude the imposition of additional requirements. Support for the admissibility of imposing additional requirements can be found in Article 53(1)(a) of the Directive, which article mentions criteria

relating to the assignment, 'such as' quality and price, the words 'such as' clearly indicating that this summary is not exhaustive.

The basic premises disputed here are sufficiently related to the object of the assignment and are entirely acceptable, in view of the freedom of the Province of Groningen - in accordance with European and national policy - to pursue sustainability and positively influence social and environmental standards.

4.5. It must be stated first and foremost that the principle of equal treatment as such does not preclude awarding criteria being set that result in the number of prospective tenderers being reduced; it is sufficient for the awarding criteria to be objective, indiscriminately applicable to all offers and to relate to the delivery. Max Havelaar indisputably stated that in the Netherlands alone, there are at least 20 suppliers capable of supplying coffee and tea in accordance with the basic premises further explained by the Province of Groningen, with suppliers in other parts of Europe also being able to meet the aforementioned requirement. In addition, the Preliminary Relief Judge holds that Douwe Egberts would also be able to meet the basic premises set by the Province of Groningen, but that it deliberately opted for another initiative which pursues different principles that, as it contends itself, do not correspond with the basic premises referred to, as applied by the Province of Groningen. Accordingly, there is no evidence of any breach of Article 23(11) of the Bao. The further specification provided by the Province of Groningen is related to the political choice of the Province of Groningen for the most effective way, in its point of view, of realising environmental and social goals, in view of Article 177 of the EC Treaty, aimed at establishing a community policy for the promotion of sustainable, economic and social development of emerging economies, as well as in connection with the aforementioned EC Interpretative Communication, the resolution of the European Parliament and the wording of the Government Agenda of the Minister (on behalf of the government) to the Dutch Lower House. Since various suppliers are still able to tender within the given framework and Douwe Egberts has the option to supply coffee and tea in accordance with the basic premises referred to, there is no unequal treatment and/or a restriction of free movement of goods.

4.6. With regard to the argument presented by Douwe Egberts that a contracting authority is not authorised to set requirements which can be interpreted in various ways, the Preliminary Relief Judge holds that the set requirements are not so unclear as to render the procurement procedure insufficiently transparent, or, in any event, as to require the Province of Groningen to issue a new invitation to tender based on this ground.

4.7. The foregoing leads to the conclusion that the Province of Groningen is entitled to use the basic premises referred to above and that the claim of Douwe Egberts must be rejected.

4.8. As the party ruled against, Douwe Egberts will be ordered to pay the costs of these proceedings. The costs on the part of the Province of Groningen are estimated at:

| | | |
|--------------------------|-----|---------------|
| - fixed court fee | EUR | 251.00 |
| - local counsel's salary | | <u>816.00</u> |
| Total | EUR | 1,067.00 |

The costs on the part of Max Havelaar are estimated at:

| | | |
|--------------------------|-----|---------------|
| - fixed court fee | EUR | 251.00 |
| - local counsel's salary | | <u>816.00</u> |
| Total | EUR | 1,067.00 |

5. The decision

The Preliminary Relief Judge

5.1. rejects the claims,

5.2. orders Douwe Egberts to pay the costs of these proceedings, estimated up to this day on the part of the Province of Groningen at EUR 1,067.00, and estimated up to this day on the part of Max Havelaar at EUR 1,067.00.

This judgment was rendered by *mr. J.H. Praktiek* and pronounced in public on 23 November 2007.

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