

EC Public Procurement Infringements : Guidance 24

Introduction

The purchase of goods and services, as well as the order for public works, by public services or other public bodies, represent about 11% of the Union's GDP, equivalent to half of the GDP of Germany. Public procurement is subject to Community and International rules. These rules impose on purchasers of the public sector the respect of transparent open procedures ensuring equitable conditions of competition for the interested suppliers.

As Guardian of the Treaty, the Commission has the power to bring to the European Court of Justice (ECJ) any Member State which infringes Community law. Before going to the ECJ, the Commission has to enter into formal consultations with the Member State, first with a letter of formal notice, which is a request for information, then with a reasoned opinion, which sets the definitive Commission's position on the alleged infringement. More than 90% of the cases are solved before reaching the ECJ, which shows the efficiency of this consultation process. If, however, a Member State does not comply with a judgement from the ECJ, the Commission can request the ECJ to impose daily penalty fees on that Member State.

The application of public procurement legislation still leaves a great deal to be desired, as was highlighted in the previous business survey published by the EC to accompany the Single Market Scoreboard. Commenting on the findings, Single Market Commissioner

Mario Monti said: "This is why proposals to improve the opening-up of public procurement markets, worth 11.5% of GDP in the EU, will be featured in a Communication early in 1998, in accordance with the Action Plan for the Single Market endorsed by the Amsterdam and Luxembourg European Councils. In the meantime, I will continue to pursue infringement proceedings against any Member State which fails to apply the public procurement Directives correctly."

The following information details instances regarding action taken by the European Commission pertaining to potential infringements.

United Kingdom - provision of community facilities in Ipswich, July 2000 The Commission has decided to send a reasoned opinion to the United Kingdom concerning a decision to award a contract for the provision of infrastructure, community and other social facilities for a new neighbourhood in the Borough of Ipswich, under a negotiated procedure. The Commission believes that a negotiated procedure, whereby the contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them, was not justified in this case according to the rules on the public procurement of construction works (Directive 93/37/EEC). The Directive establishes strict rules to ensure that public contracts are awarded only after an open and transparent tender process. The Directive does provide for negotiated procedures but only in very specific circumstances, and in this case the Commission does not believe the procedure was justified.

United Kingdom - redevelopment of Pimlico School, London, 27 July 2000

The Commission has decided to send a reasoned opinion to the United Kingdom concerning the award of a contract to redevelop Pimlico School in Westminster, London. As in the case above, the contracting authorities used a negotiated procedure and the Commission, as in the case above, does not believe that this procedure was justified by the circumstances. The Commission therefore considers that the UK has infringed the terms of the procurement of the construction works Directive.

United Kingdom - radio communications system for the police, 9 September 1999

The Commission has sent a reasoned opinion to the UK because it considers that a framework arrangement for a Public Safety Communications Project for the police and rescue services launched by the UK Home Office violates a provision of the Directive on public procurement of services (92/50/EEC) and EC Treaty rules on the free movement of goods (Article 28, ex-30).

This provision is also present in substantially the same terms in Directives on public procurement of supplies (93/36/EEC) and works (93/37/EEC) and in the Directive on procurement in the water, energy, transport and telecommunications sectors (93/38/EEC). The contract in question was awarded by way of a negotiated procedure. The award covers an initial phase (carrying out a project definition study - PDS), to be followed by one or more contracts for the provision of telecommunications services for police and/or rescue services over a 15-year period. One or more contracts may also be awarded for the supply of the necessary equipment, for instance terminals. The characteristics of the equipment and services to be procured are specified by reference to the TETRA European technical standard for mobile radio services.

The problem is that the UK interprets the public procurement Directives in such a way that contracting authorities would not be obliged to verify whether products or services, which are not manufactured according to the European standards specified in the tender documents, are nevertheless equivalent.

Instead, contracting authorities would be allowed to reject products or services which were genuinely equivalent simply because they were not manufactured in accordance with the relevant European standard. The Commission, on the other hand, maintains that the public procurement Directives require reference to European standards where they exist, so as to ensure that technical specifications are defined by reference to standards which are common, transparent and publicly available (in all languages). Reference to such European standards should, however, simply offer a common yardstick against which the solutions proposed by suppliers can be measured. If contracting authorities refuse to examine whether or not the products or services offered are genuinely equivalent to products or services manufactured in accordance with the European standards, this constitutes a violation of the public procurement Directives and of EC Treaty rules on the free movement of goods.

United Kingdom - minimum number of candidates to be invited to participate in a restricted procedure, 9 August 1999

The Commission has decided to issue a reasoned opinion to the United Kingdom in relation to an official White Paper (Setting New Standards: a strategy for Government

Procurement), which contains advice capable of being construed in such a way as to lead public purchasers to commit infringements against the public procurement rules.

The point at issue is that candidates to be invited to participate in a restricted procedure may always and in all circumstances be set as low as three participants, irrespective of the fact that under the public procurement rules, in certain circumstances, at least five candidates must be invited.

United Kingdom - improper use of framework contract arrangements, 6 January 1998

The Commission has decided to refer the United Kingdom to the Court of Justice concerning the use of "framework arrangements" by the Department of Environment (Northern Ireland) for procuring architectural, engineering and other construction-related services. Under this procedure, a tender notice is published in the EC Official Journal indicating a general category of services to be provided rather than giving details of a specific contract. Once a list of approved suppliers has been established by this procedure, entities may choose suppliers from the list without going through a new competitive procedure for each individual contract. The case raises an important question of principle, namely the use by contracting entities of such framework contract arrangements for the procurement of services, supplies and works. The Directive on procurement of works, supplies, services and in the water, energy, transport and telecommunications sectors (93/38/EEC) explicitly provides for the use of such framework contracts. However, the use of such framework contracts is not authorised by the public procurement rules applicable in all other sectors to public service, supplies and works contracts (Directives 92/50/EEC, 93/36/EEC and 93/37/EEC respectively).

The UK authorities' reply, received on 29.7.1997, to the reasoned opinion sent by the Commission on 2.5.1997 was unsatisfactory, in the Commission's view.

Germany - police station complex in Singen, Baden-Württemberg, 27 July 2000

The Commission has decided to send a reasoned opinion to Germany concerning the failure of the Land of Baden-Württemberg to publish at the EU level an invitation to tender for the construction of a police station complex in Singen. The works contract was awarded to a company that is 100% owned by the City of Singen. This company is to carry out the construction work on a site which the company owns itself, but according to precise instructions from the Land. The company will then sell the completed buildings to the Land.

The Directive on public procurement of construction works (93/37/EEC) does not apply to the simple acquisition by a public contracting authority of an existing building. However, since the building in question is being constructed in order to meet the requirements of the public contracting authority and given that the authority has already committed itself in writing to acquiring the building when it is completed, the Commission considers that this constitutes a works contract, and as such falls within the scope of the works procurement Directive and should have been put out to tender.

Germany - Flörsheim waste disposal unit, 13 January 2000

The problem concerns the award, by the municipality of Flörsheim, of a contract for planning the construction of a waste disposal unit. The contract was awarded under an accelerated procedure although the conditions specified by the Directive on public procurement of services (92/50/EC) for the use of this procedure were not fulfilled.

The Directive's requirement that the criteria for awarding the contract should be published was not respected either. The Commission does not regard the German authorities' explanations as satisfactory and so has decided to refer the case to the Court.

Germany - Braunschweig waste incineration contract, 13 January 2000

The Commission has decided to send Germany a reasoned opinion concerning the procedures followed by the town of Braunschweig when it awarded a 30-year contract for waste incineration to the BKB Kohlebergwerke company. The Commission considers that these procedures were in contravention of the Directive on public procurement of services (92/50/EEC). In particular, the contract was awarded under a negotiated procedure without prior publication of a notice despite the fact that the conditions for the use of such a procedure were not fulfilled.

Germany - wastewater disposal in Bockhorn, 13 January 2000

The Commission has sent Germany a reasoned opinion concerning a 30-year contract awarded by the town of Bockhorn to the power company EWE for wastewater disposal. The contract was awarded without any invitation to tender, in violation of the Directive on public procurement of services (92/50/EEC), which covers sewerage collection and purification. The Federal Government authorities have admitted the infringement but the contract is still in force.

Germany - supplies to the Federal Office for military procurement, 13 January 2000

The Commission has also sent a reasoned opinion to Germany about a contract for the supply of static converters (to transform alternating current to direct current and vice versa) to the Bundesamt für Wehrtechnik und Beschaffung (Federal Office for Military Technology and Procurement). The Commission considers that the conditions under which the contract was awarded violated the Directive on public procurement of supplies (93/36/EEC) for two reasons. First, the contract was awarded by use of an accelerated procedure without the specific conditions foreseen by the Directive being fulfilled. Second, the contract notices specified that the static converters had to be manufactured by a specific company without allowing equivalent equipment to be offered.

The German authorities tried to justify the use of the accelerated procedure and the references to a particular supplier by the fact that the product must meet specific military requirements. However, according to the case law from the European Court of Justice, these arguments would only be justified if the German authorities could prove that a particular specified firm was the only supplier, rather than just the most

efficient supplier, and that it was "absolutely essential" for the contract to be awarded to a specific supplier in order to meet the technical specifications. The Commission has not been satisfied by the arguments put forward by the German authorities so far.

Germany - University of Würzburg, 9 August 1999

The procurement procedure concerning the hospital of the Julius-Maximilian-University of Würzburg was brought to the attention of the Commission by a complaint. In September 1997 a contract for the planning, extension and refurbishment of the old dental clinic and another contract for the construction of operational units of the hospital of the University of Würzburg was published in the Supplement to the Official Journal. The contract notice referred under point 14 to a "negotiated procedure with prior publication in accordance with Article 11(2) of Council Directive 92/50/EEC".

The negotiated procedure is an exceptional procedure and therefore only applicable in certain limited cases. The Commission is of the opinion that the conditions of the provisions to award the contract under the negotiated procedure have not been fulfilled. The German authorities have not proved the existence of exceptional circumstances justifying a negotiated procedure with prior publication.

Germany - mail sorting equipment, 3 July 1998

The Commission has decided to bring an action before the Court of Justice against Germany for failing to fulfil its obligations under Directive 77/62/EEC on public supply contracts. In 1993 DBP Postdienst put out to tender a contract for the supply of mail sorting equipment under the negotiated procedure, although the conditions for the use of that procedure were not met; it also set a shorter deadline for participation than that stipulated by the Directive, failed to adhere to the minimum requirements laid down in its tender specifications and failed to indicate the contract award criteria.

In 1996 the German Government informed the Commission that Postdienst had been privatised and that proceedings were under way in a national administrative court to determine whether the new company, Post AG, had to apply the public procurement rules. Since no hearing has been announced as part of those proceedings, the Commission has decided to bring the matter before the Court of Justice.

Belgium - aerial surveys, 27 July 2000 The Commission has decided to refer Belgium to the European Court of Justice for failure to apply the rules relating to the public procurement of services as laid down in Directive 92/50/CEE. Under this Directive, tenders for public services worth more than 200,000 must be published in the EU's Official Journal. But in this case, the contracting authority, the Flemish Regional Executive, did not publish a tender for a contract to conduct aerial surveys of the Belgian coast, although it was worth considerably more than the 200,000 threshold. Instead, the contract in question was directly negotiated with a Flemish company for a period of six years and subsequently extended to nine years.

The Belgian authorities argue that in this particular case, the Directive is not applicable because the task is highly specific and because national security is at stake,

which means that there is only one company to which it can be awarded. They also maintain that the provision of aerial photography services is excluded from the obligation to publish a tender. The Commission does not accept these arguments because, as long as a contractor agrees to be bound by professional confidentiality, the military certificate necessary for aerial photographic observation of the coast may be awarded to a non-Belgian company. The Belgian authorities have failed to convince the Commission that there is only one company capable of doing the job. Moreover, in the Commission's view, the aerial photographic services required fall under the category of "surface surveillance services and the provision of geographic maps" that, according to the Directive, should be subject to open and competitive tender procedures.

Spain - Construction work at Segovia educational penitentiary centre, March 2000
The Commission has referred Spain to the Court of Justice concerning incorrect procedures followed during selection of a firm to carry out construction work at an experimental penitentiary centre in Segovia. In particular, the call for tenders was published in the national press but not in the EC Official Journal and violated the Directive on public works (93/37/EEC).

The Spanish authorities maintain that the Directive does not apply to the Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios (SEIEPSA) on the grounds that it is a public commercial company governed by private law. However, the Commission considers that SEIEPSA is a contracting authority within the meaning of the Directive, in particular because the company has been established for the specific purpose of meeting public interest needs, and so is not a conventional industrial or commercial firm.

Spain - Tendering procedures for public works contracts, March 2000

The problem concerns the standard contract documents drawn up by the Spanish authorities for use by procurement bodies which in several key respects do not follow the rules (e.g. as regards selection criteria) that are laid down in the Directive on works procurement (93/37/EEC).

Spain - works at the experimental penitentiary centre in Segovia, 9 August 1999

The call for tenders to carry out works at the Experimental Penitentiary Centre in Segovia, published in the national press but not in the OJEC, was launched in violation of the provisions of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts. The Spanish authorities contest the application of this Directive to the Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios on the grounds that it is a public commercial company governed by private law. The fact remains that the SEIEPSA is a contracting authority within the meaning of the Directive, inasmuch as it fulfils the conditions of Article 1 thereof, in particular the condition that it has been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

France - Construction of the Maxéville/Nancy sewage treatment plant, March 2000

The Commission considers that the French authorities have violated the Directive on procurement of public works (93/37/EEC) and EC Treaty rules on the freedom to provide services (Article 49, ex-59). The contract was attributed following a restricted procedure (i.e. a limited number of firms were invited to tender). However, contrary to the requirements of the Directive, the contracting entity did not publish beforehand an indicative notice of the contracts it was intending to award. Moreover, in the call for expressions of interest, the contracting authority specified that those submitting bids had to be registered with the French national order of architects, thereby discriminating against potential bids from suppliers established in other Member States. This discrimination violates not only the public works Directive, but also EC Treaty rules on the freedom to provide services. Another problem with the procedures followed was that only four firms were invited to tender, whereas the Directive requires a minimum number of five bidders so as to try to ensure genuine competition between bidders.

France - subsidised housing, 18 January 1999

The Commission has decided to bring proceedings before the Court of Justice against France on the grounds that several subsidised housing bodies have launched a number of invitations to tender for construction work without first publishing them in the Official Journal of the European Communities, as stipulated in the Directive on public works contracts (93/37/EEC). On the basis of the concept of "public body" established by the Court in its case law, the Commission considers that these bodies are awarding authorities within the meaning of the above-mentioned Directive and are consequently subject to the rules of that Directive, particularly as regards publication.

France - automatic light rail transit system for the city of Rennes, 3 July 1998

The Commission has decided to bring an action before the Court of Justice against France for failing to comply with Directive 93/38/EEC on procurement in the water, energy, transport and telecommunications sectors when awarding the main supply contract for an automatic light rail transit system in Rennes. It has taken this decision because the explanations given by the French authorities concerning the conditions under which the contract was awarded, in response to an informal request for information made in January 1997, a letter of formal notice issued on 17 June 1997 and a reasoned opinion delivered on 5 March 1998, were not satisfactory.

Notwithstanding the French authorities' explanations, the Commission takes the view that no award of the contract at issue took place before the entry into force of Directive 93/38/EEC and that the award of the contract by direct agreement on 22 November 1996, after the previous procedure conducted between 1989 and 1993 had been abandoned in 1995, was incompatible with the Directive, although the contract lay fully within its scope.

Neither are there any technical reasons justifying the failure to open up the contract to competition. Lastly, the Commission is challenging the contracting entity's use of the possibility, provided for in the French public procurement code, of exempting itself from the normal competitive tendering rules on the grounds that it had already carried out major investment. Such a circumstance is not one of the exceptions allowed by

Directive 93/38/EEC. Since the French authorities have not taken appropriate measures to remedy this situation within the time limit laid down in the reasoned opinion, the Commission has decided to refer the matter to the Court of Justice.

France - architectural competitions organised by the General Council of Réunion, 6 April 1998

After securing the cancellation of several architectural competitions involving serious irregularities in an earlier case in 1995, the Commission has received a fresh complaint concerning various architectural competitions organised by the General Council of the French Department of Réunion. In general terms, the contracting authority appears to have departed from the principle of equality of treatment between candidates laid down in Article 3(2) of Directive 92/50/EEC on public service contracts. The two winners of the four contested competitions have links with one of the members of the jury, in breach of Article 13(6) of the Directive, which stipulates that the jury must be independent (one of them is even an ex-officio member of the jury). The contracting authority for the most recent competition rejected certain candidates on the ground that they had not been selected in earlier procedures, which contravenes the requirement laid down in Article 13(5) of the Directive that selection criteria must be clear and laid down beforehand. One of the projects selected was incompatible with the land-use plan, which was subsequently revised in breach of the principle of equal treatment.

Not satisfied with the explanations given by the French authorities in response to its initial request for information, the Commission sent them a letter of formal notice on 17 September 1997.

After examining their reply dated 5 December 1997, it decided to issue a reasoned opinion for infringement of Directive 92/50/EEC, in which it calls on the French authorities to terminate the award procedures in question and to take the necessary steps to ensure that architectural competitions in Réunion are genuinely opened up to competition. If the French authorities failed to take this action, the Commission could bring the matter before the Court of Justice.

Italy - waste processing contracts in Lombardy, 13 January 2000

The problem concerns a law applicable in the Lombardy region (No. 21 of 1.7.93) which allows contracts for treatment works and the treatment/recycling of urban waste to be awarded to public or private bodies without open and competitive procurement procedures. The Commission considers that this procedure violates Directive 93/37/EEC, which stipulates that public works contracts must be published and put out to tender. In the absence of a satisfactory response from the Italian authorities, the Commission has decided to refer the case to the Court of Justice.

Italy - technical assistance for the Treasury Ministry, 13 January 2000

The Commission has decided to send a reasoned opinion to Italy concerning a contract awarded by the Italian Treasury and Economic Planning Ministry for the provision of administrative and technical assistance to help in the drawing-up of

regional aid. The Commission considers that the Directive on public procurement of services (92/50/EEC) has been violated in three respects. First, the contract was awarded using an accelerated negotiated procedure whereas the conditions stipulated in the Directive for such a procedure were not fulfilled. Second, companies bidding were obliged to have a specific legal form (SA or Srl). Third, tenders more than 30% above or 25% below the average of all tenders submitted were automatically excluded from consideration.

Italy - Public procurement of banking services (cash-flow management) for the SACE, 9 August 1999

The Commission has decided to send the Italian Government a reasoned opinion for violation of the provisions of Directive 92/50/EEC, and in particular Article 11 thereof. This reasoned opinion concerns the award of a banking services contract for cash-flow management for the SACE (Special Department for Export Credit Insurance) to the San Paolo Banking Institute in Turin at the beginning of 1997.

The failure to implement this provision results from the fact that the SACE, a body governed by public law and, as such, obliged to observe the directives on public procurement, awarded the contract to the San Paolo Banking Institute in Turin without going through any public procedure.

The Commission found that none of the conditions laid down in Article 11(3) of Directive 92/50/EEC which permit the use of the negotiated procedure without prior publication of a tender notice had been fulfilled in this case.

Italy - public procurement of design services for the Classe Archeological Museum by the municipality of Ravenna, 9 August 1999

The Commission has decided to send the Italian Government a reasoned opinion for infringement of the provisions of Directive 92/50/EEC, and in particular Article 11 thereof. This reasoned opinion relates to the award by negotiated procedure, without prior publication of a tender notice, of design services for the Classe Archeological Museum by the Municipality of Ravenna.

The infringement results from the fact that the Municipality of Ravenna awarded the contract following a negotiated procedure, without prior publication and without an invitation to tender, despite the fact that the conditions laid down in Article 11 of Directive 92/50/EEC, which are the only ones justifying the use of the negotiated procedure, were not met.

Italy - integrated computerised system for the general national accounts department, 18 January 1999

The Commission has decided to bring proceedings before the Court of Justice against Italy for infringement of the Directive on public service contracts (92/50/EEC), and in particular Article 11 thereof, on the grounds that the contracts for the maintenance, management and development of the integrated computerised system for the general national accounts department/Ministry of the Treasury (Ragioneria Generale dello Stato) and the Court of Auditors, originally concluded in

1987 and 1988, have been renewed with the same company on several occasions without competition. Decree Law No. 414 of 19 November 1997 authorised the negotiated procedure for a further period of eighteen months.

However, the circumstances specified in Directive 92/50/EEC did not obtain (for example, after publication of a contract notice, when prior pricing is not possible or when the specifications cannot be established precisely), and it is only under such circumstances that a negotiated procedure may be justified. Italy's reply to the reasoned opinion of 11 June 1998 was not satisfactory.

Italy - radiographic equipment, 18 January 1999

The Commission has decided to issue a reasoned opinion against Italy for infringement of the Directive on public supply contracts (93/36/EEC) in connection with the contract for the supply of sterile sutures for operating theatres, radiographic equipment and developing fluids awarded by a Rome hospital (Azienda Complesso ospedaliero San Filippo Neri), on the grounds that the contract was awarded by accelerated restricted procedure although the conditions set out in the Directive for use of the accelerated procedure were not fulfilled, since supply of these products should have been possible simply by launching the procedure well before the previous contract expired, on the basis of expected consumption. The previous contract had also been the subject of an infringement procedure, since it had been concluded following a negotiated procedure in infringement of Directive 93/36/EEC and its performance should not have been completed.

ITALY - Contracts for architectural services - Karrer Decree, 31 July 1998

The Commission has decided to deliver a reasoned opinion to Italy for improper transposition of Directive 92/50/EEC on the award of public service contracts. It has raised the three objections set out below concerning Order No. 116 to the Prime Minister of 27 February 1997, which establishes rules for determining the economically most advantageous tender in the award of contracts for architectural, engineering and other technical services.

(a) Order No. 116 was not notified, so that Italy has infringed the obligation in Directive 92/50/EEC under which Member States must communicate to the Commission the main provisions of national law which they adopt in the field governed by the Directive.

(b) It has included in the criteria for assessing tenders at the award stage (i.e. criteria for determining the economically most advantageous tender) criteria referred to in Directive 92/50/EEC for the selection stage. Examples are quality certification and the other factors fixed by the contracting authority to establish that a tenderer is particularly qualified to provide the service in question, which can be taken into consideration at the selection stage but not at the award stage.

(c) Order No. 116 allows the committee assessing the tenders to determine subsidiary award criteria after drawing up the specifications, which is contrary to the principle of transparency established by Directive 92/50/EEC. Since this is a general measure, it cannot ensure that the subsidiary criteria only constitute refinements of the criteria set

out in the specifications and that the final determination of all factors used in the assessment is systematically effected after transmission of the specifications.

ITALY - Lombardy - public works, 31 July 1998

The Commission has decided to deliver a reasoned opinion to Italy for infringing Directive 93/37/EEC concerning public works contracts through Lombard Regional Law No. 21 of 1 July 1993. Under that Law, public works concessions can be awarded without fulfilling the advertising requirements laid down in the Directive; public works contracts may also be awarded on the basis of negotiated procedures without prior publication of a contract notice although the conditions in the Directive have not been fulfilled. Those provisions of the Law have already been relied upon, for example, in awarding a public works concession for establishing waste-disposal facilities in Monza although the rules on advertising were not complied with.

ITALY - IT services for the association of local authorities of Valli del Taro e del Ceno, 31 July 1998

The Commission has decided to deliver to Italy an infringement notice reference Directive 92/50/EEC on the award of public service contracts. The Commission's objection relates to the award of a contract for work on the design and establishment of a territorial tax system for the local authorities of Valli del Taro e del Ceno to a company on the basis of the negotiated procedure without prior publication of a contract notice although the conditions in the Directive were not fulfilled.

Italy - supplies of oil for food aid, 3 July 1998

The Commission has decided to send Italy a reasoned opinion for breaching the EC rules on the free movement of goods (Article 30 et seq.) and services (Article 59 et seq.) and the Directive on public supply contracts (93/36/EEC) in connection with public contracts awarded by the AIMA (a public enterprise which intervenes on the agricultural market) to obtain supplies of food products for donation to countries in difficulty as part of the Italian Government's food aid initiatives.

The infringement stems from the fact that the notices and the letters of invitation to tender for these contracts require the products to be loaded and shipped from an Italian port and also stipulate that, even if the contract is awarded to the lowest bid, the contracting authority is nevertheless entitled to ask the successful bidder to improve his offer in line with market conditions. The requirement that the goods be shipped from an Italian port prevents the use of goods originating in other Member States and is therefore incompatible with the rules of the EC Treaty on the free movement of goods; it also prevents tenderers using carriers operating ships from ports elsewhere in the Community and is consequently also contrary to the provisions on the freedom to provide services.

Lastly, the possibility of negotiating with tenderers after the contract has been awarded is a serious violation of Directive 93/36/EEC, under which the negotiated procedure may be used only in specific cases. Negotiating after a contract award is also contrary to the principle of equal treatment, which the Court of Justice has

recognised as one of the foundations of the Directives on public procurement, as well as the principles of transparency and legal certainty.

Italy - town planning services for the municipality of Jesolo, 3 July 1998

The Commission has decided to address a reasoned opinion to Italy for breaching the Directive on public service contracts (92/50/EEC) and the Treaty rules on the freedom to provide services (Article 59). The infringement concerns a public contract awarded by the Municipality of Jesolo for the preparation of a preliminary draft of the general regulating plan (PRG): the contract was awarded by negotiated procedure with prior publication of a notice; the tender notice allowed only architects and engineers to participate in the procedure; and the award criteria included assessment of the professional calibre and organisation of the team.

The Italian authorities have argued that the use of the negotiated procedure with publication of a contract notice was justified under Directive 92/50/EEC, which allows that procedure to be used "when the nature of the services to be procured, in particular in the case of intellectual services and services falling within category 6 of Annex I A, is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures". The Commission does not share this interpretation, because the impossibility of establishing contract specifications must be construed strictly.

The clause reserving the contract exclusively for architects and engineers constitutes an unjustified restriction of competition and is incompatible with Directive 92/50/EEC. Neither does it appear to meet the criterion of proportionality, because it excludes from the award procedure professionals (e.g. town planners) who could be equally well-qualified to provide the services covered by the contract, i.e. the preparation of a preliminary planning instrument. Consequently, this condition is not objectively justified and is contrary to Article 59 of the Treaty.

As regards the inclusion in the award criteria of an assessment of the professional calibre and organisation of the team, Directive 92/50/EEC allows such criteria to be taken into account only during the selection of tenderers and not in the contract award phase.

Italy - municipal waste collection at Assemini (Cagliari), 3 July 1998

The Commission has decided to send Italy a reasoned opinion for breaching the Directive on public service contracts (92/50/EEC) and the Treaty rules on the freedom to provide services (Article 59) in connection with a public contract awarded by the Assemini town council for municipal waste collection services. The infringement stems from the fact that the contract was awarded by accelerated restricted procedure and that the contract notice included, among the minimum qualifying conditions, membership of the Italian national register of firms providing waste treatment services.

The Commission takes the view that there was no urgency rendering impracticable compliance with the normal time limits laid down for restricted procedures, in other

words that the conditions in which the Directive allows recourse to the accelerated restricted procedure were not met in this case. Limiting the right to bid to firms on the national register is contrary to the principle of the freedom to provide services enshrined in Article 59 et seq. of the EC Treaty: making participation in a service contract in one Member State by an enterprise established in another Member State conditional on membership of the first country's national register would remove all practical effectiveness from Article 59 of the Treaty, the purpose of which is precisely to eliminate restrictions on the freedom to provide services of persons who are not established in the Member State where the service is to be provided.

Greece - contract for the supply of operational leather belts with accessories by the Ministry for Development, 9 August 1999

The Commission has decided to send the Hellenic Republic a reasoned opinion relating to the procedure for the award of a contract for the supply of operational leather belts with accessories by the Ministry for Development.

The Commission's objections are based on the incorrect use by the Hellenic Republic of the accelerated restricted procedure and deficiencies in the publication of the tender notice in the OJEC, as well as the confusion of selection and award criteria.

The Commission considers that the awarding authority has infringed the provisions of Articles 11 and 12 of Directive 93/36/EEC by having recourse to the accelerated restricted procedure in a case where the conditions for the use of this procedure were not fulfilled. The Commission also takes the view that Article 9(4) of Directive 93/36/EEC has been infringed because publication of the tender notice in the OJEC was incomplete, inasmuch as it did not give reasons for the use of the accelerated procedure.

Austria - construction of a bypass in the City of Linz, 9 August 1999

The contract for the construction of a bypass of Linz was brought to the attention of the Commission by a complaint. The City of Linz concluded two contracts, one with a local bank for the financing and a second with a subsidiary undertaking of the local bank for the construction of this bypass, without a prior public procurement procedure.

The Commission takes the view that the above-mentioned contracts are public works contracts as defined in Article 1(a) of Directive 93/37/EEC and that the City of Linz is a contracting authority under the terms of Article 1(b) of the same Directive. On the basis of these considerations the contracts for the financing and construction of the bypass of Linz should have been awarded via a procurement procedure.

The Netherlands - safety barriers for roads, 18 January 1999

The Commission has decided to send a reasoned opinion to the Netherlands for misapplication of the Directives on public supply and works contracts (93/36/EEC and 93/37/EEC) in a case involving the purchase of safety barriers for roads. The Commission also thinks the Netherlands has infringed the rules of the EC Treaty on obstacles to the free movement of goods (Article 30). The reasoned opinion concerns

the methods used for purchasing safety barriers by the ministry department responsible for road maintenance, which buys exclusively from a single supplier without putting the contract up for competition by publishing notices in the Official Journal of the European Communities. This supplier also has a monopoly on supplying safety barriers in connection with works contracts awarded by the ministry department.

All information in this guidance is checked and believed to be correct, but cannot be so guaranteed and the publishers shall not be liable for any loss suffered directly or indirectly as a result of its use.