

EC Infringement Proceedings - Public Procurement
Part 4

France - Plan Lycée of the Nord-Pas de Calais Region and Nord département – Directive Infringement
22 July 1997

The Commission decided to refer France to the Court of Justice for violations of the Public Works Directive (71/305/EEC, as amended by the Directives 89/440 and 93/37/EEC) arising from the public contracts for the construction of school buildings in the Nord-Pas de Calais Region. The French authorities answered neither the various letters of formal notice concerning the plan lycée, nor the reasoned opinion notified on 7 April 1997. The Commission referred France to the Court of Justice concerning the construction of a lycée in Wingles, part of the same region.

The Commission had serious doubts concerning the plan lycée launched by the region, worth 1,400 million French Francs.

The contract notices quoted purely French standards without mentioning the equivalence of other Member States' standards and confused the various criteria envisaged at the time of the procedure. In particular, an additional criterion relating to employment, which was discriminatory according to the case law of the Court of Justice, had been included in an inter-ministerial circular not communicated to the Commission. Moreover, the French authorities refused to forward to the Commission the documents requested in connection with these procedures, which did not respect the obligation to ensure competition. The Commission questioned the systematic application of this additional criterion to all school building contracts in the Nord Region and département from 1993 to 1995.

France - Electricity Supply Infrastructure – Directive Infringement
22 July 1997

The Commission decided to refer France to the Court of Justice concerning violations by the syndicat départemental d'électrification de la Vendée of the consolidated Utilities Directive (93/38/EEC), on public procurement in the water, energy, transport and telecommunications sectors. The Commission decided to refer the case to the Court because it considered unsatisfactory the French authorities' response to its reasoned opinion of 7 April 1997.

The contracting entity divided up its three-year work programme, worth approximately 600 million French Francs, so as to publish in the EC Official Journal only some of the contract notices published at the national level. The programme was split on a geographical basis, with the threshold provided for by the Directive 93/38/EEC applied separately in each individual area covered by the authority, and then on a technical basis by separating electricity supply and street lighting work. The Commission also considered that the contracting entity did not separate the various procedures as required by Directive 93/38/EEC (Article 1 items [5] and [7]), by concluding a framework agreement rather than the restricted procedure originally specified. The contracting entity finally awarded the contracts to local companies without publishing the award notices required by the Public Procurement Directives.

France - Supplies of Water Pipes – Directive Infringement
22 July 1997

The Commission decided to send France a reasoned opinion concerning the procedures followed for the procurement by various local authorities of supplies of water pipes. These procedures violated not only the Utilities Directives (90/531 and 93/38/EEC), on public procurement in the water, energy, transport and telecommunications sectors, but also EC Treaty rules on the free movement of goods (Article 30). The French authorities' response to the letter of formal notice on this case was considered by the Commission to be unsatisfactory. When local authorities or contracting entities in the water sector award contracts for supplies of water pipes in ductile cast iron, the complainant, the company Biwater, had suffered systematic discrimination in favour of the French competitor.

The contracts in question gave rise to numerous problems of discrimination from the point of view of Article 30 of the Treaty and of the Utilities Directive, which is applicable to the drinking water and water treatment sectors.

In addition, one of the cases brought to light certain deficiencies in the way France applied the Directive on Remedies in the water, energy, transport and telecommunications sectors (92/13/EEC), to which the French authorities offered no satisfactory solution. The Commission requested the French authorities to take general measures to put an end to these discriminations.

Italy - Messina Straits Bridge – Breach of EC Treaty Rules
22 July 1997

The Commission decided to send a reasoned opinion to Italy concerning the concession for the design, construction and management of a bridge over the Messina straits. The Commission considered the terms of this concession broke EC Treaty rules on the freedom of establishment and the freedom to provide services (Articles 52 and 59).

The infringement stemmed from the requirement laid down in Law N 1158a of 17.12.71 for the concessionaire to be a company owned 100% by public authorities or Italian firms. This requirement, which had been applied in practice, constituted a violation of Articles 52 and 59 of the EC treaty, insofar as it excluded any non-Italian public or private body from obtaining the concession or being a shareholder in the concessionaire.

Spain - Cleaning Services for the National Library – Directive Infringement
22 July 1997

The Commission decided to send a reasoned opinion to Spain concerning a public procurement contract to supply cleaning services for the National Library. Spain replied to the letter of formal notice notified by the Commission on 12 February 1997, but after the deadline. Moreover, the reply was not satisfactory.

The call for tenders launched by the Ministry of Culture gave rise to several objections, namely:

- the deadline for receipt of tenders was less than the minimum 52 day period required for open procedures by the Directive on public service contracts (92/50/EEC)
- the selection criteria applied to bidders were also used as attribution criteria, and moreover one of these criteria was disproportionate and contrary to the principles of equal treatment and of free competition and
- the experience requirements exceeded what is allowed by the Directive.

Austria - Electronic System for Recording Ecological Points (Ecopoints) - Directive Infringement
22 July 1997

The Commission decided to send a reasoned opinion to Austria concerning the attribution of a public supply contract for an electronic system for recording ecological points for lorries (ecopoints). The Commission considered that Austria violated the Directive on public supply contracts (93/36/EEC) because the contract was awarded to a tender which was not read at the time of the official opening of tenders. Moreover, the award took into account a total discount which was not read either when the tenders were opened. Finally, the tender selected was not in conformity with the technical requirements of the contract specifications, which included "environmental compatibility" among the attribution criteria. Ecological criteria can be taken into consideration only if they confer a real advantage in meeting the stated requirements and allow an objective evaluation of the relative quality of tenders for a specific contract. While examining this specific case, it came to the Commission's attention that the Austrian federal law on public procurement contracts did not afford any possibility to challenge decisions on attribution of contracts before national remedies procedures, in violation of the public procurement Remedies Directive (89/665/EEC).

The Commission considered that the Austrian authorities' answer of 7 May 1997 to the letter of formal notice was neither satisfactory nor complete.

Proceedings against Belgium - Construction of New Building – Breach of Community Law
12 July 1996

The Commission decided to initiate proceedings against Belgium in the Court of Justice because it considered that Belgium had breached Community law on public works contracts (Directive 93/37/EEC). In the case in point, the construction of the new building which was to house the Vlaamse Raad (Flemish Parliament) was not put out to tender in accordance with the rules laid down in the Directive.

This Directive stipulates that all works contracts exceeding the threshold of ECU 5m must be put out to tender by means of a notice published in the Official Journal of the European Communities and in accordance with precise rules of procedure. Although the contracts relating to the construction of the Vlaamse Raad exceeded the threshold laid down in the Directive, there was no invitation to tender at Community level and no contract notice was ever published in the Official Journal.

The Commission considered that the Vlaamse Raad was a contracting authority and was, therefore, obliged to comply with the Public Procurement Directives. Since it regarded the failure to publish a notice as a breach of the Directive, the Commission asked Belgium, firstly, in its letter of formal notice of 28 July 1994 and, subsequently, in its reasoned opinion of 16 November 1995 to suspend the award procedure and ensure that Community law is complied with.

Despite this request from the Commission the Vlaamse Raad refused to suspend the award procedure. Moreover, the Belgian Government took the view that, as a constitutionally independent national institution, a parliament is not obliged to apply the Community rules on the award of public works contracts. However, the Directive defines contracting authorities as "the state, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law". The Commission considered that the definition makes no distinction based on the fact that the contracting authorities belong to or depend on a constitutional authority. On the contrary, the Commission believes that the Directive is applicable irrespective of the state body or local authority involved, even if it is a constitutionally independent institution or body.

The Commission based its opinion on the judgment of the Court of Justice of 20 September (Case 31/87), in which the Court confirmed that the concept of the State within the meaning of the Directive on public works contracts must be interpreted in functional terms in order to avoid jeopardizing the aim of the Directive.

Proceedings against Ireland - Fertilizer for the Irish Forestry Board – Directive Infringement 12 July 1996

The Commission decided to initiate proceedings in the Court of Justice against Ireland because the Irish Government had not responded to a reasoned opinion (see IP/95/795) and had not ensured that the Irish Forestry Board (Coillte Teoranta) fulfilled its obligations under the Directive on public supply contracts (93/36/EEC).

The infringement in question related to an invitation to tender for fertilizer valued at around IRL 280 000, which Coillte Teoranta (a body set up under the Forestry Act 1988) issued in March 1994 without publishing a notice in the Supplement to the Official Journal of the EC. The case also involved a more general problem since the Irish authorities did not accept the definition of Coillte Teoranta as a contracting authority as defined in the Public Procurement Directives. However, the Commission considered, particularly on the basis of the Court of Justice's judgment in the Beentjes case (C-31/87), that Coillte Teoranta fully constituted a contracting authority within the scope of the Public Procurement Directives.

Italy - Incorrect Implementation of the Directive on Review Procedures (Water, Energy, Transport and Telecommunications) – Reasoned Opinion 12 July 1996

The Commission decided to send the Italian Republic a reasoned opinion (second stage of the infringement procedure) because it had failed to fulfil its obligation to send notification of the national measures taken to implement the provisions on the Conciliation Procedure provided for in Directive 92/13/EEC on review procedures in relation to procurement by entities operating in the water, energy, transport and telecommunications sectors.

Chapter 4 of this Directive makes provision for a special Conciliation Procedure aimed at the amicable settlement of disputes between contracting entities and tenderers who consider that they have been harmed by a failure on the part of those entities to respect Community law. Article 13 obliges Member States to take the necessary measures to comply with the Directive by 1 January 1993 (with the exception of Spain, Greece and Portugal, which had a later deadline) and to inform the Commission accordingly.

Since the Italian Republic failed to meet the deadline for introducing the Conciliation Procedure, the Commission has sent the Italian authorities a letter of formal notice (first stage of the infringement procedure) requesting them to take the appropriate action.

France - Electrification of the Vendée Region – Directive Infringement

1 August 1996

The Commission decided to send a reasoned opinion to France concerning the procedures followed for awarding public works contracts for electrification in the Vendée département. The Commission considered that the procedures followed violated the consolidated Utilities Directive (93/38/EEC), on public procurement in the water, energy, transport and telecommunications sectors. In particular, the contracting entity grouping divided up its work programme in such a way as to publish in the EC Official Journal only some of the contracts published at the national level, and then awarded the contracts to local companies. The French authorities' answer to a letter of formal notice (first stage of the infringement procedure provided for in Article 169 of the EC Treaty) sent on 17 January 1996 was judged unsatisfactory by the Commission.

France - Plan Lycée of the Nord-Pas de Calais region – Reasoned Opinion

1 August 1996

In the absence of any reply to its various letters of formal notice, the Commission decided to send a reasoned opinion to France concerning public works contracts for school buildings of the Nord-Pas de Calais region and of the Nord département. In particular, the Commission had serious doubts concerning the plan lycée launched by the region worth 1.4 billion French Francs, which did not comply with the Public Works Directive (71/305/EEC, as amended by Directives 89/440/EEC and 93/37/EEC).

The contract notices quoted purely French standards, without mentioning the equivalence of other Member States' standards, and confused the various criteria envisaged at the time of the procedure. In particular, an additional criterion relating to employment has been included in an interministerial circular not communicated to the Commission, which was discriminatory on the basis of the case law of the Court of Justice. The Commission questioned the systematic application of this criterion to all school building contracts in the Nord-Pas de Calais region and the Nord département from 1993 to 1995.

Moreover, the French authorities refused to forward to the Commission the documents requested in connection with these procedures, which do not respect the obligation to ensure competitive procedures. The Commission already decided in December 1995 to refer France to the Court of Justice in connection with the construction of the lycée at Wingles, in the same region (see IP/95/1399).

France - Subsidised Housing Organisations – Reasoned Opinion

1 August 1996

In the absence of any reply to a letter of formal notice sent on 7 December 1995, the Commission decided to send a reasoned opinion to France in connection with numerous cases of subsidised housing organisations' construction contracts not being published in the EC Official Journal. Although these entities fell within the scope of Community legislation, they systematically failed to respect their obligations under the public works procurement Directive (93/37/EEC) to publish contracts in the EC Official Journal.

Germany - Tram Cars – Reasoned Opinion

1 August 1996

The Commission decided to send a reasoned opinion to Germany for failing to ensure a contract for the supply of tram cars in Hanover followed the procedures required by the Utilities Directive 90/531/EEC (on public procurement in the water, energy, transport and telecommunications sectors). In particular, the

Commission considered that the contract was not opened correctly to competition. The contracting entity, the Hanover city transport company (UESTRA), published a contract notice concerning qualification for the supply of only 40 tram cars, while the contract in fact required the delivery of 144 tram cars.

Italy - Poor Transposition of the Public Works Directive - Reasoned Opinion

1 August 1996

The Commission decided to send Italy a reasoned opinion concerning the incompatibility of certain provisions of its national legislation (framework law n109/94, as modified by law n216/95) with the Public Works Directive (93/37/EEC).

The Italian authorities adopted, on 11 February 1994, a framework law on public works contracts (law n109/94), amended by a law of 2 June 1995 (law n216/95). Certain provisions of the laws are not in conformity with Directive 93/37/EEC, namely the rules on advertising contracts, on access to contracts for non-Italian operators, on the automatic rejection of abnormally low offers and on acceleration of the appeal procedures.

No response was received from the Italian authorities to the letter of formal notice sent by the Commission on 10 April 1996.

Italy - Digital Mapping – Reasoned Opinion

1 August 1996

The Commission decided to send to Italy a reasoned opinion concerning the procedures followed for the award of a contract for digital mapping services in Sardinia. The Commission considered the procedure violated not only

EC Treaty rules on the freedom to provide services (Article 59), but also the Services Procurement Directive (92/50/EEC).

The Sardegna region launched the public contracts in question by an accelerated restricted procedure without indicating any reason to justify recourse to such a procedure. Moreover, in order to participate in the procedure, candidates had to have a suitably-equipped workshop in Cagliari or in the vicinity, which constitutes both an obstacle to the freedom to provide services in violation of Article 59 of the EC Treaty and a breach of the provisions of the Services Procurement Directive concerning the selection criteria (Articles 29 and following). Another condition of admission to the procedure was connected with capacity to prove a very high turnover in relation to the value of the tender, in violation of the principle of proportionality as well as of Articles 31 and 32 of the Directive.

The Commission sent a letter of formal notice to the Italian authorities on 4 March 1996. The authorities' reply dated 3 April 1996 did not meet the objections raised by the Commission.

United Kingdom - Services for the Audit Commission – Reasoned Opinion

1 August 1996

The Commission decided to send the United Kingdom a reasoned opinion because the Audit Commission, a body established pursuant to the Local Government Finance Act 1982, violated the Directive on public procurement of Services (92/50/EEC) when it appointed external auditors to all local authorities in England and Wales for the years 1992 and 1993. The audit appointments in question are shared between the in-house District Audit Service (DAS), which carried out approximately 70% of the work, and independent United Kingdom accountancy firms, which jointly covered the remaining 30%.

For these external audit appointments, the Audit Commission did not publish any notices in the Official Journal of the European Communities, but appeared to select from a closed list of firms. The infringement procedure concerned these external appointments.

The Audit Commission's published Annual Accounts 1993/1994 revealed that contracts worth a total sum of £13.961 million were entered into with private firms in the year 1992 and a further sum of £17.684

million in the year 1993. In the view of the Commission, the service contracts entered into by the Audit Commission were covered by the provisions of the Services Procurement Directive. The services procured by the Audit Commission fell within Category 9 of Annex IA to the Directive (accounting, auditing and book-keeping services) and, pursuant to Article 8, the award procedures for these contracts were therefore covered by the provisions of Title III to VI of the Directive.

Ireland - Directive on Remedies in the Utilities Sectors – Reasoned Opinion

1 August 1996

The Commission decided to send Ireland a reasoned opinion following the Irish Government's failure to implement correctly some provisions of Directive 92/13/EEC on remedies in the utilities sectors (water, energy, transport and telecommunications). Member States were due to take the measures necessary to comply with this Directive before 1 January 1993. The Irish Government transposed the Directive by virtue of Statutory Instrument N 104 of 1993 on

21 April 1993. This text did not, however, provide for the setting up of an attestation system pursuant to Chapter 2 of the Directive, which obliged each Member State to give contracting entities the possibility of having recourse to an attestation system in accordance with Articles 4 to 7. The purpose of the attestation system is to provide for the procurement procedures and practices applied by contracting entities to be examined by independent persons with a view to establishing that they comply with Community law.

Ireland - Supply of a Geographical Information System - Reasoned Opinion

1 August 1996

The Commission decided to send Ireland a reasoned opinion in a case involving breaches of the Utilities Procurement Directive (90/531/EEC) by the Irish gas utility, Bord Gais Eireann. The infringement concerned the actions of Bord Gais Eireann during a negotiated procedure launched in January 1994 for the award of a contract for the supply of a geographical information system. The contract was to involve the supply of hardware, software and data conversion system. The Commission received an official complaint from a company that had unsuccessfully attempted to be represented among those invited to negotiate with Bord Gais Eireann.

The complainant company joined a consortium and submitted its bid in October 1994. According to the complaint, in September 1995, Bord Gais Eireann, having not yet awarded the contract, and in the course of continuing negotiations, requested of another of the consortium's members that it substitute another company of Bord Gais Eireann's own choice within the consortium in the place of the complainant. It is understood that this substitute was a company which had already submitted a bid as part of another consortium, whose bid had been rejected by Bord Gais Eireann on the basis of the price put forward. Such actions are contrary to the rules, in the Directive, governing the selection of candidates according to objective criteria, those permitting groupings of suppliers to be allowed to negotiate, and those setting out the only criteria which may be employed for the award of the contract, the identity of one of the consortium members not being among them.

The Irish authorities did not respond satisfactorily to the points raised by the Commission in a letter of formal notice sent on 1 February 1996.

Ireland - Spreading of Fertiliser by Helicopter for the Irish Forestry Board - Reasoned Opinion

1 August 1996

The Commission decided to send Ireland a reasoned opinion because the Irish Forestry Board (Coillte Teoranta) had failed to fulfil its obligations under the Services Procurement Directive (92/50/EEC). Coillte Teoranta, a body created pursuant to the Forestry Act 1988, failed to apply the Services Directive in relation to a call for tenders launched in April 1995 for the spreading of fertiliser by helicopter. The problem was, however, a more general one in that the Commission considered Coillte Teoranta as a contracting authority pursuant to the Public Procurement Directives. This classification of Coillte Teoranta is not accepted by the Irish authorities.

The reply received by the Commission to a letter of formal notice sent to the Irish Government on 21 March 1996 was not satisfactory.

Belgium - Aerial Survey of the Coast - Reasoned Opinion

1 August 1996

The Commission decided to send a reasoned opinion to Belgium because a contract for an aerial survey of the Belgian coast was not open to competition in violation of the Services Procurement Directive (92/50/EEC). The Directive stipulated that all service contracts exceeding the threshold of ECU 200,000 had to be open to competition by means of a contract notice published in the Supplement of the EC Official Journal and according to precise rules of procedure.

Although the contract relating to the aerial survey exceeded the threshold in the Directive, the contract was not opened to competition at the Community level and in particular no notice concerning the contract was published in the Supplement of the EC Official Journal. The contract was awarded to a Flemish company.

As the Commission regards the failure to publish a contract notice as a breach of the Directive, it asked in its letter of formal notice to the Belgian authorities of 27 December 1995, to have the attribution procedure suspended and for Community law to be applied. In their reply of 2 February 1996, the Belgian authorities stated that, as the contract had already been awarded, the contract could not be cancelled and, moreover, that the attribution of the contract by a negotiated procedure without preliminary publication of a contract notice was justified because there is only one company able to carry out the contract in question.

The Commission did not accept this view, because recourse to the negotiated procedure without preliminary publication, therefore without any publication at the Community level, is an exception to the rule that public procurement contracts have to be open to competition at the EC level. Under the terms of the Directive, a negotiated procedure without preliminary publication can only be used if very strict criteria (listed in the Directive) are met. On several occasions, the Court of Justice has ruled that if contracting authorities wish to award a contract by a negotiated procedure without preliminary publication, they have to provide the proof that all the conditions to resort to this procedure, conditions that have to be interpreted strictly, are fulfilled.

As the Commission considers that the Belgian authorities did not provide the proof, that all the conditions to resort to the negotiated procedure without preliminary publication were met, it has decided to send a reasoned opinion.

Portugal - Poor Transposition of the Supplies Directive - Reasoned Opinion

1 August 1996

The Commission decided to send a reasoned opinion to Portugal because it had failed to fulfil its obligations to transpose entirely and correctly the Supplies Procurement Directive (93/36/EEC).

The transposition measure notified by the Portuguese authorities, decree law 55/95, did not comply with the Directive 93/36 because it:

- (i) did not stipulate that session and installation operations are covered by the definition of supply contracts
- (ii) excluded contracts with the contracting authorities from the established arrangements
- (iii) allowed the negotiation of prices in restricted procedures
- (iv) did not compel contracting authorities to send their contract notices to the EC Publications Office for publication in the EC Official Journal and did not state clearly that contracts exceeding the appropriate threshold are subject to this obligation
- (v) stated that the deadlines for the presentation of applications or contract tenders run from the date of publication of the notice in the Portuguese Official Journal and not the EC Official Journal.

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.