

(see IP/04/149). The European Parliament and Council of Ministers adopted in February 2004 a new legislative package modernising and simplifying procurement procedures which should further boost cross-border competition (see IP/04/150).

ITALY – AWARD PROCEDURES

The Commission has decided to send Italy a reasoned opinion concerning the procedures used by its national railway administration, Ferrovie dello Stato (FS), to award the company TAV contracts for the construction of high-speed railway lines. In 1991, FS decided to contract TAV to build these lines in accordance with criteria to be set out in a performance agreement, which stipulated that TAV had to use general contractors to be chosen among Italy's leading industrial groupings.

After considering the arguments put forward by the Italian authorities, the Commission took the view that this provision effectively reserved the contracts for the lines in question for Italian companies, in breach of the principles of freedom of establishment and freedom to provide services enshrined in Articles 43 and 49 of the EC Treaty. The Commission's action under this procedure is primarily aimed at opening up to EU-wide competition work on lines (particularly those between Milan and Verona and Milan and Genoa) whose construction phase has not yet commenced.

GREECE – AWARD PROCEDURES

The Commission is sending a reasoned opinion to Greece for non-compliance with Directive 92/50 (public service contracts) in relation to the printing and publications of schoolbooks in Greece.

The Organisation for the Publication of Schoolbooks cooperates with approximately 80-90 relevant companies, based in the region of Attika, to which it awards the publication and printing of the schoolbooks every year, without launching a tender, on the basis of the companies' personnel, equipment and productivity.

The Greek authorities argue that there are time constraints as the books need to be ready for the beginning of every school year. Although the Directive (Article 11(3)(d)) allows agreements to be negotiated directly with suppliers without publishing a general invitation to tender in justifiable cases of extreme urgency, the Commission does not consider that these conditions are met in this case. First, there is no evidence that these time constraints are tight enough to prevent adhering to even the reduced time limits for accelerated restricted procedures provided for in Article 20 of the Directive. Furthermore, the reasons of urgency invoked by the Greek authorities are not brought about by events unforeseeable by the contracting authorities or by events which are not within the latter's control, as the Directive would require if the circumstances were to be considered of extreme urgency – after all, the school year begins every year, on a date set by the Greek authorities themselves. Therefore, the approximate number of books to be published and edited every year, as well as the expected delivery date, are known beforehand by the contracting authority.

PORTUGAL – NON-COMPLIANCE WITH EU LAW

The Commission has decided to send Portugal two reasoned opinions for incorrect implementation of Directive 93/38/EEC, coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, and of Directive 92/13/EEC, aimed at guaranteeing the effective implementation of the previous Directive by ensuring that effective and rapid remedies are available to suppliers, contractors and service providers in the event of infringement of the relevant EU law or national rules implementing that law.

The Commission takes the view that the Portuguese legislation does not comply with EU law, particularly in relation to the scope and application thresholds of the Directive, time limits for receipt of tenders, design competitions and abnormally low tenders.

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IRELAND AND UK – FAILURE TO COMPLY WITH REMEDIES DIRECTIVE

The Commission has decided to issue reasoned opinions against Ireland and the UK owing to their failure to comply with the obligations of the Remedies Directive 89/665/EEC on public procurement. In its Alcatel judgment (case C-81/98), the European Court of Justice stipulated that Member States were required to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the infringement can still be rectified. This should allow an aggrieved tenderer to have a contracting authority's decision suspended by way of interim measures and set aside, notwithstanding the possibility once the contract has been concluded of obtaining an award of damages.

In the Commission's view, neither Irish nor UK legislation currently complies in full with these requirements. The UK authorities are proposing amendments to their current remedies system, but the Commission does not consider these sufficient to comply with the Alcatel judgment.

GERMANY – COMPETITION REQUIREMENTS

The Commission is sending three reasoned opinions to the German authorities over the award without competition of contracts for the disposal of waste and wastewater.

In the first two cases, the Court of Justice has already ruled against Germany on 10 April 2003 (joint cases C-20/01 and C-28/01). The Commission is now asking the national authorities to comply with this judgement, failing which it can ask the Court to impose a daily fine.

The Court ruled that the Federal Republic of Germany had failed to fulfil its obligations under the services procurement Directive (92/50/EEC) in two cases of procurement by local communities in the State of Lower Saxony. In 1996, the City of Braunschweig awarded a contract for waste disposal by direct negotiations with contractors without prior publication of a contract notice. In 1998, the Municipality of Bockhorn did not invite tenders for the award of the contract for the collection of its wastewater. The contracts have been concluded for durations of a minimum of 30 years.

The Commission sent a letter of formal notice to Germany in October 2003 asking it to provide information on the measures it had taken to comply with the Court's judgment. However, the German authorities replied by simply repeating previous arguments which the Court had not accepted. Its judgment established that the breach of procurement law continues throughout the period of the contracts awarded illegally. As the current contracts will continue to produce effects for decades, the Commission considers that it is not sufficient to avoid breaches in future procurement procedures. To comply with the judgment, measures to end the actual infringements are required.

Finally, in December 1999 the Municipality of Hinte, also in Lower Saxony, awarded a service concession to the Oldenburgischer Ostfriesischer Wasserverband for the provision of wastewater disposal services. No transparent award procedure was carried out as required under EU law as interpreted by the Court of Justice (C-324/98, Teleaustria).

Germany argued that the Municipality was justifiably assuming that its decision was in compliance with EU law because at the time of that decision it could not have been aware of the developments in the Court of Justice's case law. However, the Commission does not accept this view, because an interpretation of EU law by the Court does not mean that the provision which it interpreted had a different substance before the Court's decision. Thus, EU law was broken by the award of the service concession.

This is the sixth Supplier Guidance on Infringement. Previous Guidance Nos 12/2002, 13/2002, 12/2003, 13/2003 and 9a/2004 are available at www.bipsolutions.com/html/briefing.php

LATEST EU PUBLIC PROCUREMENT INFRINGEMENT PROCEDURES

PART TWO OF TWO

European Union (EU) public procurement law aims to ensure that all European companies have a fair chance to bid for public contracts. Open and transparent tendering procedures mean more competition, stronger safeguards against corruption, better service and value for money for taxpayers and, ultimately, a more competitive Europe.

Representatives of the European Parliament and Council agreed on 2 December 2003 – on the basis of a proposal submitted by the Commission in May 2000 – on a legislative package simplifying and modernising EU public procurement law (see IP/03/1649). This package was formally adopted in early 2004. The Commission will shortly be publishing a report setting out the potential of more open procurement to boost the EU economy. Public procurement represents approximately 15% of EU GDP.

ITALY – TENDERING RULES

The Commission decided to bring a case before the Court of Justice against Italy concerning the award of service concessions for sports betting operations. The Commission has found that Italy failed to comply with the general principle of transparency under the EC Treaty and the resulting publicity requirement when, without any tendering procedure, it renewed until 2006 with the former concessionaires some 300 concessions for the management of horserace betting.

ITALY – TENDERING RULES

The Commission will also refer Italy to the Court in two cases concerning the award by ANAS, a body governed by public law, of contracts for the construction and management of two motorways, the Valtrompia and Pedemontana Veneta Ovest routes, without any prior invitation to tender at EU level. The Public Works Directive (93/37/EEC) stipulates that when the value of the work is at least €5 million contracting authorities are required to publish a contract notice in the Official Journal of the European Union (OJEU).

ITALY – CONTRACT AWARDS

Italy is also to be brought before the Court with regard to the award by the Municipality of Mantova of the management of a series of IT services. At the end of 1997, the management of these services was entrusted by negotiated procedure to the public limited company ASI, in which at the time the same Municipality of Mantova had a majority interest. According to the Court's case law, application of the tendering procedures provided for in the Directives can be waived only in cases where the contractor,



even if formally separate from the contracting authority, is not essentially independent of it as regards decision-making. The Commission considers that the sole fact that a contracting authority has a majority holding in a company's capital is not sufficient to deny that company's decision-making independence and thus cannot justify the failure to apply EU rules.

ITALY – CONTRACT RENEWALS

In addition, the Commission has decided to send a reasoned opinion asking Italy to repeal Article 44 of Law 724/1994, which allows contracting authorities in Italy to renew a public supply or service contract when it expires with the same contractor without applying the tendering rules laid down in the public procurement Directives.

UK – BODIES GOVERNED BY PUBLIC LAW

The Commission has decided to refer the UK to the Court because Registered Social Landlords, the main providers of social housing in the UK, do not apply EU public procurement Directives. These Directives impose strict procedural and other requirements on bodies governed by public law so as to ensure that their procurement of goods, works and services is transparent and non-discriminatory. The Commission considers that the relationship between Registered Social Landlords and the Housing Corporation, a public body sponsored by the former Department for Transport, Local Government and the Regions, is such that they should be treated as bodies governed by public law and thus comply with the public procurement Directives.

AUSTRIA – SALE OF COMPANY SHARES AFTER CONTRACT AWARD

The Commission will refer Austria to the Court over the award of a contract for the collection and treatment of waste in the Municipality of

Mödling. The contract was awarded on 15 September 1999 for an unlimited period directly to a company which was previously established and fully owned by the Municipality. However, in parallel with the award of the service contract, the Municipality sold 49% of the company's shares to a private undertaking.

The Austrian authorities argued that the Court's case law on 'in-house' awards applies in this case. That case law stipulates that the award to entities over which a contracting authority exercises control similar to that over its own internal departments does not fall under European public procurement law. The Commission considers that the Municipality of Mödling does not exercise such control over the said company, of which it owns only 51% of the shares. Therefore, the Municipality should have put the contract out to tender in accordance with the Directive on the public procurement of services (92/50/EEC).

FINLAND – ADVERTISING REQUIREMENTS

The Finnish contracting authority in charge of government real estate, Senaatti-kiinteistöt, awarded a contract for the supply of kitchen equipment worth 1 050 000 Finnish marks (€176 000) without advertising it. Finland has argued that the sum is below the threshold of application of the public procurement Directives. However, the Court's case law confirms that a contracting authority in such cases must ensure an adequate degree of advertising, sufficient to ensure competition and to avoid discrimination on the grounds of nationality. The Commission will now take the case to the Court.

GREECE – COMPETITION REQUIREMENTS

On 26 July 2002 Attiko Metro AE (the Athens metro company, a public entity) signed a contract with Hanhwa Koros for the supply of four trains for a dual-voltage network, and the transformation of three trains from single voltage to dual voltage. Hanhwa Koros had already been awarded a contract for the supply of 17 single-voltage trains. The July 2002 contract was the subject of an option clause in that earlier contract, which was neither evaluated nor awarded during the first procedure. The Commission believes that the award of the new contract without competition breaches the EU Directive on the procurement of supplies (93/36/EEC). It has therefore decided to send Greece a reasoned opinion.

The Greek authorities have not provided evidence to show that the contractor in question is the sole manufacturer or supplier of the items concerned, which would be one possible ground for exemption from the rules in the Directive. Neither can they justify the absence of competition on the basis of urgency arising from unforeseen circumstances connected with the 2004 Olympic Games. The fact that the Games would be held in Athens has been known for many years, and the contracting authority should have scheduled the work accordingly.



Besides, the inclusion of an option clause in the original tender for dual-voltage trains to be used on the suburban track suggests that the contracting authority considered such a development likely.

The new contract cannot be considered as a partial renewal of the existing supply contract, which would be another potential basis for exemption, because the dual-voltage trains are different from the single-voltage ones.

Finally, problems regarding different spare parts and the need for additional training and more personnel do not constitute disproportionate technical difficulties within the meaning of the Directive.

GREECE – ADVERTISING/TENDERING PROCEDURES

The Commission also decided to send Greece a reasoned opinion with regard to contracts for technical assistance to farmers. To help farmers take full advantage of certain EU aid measures under the common agricultural policy, the Greek Government used to conclude technical assistance contracts each year with specialist firms for each region, following suitable tendering procedures. In 2001, contrary to the approach followed previously, a framework programme was drawn up and the implementing contracts were awarded by negotiation.

The Commission considers that all the implementing contracts fulfil the same purpose and therefore have to be considered together, which means that they exceed the threshold in the Directive on public service contracts (92/50/EEC) and thus come within its scope. The detailed advertising and tendering procedures laid down in the Directive should therefore apply. Lastly, the argument put forward by the Greek authorities that only the chosen contractors had the technical capacity to carry out the contracts was at odds with the facts, since up to 2001 these contracts were subject to tender and they would be again from 2003 onwards.

GREECE – TENDERING RULES

A reasoned opinion is also to be sent to Greece with regard to a call for tenders issued by the Ministry of Public Works to recruit a technical consultant in connection with the construction of a wastewater treatment plant on the island of Psitallia. The award criteria related to tenderers' economic, financial and technical capacities and their experience. However, according to Directive 92/50, these aspects must be part of the selection criteria, and the Directive stipulates that the evaluation of bids must be divided into two distinct phases – first the selection phase and then the award phase. The function of the selection criteria, including the above-mentioned capacities, is basically to allow the contracting authority to establish a list of tenderers capable of carrying out the work concerned, whereas the award criteria are used for assessing tenderers' bids and awarding the contract.

GREECE – USE OF STANDARD FORMS

Furthermore, Greece has not notified the Commission of the transposition into national law, as regards supplies and the special sectors, of the Commission Directive of September 2001 (see IP/01/1271) on the use of standard forms for public procurement notices. The Commission has therefore decided to send a reasoned opinion asking Greece to transpose the Directive. The compulsory use of these forms improves the quality of the notices published, which promotes open markets, efficiency and transparency and facilitates the award of contracts electronically. In particular, using these forms makes it easier for potential suppliers to use automatic search tools to find the contract notices that interest them. For contracting authorities the standard forms reduce the work and costs associated with complying with the European rules on public procurement works.

NETHERLANDS – ADVERTISING REQUIREMENTS

The Commission has decided to send the Netherlands a reasoned opinion asking it to rectify breaches of EU law over works contracts for renovating the city centre of Hoogezand-Sappemeer. The local authority signed an agreement giving a particular company the exclusive right to carry out several types of work and then awarded it several contracts without competition. The Commission considers

that such direct awards constitute a violation of the Public Works Directive (93/37/EEC), if the threshold for application of this Directive is reached, in terms of the value of the contracts concerned. Even if that threshold is not reached, the EC Treaty requires, in order to comply with the principles of equality of treatment and of non-discrimination, an adequate degree of advertising to enable different businesses to compete.

BELGIUM – NON-COMPLIANCE WITH OBLIGATIONS

The Commission has decided to issue a reasoned opinion against Belgium owing to its failure to comply with the obligations of the Remedies Directive on public procurement. In its Alcatel judgment (case C-81/98), the Court stipulated that Member States were required to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the infringement can still be rectified.

The result of this judgment with regard to the applicable Belgian law is that a reasonable period must be allowed between unsuccessful tenderers being notified of the decision awarding a contract and the signing of the contract. However, under Belgian law there is no obligation to allow such a period.

FRANCE – PUBLIC PROCUREMENT CODE

The Commission has decided to take France to the Court of Justice for the non-compliance of its public procurement code with the Directives on public contracts and with the EC Treaty. The Commission found that the new code adopted on 7 January 2004 did not take into account the 11 complaints which the Commission had made in its reasoned opinion of 23 October 2002 regarding the earlier version of the code dated 7 March 2001 (see IP/02/1507).

Firstly, the new code, like the March 2001 version, provides 'simplified' procedures for certain service contracts listed in Annex B of Directive 92/50/EEC. These are primarily legal services, social and health services, recreational, cultural and sporting services, education services and vocational training and placement services.

For these services, the public authorities are not required by the French code to ensure a proper degree of advertising, which according to the Telaustria judgment by the Court of Justice (case C-324/98) is in fact absolutely necessary for the award of a contract to comply with the principle of transparency required by the EC Treaty.

Secondly, the code continues to exclude loan contracts from advertising and competition requirements, whereas the Commission considers that generally contracts concerning loans or other financial commitments are covered by Annex IA of Directive 92/50/EEC (public service contracts) and Annex XVIIA of Directive 93/38/EEC (public contracts in the water, energy, transport and telecommunications sectors) and are thus subject to the requirements of transparency laid down by the Directives.

Lastly, the Commission considers that the new code continues to infringe the Directives on public contracts with regard to the minimum number of participants to be invited in a restricted procedure (ie not open to every tenderer wishing to submit a bid). Indeed, according to the case law of the Court of Justice, even if there is no range laid down in the contract notice published in the OJEU, the minimum number of applicants invited to tender should not be less than five (see the judgment *Commission v France*, case C-225/98). The code in fact applies this minimum number only if a range has been indicated in the contract notice.

FRANCE – LOCAL DEVELOPMENT AGREEMENTS

The Commission has sent the French authorities a reasoned opinion in connection with the incompatibility of Article L300-4 of the French town planning code with European law. This article allows local development agreements and appointment contracts for the follow-up of preliminary studies for a development project to be concluded without being advertised and without competition.

France makes use of local development agreements primarily for global projects, including the construction of public amenities to be handed over to the awarding authority and for buildings to be resold or rented, eg as part of the implementation of a town planning project and local housing policy or urban renewal.

The Commission considers that the main purpose of these agreements concerns works, even if they are not actually performed by the planner but by a builder selected by the planner. These types of local development agreements must in principle be concluded in accordance with the advertising and competition rules laid down in Directive 93/37/EEC on public works contracts.

When these local development agreements are concluded with a restricted category of public or semi-public bodies defined in Article L300-4 of the town planning code (eg semi-public companies), these bodies may also be given the right to perform the procedures for the expropriation decided by the State of the land to be developed. In this case, the Commission feels that granting this right to 'public' planners, when there is nothing to prevent it from being granted to private individuals, does not provide grounds for exemption from the rules of the EC Treaty. Indeed, the application of this right is not an activity involving the exercise of official authority, as referred to in Article 45 of the Treaty.

Other types of local development agreement may refer to the management of economic activities or the development of recreation and tourism, in which case the Commission takes the view that they must be regarded in the same light as service concessions, which according to the Treaty must be awarded with a proper degree of advertising for the benefit of all potential applicants (see the Court of Justice's Telaustria judgment, case C-324/98).

As for appointment contracts for preliminary studies needed to define the features of a development project, the Commission considers that such contracts must be awarded in accordance with the advertising and competition rules laid down in Directive 92/50/EEC on public service contracts.

ITALY – PURCHASING PROCEDURES

The Commission has decided to send Italy a reasoned opinion on the procedures followed by the Italian Government in connection with the purchase of helicopters for civilian use. The Italian Government has for a long time followed a practice of awarding to an Italian manufacturer, directly and without any kind of competition, contracts for helicopters to be used by certain public services, and especially by the forestry department (Corpo Forestale dello Stato), financial police (Guardia di Finanza), fire services (Vigili del Fuoco), police and security forces (Polizia di Stato and Carabinieri), coastguard (Guardia Costiera) and the civil defence department (Dipartimento della Protezione Civile).

The Commission feels that this practice is contrary to the Directive on public supply contracts (93/36/EEC), since none of the strict conditions governing the possibility of using a negotiated procedure without prior publication of a contract notice is met in this instance.

It also feels that Italy has in no way shown that the practice in question is justified on the basis of Article 2 of Directive 93/36/EEC, which states that the Directive does not apply to "contracts which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member States concerned or when the protection of the basic interests of the Member State's security so requires".

The Commission has already referred Italy to the Court of Justice in connection with a government order authorising one of the services mentioned – Corpo Forestale dello Stato – to purchase helicopters without any form of competition (see IP/03/1037). The case in question at the moment, on the other hand, concerns the general practice followed by the Italian Government for the purchase of all helicopters for civilian use by the services concerned.

EU public procurement law aims to ensure that all European companies have a fair chance to bid for public contracts. Open and transparent tendering procedures mean more competition, stronger safeguards against corruption, better service and value for money for taxpayers and, ultimately, a more competitive Europe. EU public procurement markets are worth over €1500 billion, approximately 15% of total EU GDP. The existing EU public procurement Directives have increased cross-border competition in procurement markets and reduced by around 30% the prices paid by public authorities for goods and services, according to a European Commission working document