

considers that it is not sufficient to avoid future violations. Measures to end the current infringements are required. Consequently, the Commission has decided to send a letter of formal notice. If the German authorities still do not comply, the Commission can ask the Court to impose a daily fine.

GREECE – TENDERING RULES

Presidential Decree 334/2000 (OJ 279, 21.12.2000) imposed restrictions on the building firms which could take part in procedures for the award of public contracts. In the absence of official national registers of contractors, the Decree only allowed companies to produce references to similar works constructed in their country of origin and other EU or EEA Member States.

The Commission considered that this provision infringed Directive 93/37/EEC, because it constituted, without any technical justification, discrimination against tenderers who had carried out works outside EU and EEA territory, who were consequently automatically eliminated from procedures for the award of public contracts in Greece.

Following the Commission's intervention, the Greek authorities acknowledged the illegal nature of the disputed provision and, on 9 December 2002, communicated the regulatory text (Article 2 of Presidential Decree 336/2002, published in the Official Journal of the Hellenic Republic, Vol I, No 281, 20.11.2002) which amends the disputed provision by allowing companies or physical persons from EU or EEA Member States in which official registers of contractors are

not held to take part in competitions for the construction of works similar to those that they have already built, irrespective of where such works are located.

LUXEMBOURG – APPEALS

The Luxembourg legislation, insofar as it stipulated that the award involved an amount which was sufficient to justify a competitive procedure, did not allow a meaningful appeal against a decision (that is to say, at a stage where infringements could still be corrected by starting the procedure again, ie prior to the contract being signed).

In these circumstances, the Commission considered this legislation to be contrary to Directive 89/665/EEC as interpreted by the Court of Justice in the Alcatel judgment of 28 October 1999, which requires the Member States, as part of the award procedure, to enable tenderers to apply for cancellation of a decision. Accordingly, the Commission sent a letter of formal notice in October 2002.

By adopting the Grand-Ducal Regulation of 7 July 2003, the Luxembourg authorities have ended the infringement. Article 90 of the Grand-Ducal Regulation introduces a 15-day period between notification (to the unsuccessful tenderers) of the contracting authority's decision and signature of the contract.

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

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GUIDANCE 09a

2004

LATEST EU PUBLIC PROCUREMENT INFRINGEMENT PROCEDURES

PART ONE OF TWO

Under the EC Treaties the European Commission is responsible for ensuring that European Union (EU) public procurement law is correctly applied. As the guardian of the EC Treaty, the Commission has the option of commencing infringement proceedings under Article 226 EC against a Member State which, in the eyes of the Commission, infringes EU law, in particular the principle of free movement of goods. The Commission can try to bring the infringement to an end and, if necessary, may refer the case to the European Court of Justice.

IRELAND – ADVERTISING REQUIREMENTS

The Commission has decided to refer Ireland to the European Court of Justice over the extension, without competition, of the contractual arrangements with An Post (the national Post Office) for the provision of social welfare payment services.

The Commission sent a reasoned opinion, to which the Irish authorities did not reply satisfactorily, in December 2002 (see IP/03/266). The case is not specifically covered by the detailed procedural requirements for the advertising and award of contracts laid down in the Directive on the public procurement of services (92/50/EEC). However, it is covered by the general provisions of that Directive, by general EU law obligations such as non-discrimination, equal treatment and transparency and by the principles covering the free movement of services laid down in the EC Treaty.

The Irish authorities concerned should therefore have ensured, for the benefit of any potential tenderer, a degree of advertising necessary and sufficient to ensure competition.

The precise scope and form of the advertising required depends on the nature of the services in question and the extent to which the contract is of interest to potential regional, national or EU-wide service providers. The contract to An Post, for example, amounts to around €40 million and could have interested a number of suppliers outside Ireland. Advertising would therefore have to be more than simply national.



ITALY – COMPETITION REQUIREMENTS

Following a reasoned opinion sent in March 2003 (see IP/03/486), the Commission has decided to bring an action against Italy before the Court of Justice. According to an Order of the President of the Council of Ministers dated 24 July 2002 the Italian body responsible for the surveillance of woodland (Corpo Forestale dello Stato) is authorised to purchase the most suitable aircraft for its purposes by means of a direct agreement procedure outside the competition rules laid down in the EU Directives on public contracts.

As the Court of Justice has repeatedly pointed out, the provisions which, under the Directive on public supply contracts (93/36/EEC), authorise derogations from the competition requirement must be interpreted strictly. It is for the contracting authority wishing to make use of them to demonstrate the existence of circumstances that justify these derogations – for example reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question. According to the Commission, there are no such circumstances in the present case.

GERMANY – TENDERING RULES

The Commission is referring Germany to the Court of Justice in connection with a waste disposal contract awarded by the District of Friesland without the required Europe-wide tendering procedure as provided for in the Directive on the award of public service contracts (92/50/EEC). The contract was awarded in 1994, for the period 1995-2004 and for a value of DM29 million (€14.83 million).

Germany admitted the breach of EU law in answer to the letter of formal notice sent by the Commission in July 2000. However, it argued

that an early termination of the contract was impossible without claims for damages and that the contract will not be extended beyond the closing date originally provided for. Future services will be awarded in compliance with EU law.

However, this has not remedied the existing violation of EU law as the contract remains in force until the end of 2004. Furthermore, similar cases continue to occur in Germany. The Commission is currently at an early stage of assessing a similar case in the District of Friesland, where the same contracting authority is concerned.

GREECE – ADVERTISING REQUIREMENTS

The Commission has decided to send Greece a reasoned opinion on the award by the Greek airforce of a contract for the supply of 14 automatic weather stations without publication of a notice in the Official Journal of the European Union (OJEU). Since the contract exceeds the threshold laid down in the Directive on public supply contracts (93/36/EEC), a notice should have been published in the OJEU.

The Commission considers that the contract cannot be covered by the exception provided for in the case of the supply of certain equipment in the field of defence, since the supplies in question are not primarily destined for military use.

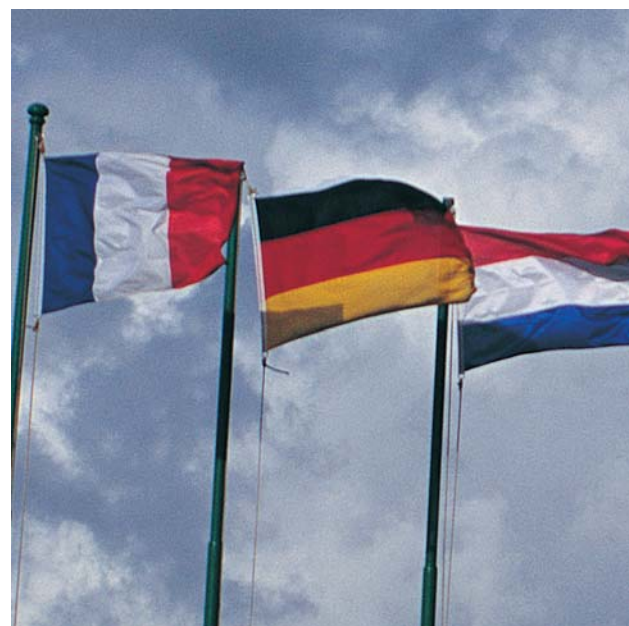
These weather stations should permit the modernisation of the system used by the National Meteorological Agency and will principally be used for the Olympic Games, and subsequently by the Agency to meet the needs of civil, and possibly military, aviation.

Nor does it seem possible to invoke another exception in connection with reasons of extreme urgency brought about by events unforeseeable by the contracting authorities. The need to have operational weather stations for the 2004 Olympic Games cannot be regarded as an unforeseeable event. Finally, the need would not appear to be so urgent that the deadlines required under the open and restricted procedures could not be respected.

ITALY – AWARD PROCEDURES

The Commission has decided to send Italy a reasoned opinion on the award procedures applied for the construction and management of the Valtrompia and Pedemontana Veneta Ovest motorways.

The competent authority in Italy for the granting of national-level motorway concessions (ANAS – a body governed by public law) awarded a concession for the construction and management of the motorways in question by means of a direct agreement without prior competition at EU level.



Under the Directive on the coordination of public works contracts (93/37/EEC), contracting authorities wishing to award a concession for public works must, if the value of the works is €5 million or more, announce their intention by means of a notice to be published in the OJEU.

NETHERLANDS – ADVERTISING REQUIREMENTS

The Commission has decided to send the Netherlands a reasoned opinion on contracts for the supply of household refuse containers awarded by the local authority in Assen to a supplier under a direct agreement.

The Directive on public supply contracts (Directive 93/36/EEC) does not apply to these contracts, as the amounts involved were below the threshold for the application of that Directive. The Commission considers, however, that the fact of awarding these contracts directly to a supplier without competition constitutes a violation of the general principle of the EC Treaty concerning equality of treatment deriving from the principle of non-discrimination on grounds of nationality. There should have been an adequate degree of advertising in order to enable different businesses to compete so that the contract could be awarded to the tenderer submitting the best bid, thus guaranteeing that public money is well spent.

SWEDEN – TENDERING RULES

The Commission has decided to issue a reasoned opinion against Sweden concerning a decision by the Municipality of Eskilstuna to award a framework contract covering several works worth at least €19.6 million without applying the tendering rules in the Directive on the procurement of public works (93/37/EEC).

Although the Swedish authorities have acknowledged the infringement and announced that some of the works have already been finished, the Commission considers that the works as a whole are still ongoing and has decided to issue this reasoned opinion.

If the Works Directive is not properly applied, there is a risk that EU companies will be deprived of a fair chance to bid and the public entity in question, and thus the taxpayer, may pay a higher price than necessary for the works.

BELGIUM – SPECIFICATION OF ORIGIN

The specifications for a works contracts awarded in Wallonia stated that all quarrying of bluestone would have to take place in Belgium. Prescription of origin is prohibited in principle under European law. The Commission sent a letter of formal notice dated 16 October 2002, and the specifications will henceforth state that equivalent natural stone from other countries will also be acceptable. The Commission has therefore decided to close the case.

GERMANY – TENDERING RULES

In 2001, the City of Freiburg awarded a 15-year contract worth €3.7 million to a private company, of which it owns 32%, for the supply of heating. No Europe-wide tender procedure was carried out as required by the Directive on public procurement of supplies (93/36/EEC).

Germany has acknowledged this breach of EU law. However, it claimed that the case constitutes an exceptional misinterpretation of the European Court of Justice's case law on 'in-house' awards. The city authority believed that the contract would not require a tender as it was awarded to an entity controlled similarly to the authority's own internal departments. The city authority has awarded a number of other contracts since the one in question, in accordance with the procedures required by EU law.

However, the Commission's view is that the breach of EU law is continuing and will do so until the end of the contract in 2016, unless steps are taken to remedy it. The fact that the City of Freiburg has fulfilled its obligations in other procurement activities does not mean Germany has remedied the breach in question. Consequently, the Commission has decided to send a reasoned opinion to the German authorities.

IRELAND – TENDERING RULES

The Commission has also decided to send a reasoned opinion to the Irish authorities asking them to put right non-compliance with EU public procurement rules in the award, without competition, by the Irish Forestry Board of contracts for the aerial fertilisation of forests by helicopter.

The Irish authorities classify the Irish Forestry Board as a private entity not subject to the public procurement rules, despite the fact that it has the important role of maintaining national forests and assisting the development of the forestry industry.

However, the Commission takes the view that the Board is a body governed by public law, as defined in Article 1(b) of the Directive on the public procurement of services (92/50/EEC), and therefore subject to EU procurement rules. A previous judgment of the European Court of Justice (17 December 1998, case C-353/96) already classified the Irish Forestry Board as a contracting authority.

As a result, the Commission considers that even if the specific contracts in question are not covered by the detailed procedural requirements for the advertising and award of contracts laid down in Directive 92/50/EEC, they do fall under the general provisions of that Directive and under EC Treaty principles. The contracts should therefore have been adequately advertised.

IRELAND – ADVERTISING REQUIREMENTS

Ireland has not complied with a reasoned opinion sent to it over the renewal of the contract for Dublin City Council (formerly Dublin Corporation Fire Brigade) to provide emergency ambulance services to the Eastern Regional Health Authority (see IP/03/266). The Commission will now take the case to the European Court of Justice.

The case is not specifically covered by the detailed procedural requirements for the advertising and award of contracts laid down in Directive 92/50/EEC on the public procurement of services. However, it is covered by the general provisions of that Directive, by general EU law obligations such as non-discrimination, equal treatment and transparency and by the principles covering the free movement of services laid down in the EC Treaty.

The Commission therefore considers that, in line with those obligations, the Irish authorities should have ensured, for the benefit of any potential tenderer, a degree of advertising necessary and sufficient to ensure competition.

ITALY – FRAMEWORK LAW ON PUBLIC WORKS

The Commission has decided to send Italy a reasoned opinion concerning certain provisions of the framework law on public works, No 109/94, as last amended by Law No 166/2002.

The Commission wants Italy to amend its legislation to bring this framework law into line with the Directives on public contracts and thereby make those contracts open to intra-EU competition.

In particular, the Commission's action is designed to:

- Avoid situations where national rules on the scope of the Directive on public work contracts which are not in conformity with EU law result in public contracts not being published at EU level in accordance with the Supplies and Services Directives, whose application thresholds are much lower than those in the Works Directive.
- Ensure that the competition rules of EU Directives on public contracts are applied in all cases or, where they are not applicable, to ensure that the contract is sufficiently advertised in accordance with the general principle of transparency. This applies, for example, to work performed by way of payment for planning permission and engineering, architectural and project assessment services falling below the thresholds of the EU Directives, and to management services and technical inspection services (*collaudo*).
- Avoid situations where national rules such as that on the right of pre-emption (*prelazione*) of the promoter within the framework of



project-financing procedures discriminate against non-nationals who bid for public contracts.

ITALY – CONTRACT AWARDS

The Commission has also decided to send a reasoned opinion to the Italian authorities concerning their methods of awarding contracts for the construction and management of gas distribution networks by the eight municipalities constituting the catchment areas known as Puglia 25 and Puglia 29 (including San Giovanni Rotondo, San Nicandro Garganico and San Marco in Lamis).

From 1991, these eight municipalities awarded contracts for the construction and management of the networks to one company via a negotiated procedure, without putting the contracts out to tender at EU level.

The Directive on public works contracts (93/37/EEC) states that contracting authorities wishing to award a public works contract (if the value of the contract is €5 million or more) must publish a notice in the OJEU. The same rules are provided for in Directive 89/440/EEC.

The Commission considers that, as the above-mentioned Directives do not lay down exemptions for the award of a public works contract via a negotiated procedure, the aforementioned contract awards should have been awarded via competitive tender.

GERMANY – TENDERING RULES

On 10 April 2003, the European Court of Justice ruled in joint cases C-20/01 and C-28/01 that the Federal Republic of Germany had failed to fulfil its obligations under Directive 92/50/EEC in two cases of service procurement by local authorities in the State of Lower Saxony. In 1996, the City of Brunswick awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice. In 1998, the Municipality of Bockhorn did not invite tenders for the award of a contract for the collection of its waste water. The contracts have been signed for a minimum of 30 years.

The Commission asked the German Government to provide information on the measures it had taken to comply with the judgment of the Court. However, the German Government simply replied by repeating its previous arguments, namely that it had always acknowledged the violations and had taken all necessary measures to avoid their repetition in the future.

The Court established in its judgment that the violation of procurement law continues throughout the execution period of the contracts awarded in breach of the Directive. As the present contracts will be in effect for decades, the Commission