

PUBLIC PROCUREMENT: INFRINGEMENT PROCEDURES AGAINST SPAIN, ITALY AND SWEDEN

The European Commission has taken action against Spain, Italy and Sweden to correct breaches of EU public procurement Law. The Commission has formally requested that Spain modifies the law on town planning (known as 'LRAU') that applies to the Valencia Community. This request takes the form of a 'reasoned opinion', the second stage of the infringement procedure laid down in Article 226 of the EC Treaty. If there is no satisfactory reply within fifteen days, the Commission may refer the matter to the European Court of Justice. The Commission has also decided to refer Spain to the Court over provisions on employment stability that apply to the Autonomous Community of Madrid. In addition, the Commission has decided, under Article 228 of the EC Treaty, to send a letter of formal notice asking Spain for full information on its execution of European Court judgments requiring it to transpose certain EU public procurement Directives correctly into national law. The Commission has decided to refer Italy to the European Court of Justice in three separate cases concerning respectively: the purchase of light helicopters for the Police and the National Fire Brigade; the



review procedures relating to the award of public contracts; and the procedure followed by Azienda Casa Emilia Romagna of Reggio Emilia for the award of public works contracts relating to the maintenance and construction of council houses. Finally, the Commission has made a formal request to Sweden concerning a decision by several nuclear operators to exclude a consultancy from their services contracts. This request takes the form of a 'reasoned opinion', the second stage of the infringement procedure laid down in Article 226 of the EC Treaty. If there is no satisfactory reply within two months, the Commission may refer the matter to the European Court of Justice.

Further information on the above can be found in 'Latest EU Public Procurement Infringement Procedures' by visiting <http://www.bipsolutions.com/docstore/pdf/12118.pdf>

The open and transparent tendering procedures required under EU public procurement Law mean more competition, stronger safeguards against corruption, and better service and value for money for taxpayers.

SPAIN - LAW 6/1994 ON TOWN PLANNING FOR THE VALENCIA COMMUNITY (LRAU)

The Commission has decided to send a reasoned opinion to Spain under Article 226 of the EC Treaty. In this reasoned opinion the Commission takes the view that the award of integrated action programmes (programas de acción integrada) in accordance with the LRAU comprises public works contracts and, in some cases, public services contracts and must therefore comply with the provisions of Directives 93/37/EEC (public works contracts) and 92/50/EEC (public services contracts) and the general principles of the Treaty.

These programmes are awarded by the municipalities of the Valencia Community for the performance of public infrastructure works. The Valencia Parliament (Cortes Valencianas) has started a legislative procedure to amend the LRAU and to bring it in line with the Directives in question.

The Commission notes that the Spanish authorities have not complied with the warning and that the draft legislation communicated to the Commission is not enough to put an end to the infringement in several respects. In particular, there is no provision in the draft legislation for a suitable solution for the matter of the transition period applicable to the LRAU.

SPAIN - PROVISIONS ON EMPLOYMENT STABILITY THAT APPLY TO THE AUTONOMOUS COMMUNITY OF MADRID

The Commission has decided to refer Spain to the European Court of Justice over Decree 213/1998 of the Autonomous Community of Madrid which obliges contracting authorities within the Autonomous Community to include, except in special circumstances, one or more criteria relating to the stability of



employment in the tenderer's workforce. These criteria will be used to determine the most economically advantageous tender.

The Commission's Interpretative Communication of 28 November 2001 on the Community Law applicable to public procurement and the possibilities for integrating social considerations into public procurement discusses the possibilities offered by Community Law to integrate social considerations into procurement procedures. The Court of Justice further clarified those possibilities in its judgment of 17 September 2002 *Concordia Bus Finland* (case C-513/99). The public procurement Directives adopted on 31 March 2004 consolidate and supplement the legal context. According to this framework, award criteria that integrate social and environmental considerations must fulfil certain requirements, including a link to the subject matter of the specific contract in question.

The Commission takes the view that some of the criteria in Decree 213/1998 do not meet these requirements. In particular, the Decree makes these award criteria mandatory for contracting authorities within the Autonomous Community, regardless of any link with the subject matter of specific contracts. The Commission also takes the view that some of the criteria in the Decree are selection criteria and should therefore not be used to award the contract.

SPAIN - FOLLOW-UP TO THE JUDGMENT OF THE COURT OF JUSTICE OF 13 JANUARY 2005

The Commission has decided to send a letter of formal notice to Spain under Article 228 of the EC Treaty. In its judgment of 13 January 2005 (case C-84/03), the Court of Justice ruled that the Kingdom of Spain had failed to comply with its obligations under Directives 93/36/EEC and 93/37/EEC (public supply contracts and public works contracts, respectively) concerning the notions of awarding authority, interadministration cooperation agreements and use of negotiated procedures in cases not covered by the Directives in question. In order to implement this ruling, Spain approved on 11 March 2005 Royal Decree (Real Decreto-ley) No 5/2005 providing urgent reform to stimulate productivity and improve public contracts.

The Commission nevertheless takes the view that this Royal Decree has not fully met the obligations placed on the Kingdom of Spain by the ruling mentioned above, inasmuch as the scope of the



Royal Decree does not coincide with the scope of the relevant provisions of Directives 93/36/EEC and 93/37/EEC.

ITALY - PURCHASE OF LIGHT HELICOPTERS; REVIEW PROCEDURES RELATING TO THE AWARD OF PUBLIC CONTRACTS; AWARD OF PUBLIC WORKS CONTRACTS RELATING TO THE MAINTENANCE AND CONSTRUCTION OF COUNCIL HOUSES

The Commission has decided to refer Italy to the European Court of Justice for infringement of EU public procurement Law on public procurement in the following three cases:

- The first case concerns a decree issued by the Minister of the Interior on 11 July 2003 permitting the purchase of light helicopters for the Police and the National Fire Brigade without applying the tendering rules set out in Directive 93/36/EEC on public supply contracts. The Commission considers that Italy has not demonstrated that any of the strict conditions allowing derogations, and in particular those concerning contracts requiring special security measures and secret contracts, is met in this case. Therefore, it is the Commission's opinion that this decree constitutes an infringement of the Directive 93/36/EEC.
- The second case concerns the review procedures relating to the award of public contracts. The Italian remedies system does not provide for a reasonable period between the notification of the award decision and the conclusion of the contract. The Commission considers a standstill period to be necessary to ensure that the award decision can be suspended and annulled at a stage where the infringement can still be rectified. Moreover, Italian Law does not empower the review bodies to take interim measures against a decision of a contracting authority independently of any prior action, as required by the Court of Justice Case Law.
- The third case concerns the procedure followed by Azienda Casa Emilia Romagna of Reggio Emilia for the award of public works contracts relating to the maintenance and construction of council houses. The Commission considers that the tendering rules laid down in Directive 93/37/EEC on public works contracts were not complied with and that, as a consequence, there was insufficient competition among bidders.



SWEDEN - EXCLUSION OF A CONSULTANCY FROM SERVICES CONTRACTS FOR SWEDISH NUCLEAR OPERATORS

The Commission has decided to issue a reasoned opinion against Sweden concerning a decision by several nuclear operators to exclude a consultancy from their services contracts. The nuclear operators are contracting entities in the meaning of Council Directive 93/38 and thus bound to apply its rules when awarding contracts.

The consultancy has however been excluded from the services contracts of the nuclear operators without receiving the rules and criteria applied for selection of candidates to their contracts. According to the Directive these rules should be made available to interested suppliers. The Swedish authorities have not acknowledged the infringement.

If the national authorities do not give a satisfactory reply to the reasoned opinion within two months, indicating that the consultancy is no longer excluded without valid justification from the contracts of the nuclear operators, the Commission may refer the matter to the Court of Justice.

The latest information on infringement proceedings concerning all Member States is available at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

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The PASS Mark Health Check is a process-based evaluation technique that helps identify how your company can develop more effective processes when tendering for public sector contracts.

For further information on the PASS service, contact our PASS Team on 0845 270 7055, email pass@bipsolutions.com or visit www.bipsolutions.com/pass/