

GERMANY: SEWAGE WATER TREATMENT AND GAS AND ELECTRICITY SUPPLY IN JEVER

The Commission considers that the City of Jever breached EU law in awarding two contracts, one for the treatment of sewage water and the other for the supply of gas and electricity, without undertaking a public tendering process as required by the public procurement Directives (Directive 92/50/EEC on the procurement of services and Directive 93/36/EEC on the procurement of supplies).

In response to the Commission's letter of formal notice sent in September 2000, the German authorities admitted the infringement and announced that a solution complying with the public procurement rules would be found for the water treatment contract by the beginning of 2002 at the earliest and that the existing electricity and gas contract would be terminated as of 31 December 2001 and a correct procurement procedure organised for the new contract.

However, the authorities concerned took no concrete steps with regard to the water treatment contract and subsequently stated that the electricity and gas contract would run until the end of 2003. As a result, the breaches of EU law have so far continued.

GERMANY: LIMBURG PROJECT DEVELOPMENT SERVICES CONTRACT LINKED WITH REAL ESTATE ACTIVITIES

In 2001 the City of Limburg awarded a contract for the planning and development of municipally owned premises near the city's main railway station for a new 'services park' and for the marketing and the sale of these premises. This contract, which amounts to £190,000 plus a success fee of 10% of the price of premises sold, was awarded without a public procurement procedure.

The German authorities have informed the Commission that in their view the contract in question does not fall under the European procurement rules since the services concerned are outside the scope of application of Directive 92/50/EEC on the procurement of services.

However, after detailed analysis of the contract, the Commission considers that the services to be provided belong to those categories of services listed in Directive 92/50/EEC and are therefore subject to the detailed procedural rules of the Directive. A call for tender should therefore have been published.

ITALY: PIEDMONT REGION TECHNICAL ASSISTANCE CONTRACT FOR MANAGING EUROPEAN FUNDS

The Piedmont Region of Italy in July 2001 awarded a contract for technical assistance in the management of European funds, according to criteria incompatible

with Directive 92/50/EEC on the public procurement of services.

In line with the Directive, the contracting authority awarded the contract on the basis of what it considered the economically most advantageous tender. However, one of the criteria used in making this assessment was an evaluation of the composition of the working group proposed by the tenderer to manage the work concerned. The use of such a criterion at this stage of the tendering process breaches Article 36 of the Directive.

Bidders who have failed to demonstrate that they have the necessary abilities and capacities to provide the service should be eliminated from the selection process at an earlier stage. The ability or the capacity of the service providers and their personnel should then play no role in the evaluation of the quality and pricing of tenders. The award of the contract to the most economically advantageous tender should be based exclusively on an assessment of the value of the tenders.

SWEDEN: BUS TRANSPORT SERVICES

Kalmar Länstrafik AB, an entity in charge of organising regional bus transport services in the Kalmar regional jurisdiction in Sweden, in December 2000 awarded contracts for bus transport services on the basis of a misapplication of EU public procurement law. The total amount of the contracts is estimated at 189.5 million Swedish Kroner (approximately £20.75 million).

As in the Italian case referred to above, some of the award criteria used breached the provisions of EU public procurement law (in this case Directive 93/38/EEC for utilities entities) in that they related to the characteristics of the tenderer as such and not to the service provided.

Case-law of the European Court of Justice has consistently confirmed that selection of those candidates among the bidders who have the abilities and capacity to provide the service required on the one hand, and the evaluation of their tenders on the other, are two different operations that may take place simultaneously but are governed by different rules.

Recent general information on infringements concerning all Member States may be consulted at: http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm



Latest EU Public Procurement Infringement Proceedings

PART ONE

Under the Treaties the European Commission is responsible for ensuring that Community 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 Community 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 Court of Justice.

This is the third BiP Guidance on Infringement. Previous Guidance Nos. 12/2002 and 13/2002 are available at: www.bipcontracts.com/html/briefing.php

SPAIN: CONCESSION ON THE A6 MOTORWAY

The Commission has decided to formally ask Spain to amend the granting of an administrative concession for the construction, maintenance and exploitation of two connections of the A6 motorway with Segovia and Ávila, and for the maintenance and exploitation of the Villalba-Adanero section of the same motorway. The concession awarded contains major features which did not appear in the relevant call for tenders. The formal request is in the form of a reasoned opinion, the second stage in the infringement procedure pursuant to Article 226 of the EC Treaty. Spain has two months after receipt of the reasoned opinion to provide a response. If there is no response, or it is unsatisfactory, the

Commission may decide to refer the case to the European Court of Justice.

The call for tenders related exclusively to the work and services set out above.

However, when the concession was awarded, a further package of infrastructure works for a sum more or less equivalent to that of the work on the two sections which were the subject of the call for tenders was also awarded.

This additional package was not provided for in the concession notice or the administrative specifications. The extra infrastructure works concern, in particular, the construction of a new reversible lane (including a new tunnel) between San Rafael and El Valle de los Caidos, the construction of new lanes on two other sections - one of them toll-free - and the construction of a new tollgate area, as well as other works.

Subsequent to the despatch of a letter of formal notice from the Commission (the first stage in infringement proceedings), the Spanish authorities replied in a letter of 27 June 2001, in which they affirmed, in particular, that the changes made when awarding the concession were based on two clauses in the specifications which lay down that tenderers must indicate in their bids the measures to be taken for the overall management of the traffic in the area concerned by the construction of the new stretches.

The Commission, however, considers that the aforementioned clauses cannot themselves allow a substantial change in the subject of the concession - particularly as these clauses always refer to the area concerned by the construction of the two new sections. What is more, nothing in the specifications led one to conclude that tenderers could submit proposals relating to work other than the two sections referred to.

Potential tenderers could have thus been led not to submit bids, and the principles of transparency and equality were infringed. The Commission has therefore decided to send a reasoned opinion.

Information on all current infringement proceedings against Member States is available on the Europa website at: http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

FRANCE: NEW PUBLIC PROCUREMENT CODE

The European Commission has decided to ask France to amend several provisions in its new public procurement Code⁽¹⁾ with a view to bringing it in line with the EU's public procurement Directives and the EC Treaty. When a public contract is awarded without a procedure that is transparent and in compliance with the principles required by European legislation, which all the Member States have pledged to observe, firms in Europe can be unfairly deprived of their right to submit a bid. Furthermore, the public authorities awarding the contract - and thus in this instance the French taxpayer - are liable to pay a higher price than necessary for the services, supplies or works covered by the contract or to receive service of poorer quality than could have been provided by a tenderer who has been improperly excluded. The Commission request takes the form of a reasoned opinion, which is the second stage of the infringement procedure laid down by Article 226 of the EC Treaty. If the French authorities do not comply within two months after receiving the reasoned opinion, the Commission may decide to refer the matter to the Court of Justice.

The Commission's main objections are as follows:

Non-discrimination and equality of treatment in the case of purchases not subject to the public procurement Directives

The provisions of the French Code applicable both to contracts below the thresholds and to contracts referred to in Annex IB of Directive No 92/50/EEC ('services') do not comply with EU law in that the methods for awarding these various contracts are not subject to any specific procedure. Indeed, even if they are not subject to the detailed requirements concerning advertising and putting out to tender which stem from the Community Directives on public procurement, it is nevertheless true that compliance with the principles laid down by the Court of Justice means that such contracts must be awarded in accordance with the fundamental rules of the EC Treaty, non-discrimination and transparency, the latter being ensured by a proper degree of advertising.

Loans and financial commitments

The Directives on public service contracts and on contracts in the water, energy, transport and telecommunications sectors (92/50/EEC and 93/38/EEC) stipulate that some contracts in connection with the 'issue, sale, purchase or transfer of securities or other financial instruments' are excluded by the Directives. It is nevertheless the Commission's view that contracts for the purpose of 'loans or financial commitments' and in particular loan contracts without the issue of securities and not contracted with central banks are not covered by these exclusions. Contrary to what is stipulated in the French Code, the provisions concerning advertising and putting out to tender laid down in the public procurement Directives must apply to these contracts.

Appointment contracts

Appointment contracts are concluded between public authorities in France and those responsible for undertaking specific tasks. However, when these contracts are, or become, subject in fact to remuneration, and can thus be recategorised in accordance with the Community Directives as public works, supply or service contracts, they must comply with the obligations contained in the Directives. However, there is no provision in the French legislation for the application of these obligations. Another reasoned opinion (see IP/02/1165) had already been sent to France concerning a particular type of appointment contract (those coming under the law on the control of public works).

Improper application of thresholds for contracts

The French Code does not comply with the thresholds to be applied in the case of the central authorities as laid down in the Directive on public service contracts (92/50/EEC). The thresholds in Directive 92/50/EEC are in fact £130,000, excluding taxes for central government authorities, and £200,000, excluding taxes for other awarding authorities. But by fixing a uniform threshold of £200,000 for these contracts, Article 74.3 of the French Code transposing the legislation exempts contracts of a value of £130,000 or more offered by the government authorities from the obligations of advertising and putting out to tender.

Negotiated procedures not covered by the Directives

The French Code allows contracts to be awarded by negotiated procedure without prior publication of a notice (that is, without prior advertising and invitation to tender) in two cases where such a procedure is not authorised by the Directives, namely:

- if a contractor fails to comply with his contractual obligations and must be replaced
- in the case of supplementary contracts following an initial works supervision contract

Evidence of tenderers' compliance with the law

The Code's provisions on the methods available to tenderers from other Member States to show that they have lawfully complied with obligations with regard to tax and social contributions do not comply with European law either.

According to the Directives, tenderers from other Member States must have the option of providing such evidence by alternative means (eg sworn statement) to those used in France. At the moment, France allows this option to firms established in non-member countries but not to those established in the European Union.

Minimum number of participants in restricted procedures

The Code's provisions on the minimum number of participants to be invited in connection with a restricted procedure do not comply with the public procurement Directives, which state that the number must be at least five.

Prior information and variants

The Code's provisions on prior information and variants reveal incorrect transposition of the provisions contained in the public procurement Directives. According to the Directives, the awarding authorities in fact have the option of shortening the normal time laid down by the Directives between the publication of a notice and the receipt of bids. But this requires, among other things, that the following condition be met: the same concrete information contained in the notice must already have appeared in the prior information notice. This condition is not required by the French legislation.

In addition, with regard to variants, the Code's provisions do not include the obligation contained in the Community public procurement Directives whereby awarding authorities must state in the notice if variants are not authorised.

Background

In March 2002, the Commission sent France a letter of formal notice concerning the compliance of several provisions in the new French public procurement Code with Community law. The French authorities replied in July and contested the Commission's interpretation.

After considering the arguments, the Commission decided to issue a reasoned opinion. The Commission reiterates its arguments to the effect that several articles in the French public procurement Code do not comply either with the obligations laid down by the Community public procurement Directives or with the rules of the EC Treaty (Article 49).

A proposal for a revised legislative package on public contracts, presented by the Commission, is currently being considered by the European Parliament and the Council (see IP/02/1391). The aim of the proposal is to modernise and simplify current legislation without amending the basic principles applying to aspects of the French legislation which in the Commission's view do not comply with European law.

The latest information on infringement proceedings against Member States may be found at: http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

1 Décret No 2001-210 of 7 March 2001 introducing a public procurement Code.

ITALY: COMMISSION REQUESTS COMPETITION IN THE AWARD OF CONCESSIONS

The European Commission has decided to make a formal request to Italy to comply with Community law when awarding concessions for sports betting operations. At present, share-capital companies listed on EU-regulated markets are excluded from obtaining such concessions, and

the Commission does not consider such an exclusion to be a necessary part of the effort to combat fraud and other crimes. What is more, Italy has renewed around 300 horse-race betting concessions without issuing a call for competition. When a major public concession is awarded without the contract being opened up to all potential European tenderers (as required by the EC Treaty and the public procurement Directives), European enterprises are unfairly deprived of their right to submit a bid. Moreover, the public authorities awarding the concession - and in this case the punters too - run the risk of receiving a service of a lower quality than might have been provided by a tenderer who has been improperly excluded from the award procedure. The Commission's request takes the form of a reasoned opinion, which is the second stage in the infringement procedure under Article 226 of the EC Treaty. If the Italian authorities do not comply within two months of receiving the reasoned opinion, the Commission may decide to refer the matter to the Court of Justice.

Although the Italian Government is pursuing a legitimate objective, namely to rule out the risk of concession holders becoming involved in fraudulent or other criminal activities, the Commission takes the view that excluding share-capital companies listed on the regulated markets of the EU from obtaining concessions for sports betting operations is not a proportionate measure.

The Commission feels that corporate integrity can be verified by obtaining relevant information on the representatives and principal shareholders of these companies. The present exclusion is thus in breach of the EC Treaty rules on freedom to provide services and freedom of establishment (Articles 49 and 43).

The Commission further finds that Italy has failed to comply with both the general principle of transparency enshrined in the EC Treaty and the associated publication requirement established in the case-law of the Court of Justice. The renewal - up to 1 January 2006 - of around 300 concessions for horse-race betting operations discriminated in favour of existing concession holders, with no call for competition being issued.

GERMANY: WASTE DISPOSAL IN LANDKREIS FRIESLAND

On 1 January 1995 the Landkreis Friesland signed a 10-year contract worth £29 million for the provision of waste disposal services, without carrying out an open and competitive public procurement procedure at EU level, as required by Article 8 of Directive 92/50/EEC on the public procurement of services.

In view of the fact that no tender notice was published in relation to this contract, that no competition took place on the market and that as a consequence potential competitors in the Internal Market were excluded, the contracting authority could not decide to award the contract on the basis of the best value for money.

In answer to a letter of formal notice sent by the Commission in September 2000, the German authorities admitted the breach of EU law, announced that the contract in question would be terminated at the earliest possible date at the end of 2004 and that any new contract would be put out for public tender according to the public procurement rules in force.

However, the Commission concluded that because the contract in question would remain in force until 2004, the measures the German authorities promised to take would not suffice to rectify the infringement.