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GUIDANCE

13

2003



Latest EU Public Procurement Infringement Proceedings

PART TWO

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 fourth BiP Guidance on Infringement. Previous Guidance Nos. 12/2002, 13/2002 and 12/2003 are available at: www.bipcontracts.com/html/briefing.php.

PUBLIC PROCUREMENT: COMMISSION ACTS AGAINST SEVEN MEMBER STATES

France: Law on Major Construction Projects

Under a French law (Loi M.O.P) frequently applied to major construction projects, only enterprises included in a pre-established list are eligible to take on the roles of deputy controller of works and of operation control. In the Commission's view, this restriction on open tendering and competition violates both the 1992 Directive on the public procurement of services (92/50/EC) and EU Treaty rules on non-discrimination. The French authorities recognised in their response to the Commission's reasoned opinion sent in June 2002 that operation control indeed falls under the scope of the Directive, but continue to maintain that the function of deputy controller of works does not. The Commission has therefore referred the case to the Court.

Portugal: Implementation of Remedies Directive

The Portuguese law implementing Directive 89/665 on remedies for tenderers who demonstrate that their bids have

been unfairly rejected does not, in the Commission's view, fully meet the provision in the Directive requiring that the "decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible".

For damages to be awarded, the current law (Decreto 48 051) still requires rejected tenderers to prove that there was wilful wrongdoing by the contracting officer(s), even if a violation of EU public procurement law is established by the court. This entails lengthy proceedings and, because such evidence is very difficult to provide, actions for damages are seldom effective. In the absence of a satisfactory response to a 'reasoned opinion', the Commission has decided to refer the case to the Court.

Germany: Waste Management in Munich and Coesfeld

The Commission is referring Germany to the Court over two instances where waste management contracts were awarded without the required Europe-wide tendering procedure. In 1998, the city of Munich won a tender for the treatment of waste in the Donauwald area of Bavaria for 25 years. Subsequently, without a tender procedure, it subcontracted part of these services, for transport of waste, to a private undertaking. In the view of the Commission, as a contracting authority in terms of EU procurement law, the city of Munich cannot, as the German authorities have argued, claim that it acted outside its own field of public responsibilities when contracting these services and therefore like any private contractor should have been able to select its subcontractors freely. If it could do that, it would be in a position to compete unfairly with the private sector by using its privileged situation in Munich where it can operate in its public domain without competition. The Commission maintains its position that the contract should have been tendered.

Continued overleaf

Meanwhile, in the region of Coesfeld, two waste disposal contracts for amounts of DM 14.6 million (£7.5 million) and DM 4.1 million (£2.1 million) respectively were concluded in 1997 for the period until 31 December 2003 without carrying out a Europe-wide tender procedure. Germany has promised to ensure that in future cases of this sort, EU law is respected. However, this has not remedied the existing violation of EU law as the contracts in question remain in force until the end of 2003. Furthermore, similar cases continue to occur in Germany and two cases are currently subject to a pending decision of the Court of Justice on the same legal issues (see IP/00/777).

Spain: Health Services

In Spain, the Instituto Nacional de Salud (national health service) imposed discriminatory conditions on bidders for contracts to provide respiratory therapy in patients' homes. For example, tenderers were required to have some offices already open in the regions where the services were to be supplied. In evaluating bids, the authorities took into account the existence of additional offices in those regions, ownership of other existing operations in Spain and previous provision of the service under contract. The Commission considers that these conditions discriminate against non-Spanish suppliers and restrict the freedom to provide services and the freedom of enterprises to base themselves wherever in the EU they choose. It has therefore decided to refer Spain to the Court.

Ireland: Welfare Payments and Ambulance Services

In Ireland, the Government extended without competition contractual arrangements for the provision of social welfare payment services by An Post (the national Post Office). In a separate case, existing arrangements for Dublin City Council (former Dublin Corporation Fire Brigade) to provide emergency ambulance services to the Eastern Regional Health Authority were also not subject to competition.

These cases are 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, the Commission considers both cases are 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 Treaty.

The Commission's view is that in both cases, the Irish authorities concerned should 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 purely regional, national or EU-wide potential providers of the service. The contract to An Post, for example, amounts to around £40 million and would have interested a number of suppliers outside Ireland. Therefore, advertising would have to be more than simply national. The Commission has sent Ireland reasoned opinions on both cases.

Italy: Olbia Road Tunnel and Road Design in Calabria

In Italy, ANAS, the public body responsible for managing the national road network, in 1992 awarded without a tender process the contract to build a tunnel in the port of Olbia in Sardinia, thus contravening the Directive on public works procurement (93/37/EEC). The contract was given to a company which was already undertaking other work at the port. The Italian authorities argue that for technical reasons the contract could not have been awarded to

anyone else. However, under the Directive the onus is on the relevant authorities to prove this and the Commission does not consider that they have done so and has sent Italy a reasoned opinion.

The Commission has sent another reasoned opinion to Italy concerning contracts awarded by ANAS, this time in violation of the Directive on the public procurement of services (92/50/EEC). In 1999 ANAS awarded six contracts for design work for a major road in Calabria (the N106), after launching a call for tender on the same day and without publication in the EU's Official Journal. None of these contracts taken alone was for a sufficient sum to reach the threshold above which the Directive applies. However, taken together they do exceed that threshold and the Directive states that in certain circumstances - including design work of this sort - when contracting authorities divide work into several different contracts, it is the total value of those contracts which determines whether the Directive applies. The Commission considers that ANAS should therefore have awarded the contracts after publication in the Official Journal and after allowing an appropriate time for responses, thus allowing service providers from other Member States to tender on an equitable basis.

Finland: Kitchen Equipment

The Finnish contracting authority in charge of government real estate, Senaatti-kiinteistöt, awarded a contract for kitchen equipment worth 1.050.000 Finnish marks (£176.000) without advertising it. The sum involved is below the threshold above which the full procedural requirements of the public procurement Directives apply. However, the case law of the European Court of Justice confirms that the contracting authority in such cases must ensure a degree of advertising sufficient to ensure competition, to avoid discrimination on the grounds of nationality and to allow the impartiality of procurement procedures to be reviewed. The Commission has therefore sent Finland a reasoned opinion.

Recent general information on infringements concerning all Member States may be consulted at:

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

Italy: Purchase of Helicopters for Firefighting in Italy

An order by the Italian Prime Minister dated 24 July 2002 laid down that the Italian organisation responsible for monitoring forests ('Corpo forestale dello Stato') was authorised to purchase the aircraft most suitable for carrying out its duties by a negotiated procedure outside the rules on competitive tendering laid down in the Community Directives on public procurement.

Under the Directive on public supply contracts (93/36/EEC), exemptions from the tendering obligations are allowed only under strictly defined conditions. These conditions include in particular extreme urgency resulting from events that the awarding authority could not foresee and for which it is not responsible, making it impossible to meet the deadlines involved in a tendering procedure preceded by the publication of a contract notice.

However, as the Court of Justice has pointed out on a number of occasions, the provisions allowing such exemptions must be interpreted strictly, and it is up to the awarding authority intending to make use of them to prove that there are justifying circumstances. In the Commission's view there are no such circumstances in the present case.

Firstly, the Commission considers that the need to increase the number of the aircraft concerned cannot be regarded as a circumstance that the Italian authorities could not have foreseen,

given that forest fires are unfortunately a common, endemic phenomenon during the summer in Italy and provision had been made for a substantial increase in airborne firefighting equipment as long ago as 1998; in other words all of four and a half years before the adoption of the above-mentioned order. Nor has the Italian Government shown that there was any exceptional, unforeseeable increase in the number of fires in the 2002 summer season.

Secondly, if the purchase of the aircraft, although planned well in advance, was not completed in time to cope with the fire hazard in the 2002 summer season, this seems to be attributable solely to the choice made by the administration, which suspended, and then cancelled, the award procedures launched in 2000 for the purchase of 49 helicopters for firefighting, despite the fact that the competent national courts had recognised the procedures' legality.

Italy: Distribution of Gas in the Municipality of Naples

The Commission has also sent Italy a reasoned opinion because of a breach of the principle of non-discrimination on grounds of nationality provided for in Articles 43 and 49 of the Treaty as regards the freedom of establishment and the freedom to provide services, in connection with the renewal of the concession for the distribution of gas in the municipality of Naples.

At present, gas is distributed in Naples by the company known as Napoletanagas, on the basis of an agreement that expires in 2005. In 2000 the municipal authorities in Naples decided to extend this concession for a period of thirty years, or for any shorter period that may be laid down by Italian legislation.

In any event, in terms of Community law, when a concession of this type expires the national authorities are not allowed to extend it for the benefit of the same operator. They must organise a competitive tendering procedure, to allow any service provider in the European Union who could carry out the activity in question to put in a bid.

Austria: Collection and Treatment of Waste

The Commission has asked Austria to rectify the breach of EU law that the Commission believes occurred when, four months after setting up a fully owned company specifically aimed to provide waste disposal services (AbfallGmbH), the local authority in the town of Mödling sold a large part (49%) of that company to the private sector. The Commission believes the town thereby in effect awarded a contract for the collection and treatment of waste without carrying out a procurement procedure, contrary to the provisions of the Directive on the public procurement of services (92/50/EEC).

The case law of the European Court of Justice sets out as one of the criteria for exemption from the public procurement rules the existence of an in-house relationship. In other words, a public authority can, without a competitive procedure, allocate the provision of goods or services to an organisation over which it exercises control similar to that which it has over its own departments.

However, in the Commission's view, that criterion is not met in this case, as the local authority does not exercise such control over the now partly privatised AbfallGmbH and as there is substantial evidence that the local authority intended to take a private partner on board from the very start. Therefore the waste treatment service should have been publicly tendered for from the outset.

The effect of the lack of transparency in the award of this contract is that not all interested and qualified companies could submit their offers and therefore the town of Mödling could not choose the offer representing the best value for money. Such behaviour restricts competition, distorts the market concerned and can cost taxpayers money unnecessarily.

Greece: Commission gives green light to Thessaloniki metro contract

On the basis of the information at its disposal, the European Commission has decided, after a thorough investigation, that there is no indication that the contract for the construction of a metro system in Thessaloniki, Greece breaches EU public procurement law. In the Commission's view, the contract does not breach the principle of equal treatment for all bidders, does not depart unacceptably from the original tender documents and is a legitimate concession contract where the holder of the concession bears part of the risk. The contract was awarded in 1999 to a consortium known as the Thessaloniki Metro Joint Venture Company. The total cost of the project is estimated at more than £700 million. The Commission's decision takes account of a January 2003 preliminary ruling by the European Court of Justice on a case (C-57/01) referred by a Greek court on some aspects of the Thessaloniki metro contract. The decision relates only to public procurement law and is without prejudice to other aspects of EU law. In particular, the Greek authorities will now need to submit their financial arrangements for clearance under EC Treaty state aid rules.

The principal grounds for the Commission's decision are as follows.

Firstly, the Commission considers that the principle of equal treatment of all bidders is not infringed by the contract. Any successful bidder for the contract could have negotiated the final contract on similar terms, without incompatibility with the tender documents, which left a wide margin for interpretation with regard to clauses that could be negotiated by the preferred bidder.

Secondly, the Commission's view is that the concession holder Thessaloniki Metro will bear risk. For example, its income from the project remains uncertain. It is therefore appropriate, in the Commission's view, for the contract to be defined as a concession contract, rather than a public works contract, which would be subject to tougher procurement rules.

Thirdly, in the final version of the contract, the defined depth of the tunnels is different from that set out in the tender documents but the commission does not consider this an unacceptable modification given that the tender documents specifically foresaw the possibility of such amendments.

Fourthly, following verifications made with the Greek authorities and on the basis of the available documentation, the Commission considers that the financial guarantees submitted by Thessaloniki Metro were adequate in the light of EU public procurement rules.

Up-to-date information on all infringement proceedings against Member States can be found at the following address:

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