

LATEST EU PUBLIC PROCUREMENT INFRINGEMENT PROCEDURES



Under the EC Treaty 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 (ECJ).

SPAIN – DEVELOPMENT OF THE SANTA CATALINA ISTHMUS IN LAS PALMAS

The Commission has sent a Letter of Formal Notice for infringement of Directives 92/50/EEC and 89/665/EEC in connection with the architectural design competition for the development of the Santa Catalina isthmus in Las Palmas organised in 2004 by the Comisión Mixta Puerto-Ciudad de Las Palmas de Gran Canaria (Las Palmas joint port and local authority board).

The Commission considers that the award procedure for this competition was not in line with Directive 92/50/EEC, since it was not published in the Official Journal of the European Union. Moreover, the architects directly invited by the contracting authority were selected on the basis of unknown

criteria that were not published in the tender documents or the invitation to tender. Finally, the proposals by each candidate were not presented or evaluated by the selection board anonymously, given that the competition rules provided for an oral presentation of each proposal by each candidate and exhibition to the public before the board made its decision.

The Commission also considers that Spain's system of interim measures did not make it possible to suspend the award procedure. The Spanish court took three and a half months to reject the request for suspension submitted by the complainant (the rejection decision was made on the same day as the selection board's decision).

It also rejected the highly urgent (provisionalísima) request for suspension on the grounds that there were no circumstances warranting special urgency (such circumstances are hardly ever admitted by the Spanish courts in connection with public procurement), which is contrary to the purpose and the urgency requirements of Directive 89/665/EEC.

UNITED KINGDOM – SCOTTISH PARLIAMENT BUILDING AT HOLYROOD

The Commission has decided to send a Letter of Formal Notice to the United Kingdom over the way contracts relating

to the design and construction of the building at Holyrood were awarded.

In particular, the Commission is concerned at the way the United Kingdom authorities, through the Scottish Office, conducted a tender procedure to appoint the architect for the design of the Parliament. The Commission believes this tender procedure violated EU rules on public procurement and notably did not respect the principles of equal treatment and transparency. The UK authorities are now invited to submit their observations to the Commission.

The Commission also is concerned at the way the United Kingdom authorities conducted a tender procedure to appoint the construction manager for the new building. This issue is currently subject of private litigation before the Court of Session in Scotland. The Commission will follow the proceedings before the Court closely and with interest.

The Commission welcomes the initiative of the Scottish Executive to develop an action plan aimed at improving the application of EU procurement rules in Scotland. The open and transparent tendering procedures required under EU law mean more competition and better value for money for taxpayers. The Commission looks forward to receiving more information on how this action plan will be implemented.

PORTUGAL – APPEAL PROCEDURES

The Commission has decided to send a Letter of Formal Notice to Portugal, having observed that the Portuguese authorities have failed to adopt the measures necessary to comply with the Court of Justice's judgment of 14 October 2004 in case C-275/03 (Commission/Portugal) within the three-month deadline and to correctly implement Council Directive 89/665/EEC on the application of review procedures to the award of public supply and public works contracts.

In its judgment, the Court of Justice ruled that, contrary to what is laid down in the Directive on review procedures, Portuguese law makes the award of damages for violations of Community rules on public contracts subject to the production of evidence by the aggrieved parties that the State or legal persons under public law were at fault in committing the illegal acts.

The difficulty of producing such evidence may in practice result in review procedures for the award of damages being slow and very probably ineffective.

ITALY – HYDRAULIC WORKS IN STINTINO, SARDINIA

The Commission has decided to bring Italy before the Court of Justice in connection with the award of a contract for a series of hydraulic works in the Municipality of Stintino (Sassari). A negotiated contract was concluded in 1991 for these works and was followed by 11 further agreements, most recently in 2001. The Commission considers that the direct award of this contract without prior competition constitutes an infringement of Directive 71/305/EEC, which was applicable at the time of the original contract.

GREECE – LAW ON THE MASS MEDIA

After the suspension of law 3310/2005 on the same subject (see IP/05/356, IP/05/492), the previously existing law (3021/2002) came back into force in Greece. The Commission

has sent a Letter of Formal Notice asking the Greek Government for its observations on the compatibility with Community law of the national provisions banning the award of public contracts to companies 'interconnected' with Greek mass media companies.

Law 3021/2002, implementing Article 14(9) of the Greek Constitution, prevents companies interconnected with Greek mass media businesses from participating in public procurement proceedings. The Commission considers that this is contrary to secondary Community law (the Directives on public procurement), in that it lays down exclusion criteria that are not provided for in the Directives, and does not respect the equal treatment of participants. It is also contrary to primary Community law (the EC Treaty), in that it lays down measures that impede, or render less attractive, the exercise of almost all the fundamental freedoms acknowledged by the EC Treaty.

Given that the law in question is already producing its effects, the Commission has given the Greek Government 15 days to reply and reserves the right to ask the Court, if it brings the matter before it, to lay down the requisite interim measures, ie the suspension of the application of law 3021/2002.

Following the Commission decision, the Greek authorities have communicated new information to the Commission services, showing that concrete measures are being taken by the Greek Government to ensure that the law in question will not produce any effects. The Commission services are in the process of analysing these communications, which will have a bearing on the further development of the procedure in question.

GERMANY – TRANSPORT OF WORKS OF ART, SERVICE CONTRACTS IN MUNICH AND HAMBURG, AND CLOSURE OF A CASE CONCERNING THE AWARD OF A CONTRACT FOR SEWAGE DISPOSAL SERVICES BY THE MUNICIPALITY OF HINTE

The Commission has decided to bring Germany before the Court of Justice in a case concerning the transport of works of art for temporary exhibitions. Several German museums regularly award such service contracts to a limited number of specialised transport companies without conducting transparent award procedures. Germany maintains that since the contracts in question are below the threshold for the application of the EC procurement Directive they can be awarded without public advertising. This view is in contradiction to fundamental principles of the Internal Market. 'Small' public contracts can be quite important for many enterprises in the Internal Market, in particular for SMEs. The ECJ has established that public authorities awarding such contracts have to ensure a sufficient degree of advertising, offering a fair chance to all potential bidders. Since the practice followed by the German museums does not provide for such advertising, the Commission has decided to refer the case to the Court.

The Commission has further decided to send a Letter of Formal Notice to Germany, having observed that the German authorities failed to take the measures necessary to comply with the Court of Justice's judgment of

18 November 2004 in case C-126/03 (Commission/Germany). In this judgment, the Court decided that the conclusion of a service contract for the transport of waste by the Municipality of Munich without a competitive tendering procedure had infringed the rules of Directive 92/50/EEC. Since the German authorities did not take any active steps to bring the service contract to an end, the Commission has decided to launch the procedure to enforce the ECJ judgment.

The Commission is sending a Reasoned Opinion to the German authorities over a series of contracts for sewage disposal services concluded between Hamburger Stadtentwässerung (a body established by the City of Hamburg for the operation of its sewage system) and several municipalities situated around Hamburg. Germany argues that these contracts concern a cooperation between municipalities outside the scope of public procurement law. However, it results clearly from the public procurement Directives and from ECJ case law that public contracts concluded between different public entities are not exempted from the Internal Market rules on public procurement. Such contracts have to be awarded in a transparent procedure, in order to ensure fair competition between the potential bidders active in the market.

Finally, the Commission has decided to close the case concerning the service contract between the Municipality of Hinte and the Oldenburgisch-Ostfriesischer Wasserverband (OOWV, a regional water association organising water supply and sewage services). In 1999, the Municipality of Hinte decided to become a member of OOWV, transferring its waste-water disposal services to the association. At the same time, a contract for waste-water disposal services was concluded between the municipality and OOWV. Since that contract had not been awarded in a competitive procedure, the Commission opened an infringement procedure and decided ultimately to refer the case to the Court of Justice (see IP/05/44). In April 2005, the contract between the municipality and OOWV was terminated. The municipality will remain a member of OOWV and OOWV will continue to perform the waste-water disposal services in Hinte. In fact, the contract consisted mainly of a restatement of the obligations following from the Municipality's membership in the association.

The termination of the contract made it clear that the responsibility for waste-water disposal services has been transferred from the municipality of Hinte to OOWV as a consequence of joining the association.

This means that OOWV was entrusted with the services through an act of internal organisation of public powers and not through a public contract. Therefore, there is no infringement of public procurement rules and the case could be closed.

SPAIN – CONCESSIONS ON THE A6 MOTORWAY

The Commission has decided to bring Spain before the Court of Justice in connection with the award of a 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 Commission considers that the procedure for the award of this concession infringed Directive 93/37/EEC on public

works contracts because the award of the concession included an additional package of infrastructures that were not called for in the concession notice or the tender documents. The extra infrastructure works include the construction of a new reversible lane (including a new tunnel) between San Rafael and El Valle de los Caídos, 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 improvements to an existing tunnel. The value of the additional package of infrastructure is more or less equivalent to the value of the works on the new sections to Segovia and Ávila, which were advertised in the concession notice. The Commission considers that tenderers were not treated equally because the awarding authority chose a bid that included the additional package of works, which had not been advertised. Furthermore, the Commission considers that the existence of two clauses in the tender documents – one asking tenderers to indicate in their bids their proposed traffic management measures, and an obligation to ensure that traffic volumes on the motorway do not exceed stated limits – cannot allow such a substantial enlargement of the subject of the concession, in relation to what was advertised in the concession notice.

GREECE – AWARD PROCEDURE FOR THE PROJECT OF A THERMOELECTRIC PLANT IN LAVRIO, AND AWARD PROCEDURE LAUNCHED BY THE MINISTRY OF AGRICULTURE FOR THE PROTECTION OF FOREST AREAS

The Commission has decided to refer Greece to the European Court of Justice concerning an award procedure for the construction of a thermoelectric plant in Lavrio, launched by the Hellenic Public Power Corporation (DEI). The Commission considers that the two companies that reached the last phase of the procedure (submission of financial bids) did not meet the conditions set out in the call for tenders, despite the fact that in the announcement of the call and the invitation to tender it was explicitly stated that any bid not meeting the specific requirements would be rejected. One of the companies concerned did not have the requisite experience, while the bid submitted by the second company, which was in the end awarded the contract, did not comply with one of the conditions concerning the long-term maintenance agreement. By accepting these two companies for the final stage of the procedure, and by awarding the contract to one of them, the DEI infringed Article 4(2) of Directive 93/38/EEC (excluded sectors), as well as the principles of the equal treatment of participants and of transparency set out in the ECJ's case law.

Failure to apply these principles may be unjust not only to the companies that take part in a given procedure, but also to those who might have participated if they had known that the contracting entity would not apply the terms it had itself set in the tender.

The Commission has also decided to send a Reasoned Opinion to Greece in relation to a procedure launched by the Ministry of Agriculture for the award of 24 studies on the protection and management of public forests.

The call for tenders mixes up the selection and award criteria, which is contrary to Directive 92/50 (public service contracts), which foresees that the selection and the award phases should be distinct and based on different criteria (set out in the Directive itself). The award system used by the call for tenders was also contrary to the Directive, as it could lead to the contract being awarded to a participant not fulfilling the established award criterion.

ITALY – MANAGEMENT OF MEDICAL TRANSPORT SERVICES IN TUSCANY, AND IMPLEMENTATION OF THE REMEDIES DIRECTIVE AS INTERPRETED BY COURT OF JUSTICE CASE LAW

The Commission has decided to take Italy to the Court of Justice concerning the Region of Tuscany's award of concessions for the management of medical transport services in the region, such as ambulance services. The Commission considers that the agreements, whereby the Region directly gave the management of these services to several associations, may be classified as public service contracts under Community law and that, as a result, the direct award of these contracts to the associations in question, without applying the competitive procedures laid down in Directive 92/50/EEC, is in breach of the Directive.

The Commission has also addressed a Reasoned Opinion to Italy on the review procedures relating to the award of public contracts. The Commission considers that the Italian remedies system does not comply with the Remedies Directives on public procurement, as interpreted by the Court of Justice, in two respects. First, Italian law does not provide for a reasonable period between the notification of the award decision and the conclusion of the contract. This is necessary to ensure that this decision can be suspended and annulled at a stage where the infringement can still be rectified. Second, Italian law does not empower the review bodies to take interim measures against a decision of a contracting authority independently of any prior action.

PORTUGAL – REVIEW PROCEDURES

The Commission has decided to address a Reasoned Opinion to Portugal after finding that, by the deadline for replying to the letter of formal notice, the Portuguese authorities had still not adopted the measures required for the implementation of the Court of Justice judgment of 14 October 2004 (Commission versus Portugal, case C-275/03) and for the proper transposition of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

In its judgment, the Court of Justice ruled that, contrary to the provisions of the Directive on review procedures, Portuguese law makes the award of damages for violations of Community rules on public contracts subject to the production of evidence by the aggrieved parties that the State or legal persons under public law were at fault in committing the illegal acts.

The difficulty of producing such evidence may in practice result in review procedures for the award of damages being slow and very probably ineffective.

FRANCE – PURCHASE OF HELICOPTERS FOR CIVILIAN USE

The Commission has decided to address a Reasoned Opinion to France under Article 226 of the EC Treaty. In this Reasoned Opinion the Commission takes the view that the contract for the purchase of eight helicopters by the Gendarmerie Nationale in 1998 was awarded in breach of the rules on invitations to tender laid down by Directive 93/36/EEC (public supply contracts).

The Commission considers that while the lack of a suitable price made it possible to declare the original invitation to tender inconclusive, this did not permit the public purchaser (in this instance, the French Ministry of Defence) to make use thereafter of a negotiated procedure to purchase the eight helicopters. The French authorities should in this case have announced a new invitation to tender.

PORTUGAL – PUBLIC PROCUREMENT REMEDIES

The Commission has decided to refer Portugal to the ECJ regarding non-compliance with the judgment of 14 October 2004 (Commission versus Portugal, case C-275/03), after finding that by the deadline for replying to its Reasoned Opinion the Portuguese authorities had still not adopted the measures required for compliance with that judgment and the proper transposition of Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

Under Portuguese legislation, in order to obtain damages in the event of a breach of Community law regarding public contracts or of national rules transposing that law, it has to be proven that agents of a particular administrative entity committed a fault or wilful deception. This is liable to dissuade Community economic operators from taking their chances in public contracts in Portugal. A tenderer who is aggrieved by an illegal decision taken by a contracting authority risks being deprived of his right to claim damages for the loss suffered as a result of that decision, or at least risks obtaining such damages later, because he cannot or cannot easily adduce proof of wilful deception or a fault having been committed.

In this context it should be recalled that Article 228 of the Treaty provides that if the Court of Justice acknowledges that the Member State concerned has not complied with its judgment, it may impose a lump sum or penalty payment.

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