

As for all other types of local development agreement, including those involving amounts which are below the EU thresholds, the Commission takes the view that, according to the Treaty as interpreted by the Court of Justice, they must be awarded with a proper degree of advertising for the benefit of all potential applicants (see Court of Justice Telaustria judgment Case C-324/98).

■ DENMARK – IMPLEMENTATION OF THE REMEDIES DIRECTIVE

The Commission has decided to send a Reasoned Opinion to Denmark over its failure to comply with the obligations of the Remedies Directive on public procurement. In its Alcatel judgment (Case C-81/98), the Court stipulated that Member States are required to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the possible infringement can still be rectified.

The result of this judgment with regard to the relevant Danish law is that a reasonable period should be granted to unsuccessful tenderers once they have been notified of the decision awarding a contract, so as to allow them to possibly challenge such a decision before the contract is signed. However, under Danish law there is no obligation to allow such a period nor any other provision ensuring that, in all cases, public procurement decisions can be challenged before the relevant contracts enter into force.

Reasoned Opinions have already been sent this year to Belgium (IP/04/44), Ireland, the UK (IP/04/428), Spain, the Netherlands and Finland (IP/04/951) over non-compliance with the Remedies Directive.

■ ITALY – HYDRAULIC WORKS IN STINTINO, SARDINIA

The Commission has decided to send Italy a Reasoned Opinion over the award of a public works contract for a series of hydraulic projects in the Borough of Stintino (Sassari). This contract was awarded by a negotiated procedure in 1991 and was then followed by 11 further agreements, the last in 2001, defining in detail the work to be done in order to fulfil the contract. The direct award of the contract, without competition, is a breach of Directive 71/305/EEC, which was the legislation applicable to public works contracts at the time the contract in question was signed.



■ THE NETHERLANDS – SUPPLY OF ROAD SAFETY BARRIERS

The Commission has decided to send a Reasoned Opinion to the Netherlands over the extension without competition by the Rijkswaterstaat (the body which administers public works) of a contract for the supply of road safety barriers. The Rijkswaterstaat prolonged this contract for two years, in breach of Directive 93/36/EEC on the procurement of supplies, which requires such contracts to be opened up to competition rather than simply awarded by extending the contract of the incumbent. Although the Dutch authorities offered in early 2004 a commitment to rectify this situation, they have not yet done so.

■ ITALY – CLOSURE OF AN INFRINGEMENT PROCEDURE OVER CONTRACTS FOR LOCAL PUBLIC SERVICES

After examining the latest Italian legislation on local public services, passed in December 2003, the Commission has decided to close the infringement procedure it opened in 2000 over the non-compliance with EU public procurement law of the national procedures used to select the operators of such local public services.

The new law allows local public services to be organised in three ways: through private companies selected after a competitive procedure, through mixed public-private companies where the private partner is chosen after a tendering process in line with EU law, or through direct award of contracts to publicly owned companies so closely linked to the awarding authority that they cannot be considered as third parties in relation to that authority ('in-house' entities according to the case law of the European Court of Justice).

The Commission considers this law as an improvement on the previous framework, which explicitly provided for local public service contracts to be awarded without competition and without meeting the specific and exceptional conditions which can allow, under EU law, such direct awards.

The Commission intends to follow very closely the implementation of the reform, given that its scope of application is very broad and that further Court judgments are soon expected, notably on the definition of the 'in-house' relationships, which could have a significant impact on the way the new Italian legislation is to be applied if it is to remain in conformity with EU law. The Commission therefore reserves the right to intervene at a later stage, if specific cases of non-compliance at the implementation level arise.

The latest information on infringement procedures against any Member State can be found at: http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

For a copy of the comprehensive *PASS Guide to EC Public Procurement Related Infringement Cases* (free to public procurement personnel, normal price: £60) call the Procurement Advice and Support Service on 0845 270 7055 or email pass@bipsolutions.com

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2005

LATEST EU PUBLIC PROCUREMENT INFRINGEMENT PROCEDURES

PART ONE OF TWO

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.

■ ITALY – SUPPLY OF HELICOPTERS

The Commission has decided to take Italy to the European Court over procedures used by the Government to buy helicopters for civilian use. This follows the failure of the Italian authorities to change these procedures, despite a request to do so in a Reasoned Opinion sent in February 2004 (IP/04/162).

The Italian Government has a longstanding practice of awarding contracts for the supply of these helicopters to the Italian company Agusta, without any form of competition. The helicopters involved are used by certain public services, including the forestry department (Corpo Forestale dello Stato), financial police (Guardia di Finanza), fire services (Vigili del Fuoco), police and security forces (Polizia di Stato and Carabinieri), coastguard (Guardia Costiera) and the civil defence department (Dipartimento della Protezione Civile).

Under Article 2 of the Supplies Directive (93/36/EEC), the Directive does not apply to "contracts which are declared secret or when the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member States concerned or when the protection of the basic interests of the Member State's security so requires". However, Italy has not demonstrated that these grounds are met in the case of the supply of these helicopters.

The Commission has already referred Italy to the Court of Justice in connection with a government order authorising one of the services mentioned – Corpo Forestale dello Stato – to purchase helicopters without any form of competition (see IP/03/1037).



The case in question at the moment, on the other hand, concerns the general practice followed by the Italian Government for the purchase of all helicopters for civilian use by the services concerned.

■ ITALY – FRAMEWORK LAW ON PUBLIC WORKS

The Commission has decided to bring Italy before the European Court of Justice over certain provisions of its framework law on public works, No 109/94, as last amended by Law No 166/2002. A Reasoned Opinion was sent to the Italian authorities in October 2003 (see IP/03/1415).

The procedure is designed to bring about legislative amendments which will bring this framework law into line with the Directives on public contracts and therefore to open those contracts more fully to intra-Community competition.

In particular, the Commission's action is designed:

- to avoid situations where national rules on the scope of the Directive on public works contracts which are not in conformity with Community law result in non-publication at Community level of public contracts which should be published in accordance with the Supplies and Services Directives, whose application thresholds are much lower than that laid down in the Works Directive;
- to ensure that the rules of competition of Community Directives on public contracts are applied in all cases or, where they are not applicable, to ensure that the obligation to issue notification of the contract is applied in accordance with the general principle of transparency. This applies, for example, to work

performed by way of payment in kind for planning permission and engineering, architectural and project assessment services falling below the thresholds of the Community Directives, and to management services and technical inspection services (*collaudo*);

- to 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 constitute discrimination against non-nationals who bid for public contracts.

THE NETHERLANDS – RENOVATION OF HOOGEZAND-SAPPEMEER

The Commission has decided to refer the Netherlands to the Court of Justice concerning works contracts relating to the renovation of the city centre of Hoogezand-Sappemeer. The Commission sent a Reasoned Opinion, to which the Dutch authorities did not reply satisfactorily, in December 2003 (see IP/03/1763).

The Municipality of Hoogezand-Sappemeer signed an agreement giving a particular company the exclusive right to carry out several types of work and then awarded it several contracts without competition. The Commission considers that such direct awards constitute a violation of EU public procurement law, even in cases where the value of the contract does not reach the threshold for the application of the Public Works Directive 93/37/EEC (€5 million). Even if that threshold is not reached, the principles of the EC Treaty require an adequate degree of advertising to enable different businesses to compete.

ITALY – WASTE MANAGEMENT IN SICILY

The Commission has decided to send a Reasoned Opinion to Italy concerning the way in which the competent Italian authorities have chosen operators to handle the processing of urban waste produced over the entire territory of Sicily over a period of 20 years.

The President of the Region of Sicily, in his capacity as Government Commissioner, launched an invitation to tender in 2002 to select the operators in question, but did not comply with the advertising requirements laid down concerning the award of public services contracts by Directive 92/50/EEC, which is applicable in this particular case. Even though the awarding authority published a notice in the Official Journal of the European Union, that notice did not contain the information which is required under the Community Directives with a view to enabling economic operators who could be interested to take part in the invitation to tender.



SPAIN, THE NETHERLANDS AND FINLAND – REVIEW PROCEDURES FOR TENDERERS

The Commission has sent Reasoned Opinions to Spain, the Netherlands and Finland requesting them to comply with the obligations of the Remedies Directive 89/665/EEC on public procurement. In its Alcatel judgment (Case C-81/98), the European Court of Justice stipulated that Member States were required to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the infringement can still be rectified. This should allow an aggrieved tenderer to have a contracting authority's decision suspended by way of interim measures and set aside, notwithstanding the possibility once the contract has been concluded of obtaining an award of damages.

In the Commission's view, neither Spanish, Dutch nor Finnish legislation currently complies with these requirements. In the Netherlands and Finland the law does not require a clear separation between the decision awarding a public contract and the conclusion of the contract. In Spain, despite separation, there is no mandatory standstill period between the award and the conclusion of the contract. In all three cases, there is consequently no guarantee of a sufficient interval between the award decision and the conclusion of the contract to allow a decision to be rectified in time.

DENMARK – ACCOUNTING SERVICES

Denmark has issued ministerial guidelines which interpret the Directive on the procurement of services (92/50/EEC) as providing a complete exemption from requirements to put services out to tender, where contracts for accounting and auditing services linked to criminal trials on financial matters are concerned. The Commission considers that the ministerial guidelines are disproportionate in the sense that less restrictive measures could be applied on a case by case basis to ensure the necessary level of confidentiality and secrecy without exempting such services completely from the scope of the Directive. The Commission therefore considers the Danish guidelines not to be in accordance with current EU law and has sent a Reasoned Opinion asking the Danish Government to amend its guidelines in this respect.

FRANCE, THE NETHERLANDS, FINLAND AND SWEDEN – SUPPLY CONTRACTS FOR COMPUTERS

The European Commission has decided to formally ask France, the Netherlands, Finland and Sweden for information on certain invitations to tender launched by authorities in these countries for the supply of computer equipment. The Commission wonders whether it is compatible with the public procurement Directives to require the procurement of Intel microprocessors or microprocessors using a specific clock rate. Reference to a specific brand would, in the Commission's view, constitute a violation of Directive 93/36/EEC on public supply contracts, while merely specifying a clock rate – which is insufficient for assessing the performance of a computer – would be contrary to Article 28 of the EC Treaty, which prohibits any barriers to intra-Community trade. The Commission's requests are in the form of Letters of Formal Notice, the first stage of the infringement procedure under Article 226 of the EC Treaty. The Member States in question will have two months to reply. If the Commission is not satisfied with the replies and finds that European law has indeed been infringed, it may formally ask these Member States to rectify the irregularities in the award of these contracts. If the Member States fail to bring these contracts into line, the Commission may bring the cases before the Court of Justice.

The Commission has decided to send letters of formal notice to France, the Netherlands, Finland and Sweden on the grounds that there is reason to believe that authorities in these countries describe the technical characteristics of the computers they wish to acquire in a discriminatory fashion. Three variants have been identified in the invitations to tender in question: requirements to supply Intel microprocessors, 'Intel or equivalent' microprocessors,

or microprocessors using a specific clock rate. Under European public procurement law, a brand may be specified only if it is otherwise impossible to describe the product sufficiently precisely and intelligibly. There are, however, ways of describing microprocessors and particularly the performance required. For example, there are various 'benchmarks' for this purpose. Merely specifying a clock rate is not sufficient for assessing the performance of a computer.

In France a dozen or so invitations to tender have been launched by local authorities or public bodies for the supply of microcomputers, servers or workstations with Intel (or equivalent) microprocessors or microprocessors with a clock rate above a specified minimum (which would favour Intel microprocessors).

In the Netherlands an invitation to tender for the supply of computers, notebooks and monitors, together with the provision of associated services, has been launched by the Municipality of Amsterdam, and an invitation to tender for the supply of computer hardware together with associated services has been launched by the IGEA group (a consortium of contracting authorities). In both cases, 'Intel or equivalent' microprocessors are specified. The Amsterdam invitation to tender also calls for microprocessors using a specific clock rate.

In Finland the Universities of Jyväskylä and Tampere and Häme Polytechnic have published three separate invitations to tender for the supply of computers. Each contains technical specifications stipulating that the computers must be equipped with Intel (or equivalent) microprocessors.

In Sweden, the Municipality of Filipstad and Chalmers University of Technology have published three separate invitations to tender for the supply of computers. Both specify that the equipment supplied must be fitted with Intel Pentium microprocessors. The national police authority (Rikspolisstyrelsen) has published an invitation to tender for the supply of portable computers, specifying that they must be equipped with 'Intel Centrino or equivalent' microprocessors. The Uppsala regional authority has published an invitation to tender for the supply of computers, specifying that they must be equipped with a microprocessor using a specific clock rate.

The Commission sent Letters of Formal Notice on similar cases to Italy and Germany at the beginning of 2004.

GERMANY – WASTE DISPOSAL AND WASTE WATER COLLECTION

On 10 April 2003, in joint Cases C-20/01 and C-28/01, the Court of Justice ruled that Germany failed to fulfil its obligations under the services procurement Directive 92/50/EEC when local authorities in that country awarded without a competitive tendering process service contracts for waste disposal in Braunschweig (1995) and for waste water collection in Bockhorn (1996). Both these municipalities are in the State of Lower Saxony.

In March 2004 the Commission formally asked the national authorities to comply with the Court's judgment (IP/04/428). But while Germany has pledged to avoid similar breaches in future procurement procedures, it continues to claim that no steps are required concerning the specific contracts in Braunschweig and Bockhorn, as German civil law does not require ending them. However, the Court's judgment confirmed that the adverse effect on the freedom to provide services arising from a breach of Directive 92/50/EEC subsists throughout the entire length of the contracts concluded in breach of EU law. The contracts are due to last for a minimum of 30 years from when they entered into force.

The Commission has therefore decided to refer the case a second time to the Court of Justice. The Court of Justice may then impose a penalty payment on Germany.

The Commission has also decided to send a Reasoned Opinion to the German authorities concerning the award by the City of Cologne in May 1992 of a 33-year waste disposal contract to Abfallentsorgungs- und Verwertungsgesellschaft Köln mbH (AVG), an entity 25% owned by a private undertaking. No transparent and competitive award procedure was carried out as required by EU law.



Germany argued that the contract award to the AVG was exempted from Community rules as the City of Cologne, with a 75% share in the AVG, exercised a level of control over the AVG which constituted an 'in-house' relationship. However, the Commission believes that the conditions required under the European Court's case law for an exemption from European procurement rules were not met, as the control over the AVG is not similar to that which the City of Cologne exercises over its own departments. Therefore the direct award of the contract, in breach of the general principles of the EC Treaty (freedom of services, freedom of establishment), does not appear to be justified.

Furthermore, in 1992-93 the AVG awarded waste disposal service contracts directly to three undertakings which are mainly privately owned. As the AVG is to be considered a public contracting authority, these awards also violated Community law.

FRANCE – LOCAL DEVELOPMENT AGREEMENTS

The Commission has referred France to the Court of Justice over the incompatibility of Article L.300-4 of the French town planning code with European law. This article allows agreements and appointment contracts for the follow-up of preliminary studies for local development projects to be concluded without being advertised and without competition. The Commission has received no reply to its Reasoned Opinion sent in February 2004 (IP/04/162).

France makes use of local development agreements primarily for projects such as the construction of public amenities to be handed over to the awarding authority and for buildings to be resold or rented, eg as part of the implementation of a town planning project and local housing policy or urban renewal.

The Commission considers that the main purpose of these agreements concerns works, which are then usually performed by a builder selected by the town planner on behalf of the competent authorities. According to the Commission, to the extent that they involve amounts which are beyond the EU thresholds, these types of local development agreements must in principle be concluded in accordance with the advertising and competition rules laid down in Directive 93/37/EEC on public works contracts.

As for appointment contracts for preliminary studies needed to define the features of a development project, the Commission considers that, to the extent that they involve amounts which are beyond the EU thresholds, such contracts must be awarded in accordance with the advertising and competition rules laid down in Directive 92/50/EEC on public service contracts.