

Finnish airline company, thus making it impossible for others to tender for this route. The estimated value of the contract was €30 million. The Finnish authorities have not acknowledged the infringement.

If the national authorities do not give a satisfactory reply to the Reasoned Opinion within two months, indicating a change in their pattern of procurement for such contracts in the future, the Commission may refer the matter to the Court of Justice.

UK – CLOSURE OF A CASE CONCERNING REGISTERED SOCIAL LANDLORDS

The Commission has decided to close infringement proceedings against the United Kingdom following a change of position on the part of the UK Government concerning Registered Social Landlords. Registered Social Landlords are providers of social housing in the United Kingdom.

The Commission had opened infringement proceedings in December 2001 over the failure of the United Kingdom to accept that Registered Social Landlords are bodies governed by public law, and must therefore comply with the requirements of the EU Public Procurement Directives. In December 2003, this culminated in the Commission's announcement that it would commence proceedings in the European Court of Justice against the United Kingdom. The Court of Justice had already ruled on housing associations before in its 'HLM' judgment (C-237/99) against France.

In September 2004, the UK Government decided to change its position, and publicly accepted that the Commission is correct in its view that Registered Social Landlords are bodies governed by public

law for the purposes of procurement law, and therefore must comply with the EU Public Procurement Directives where these apply. The UK Government furthermore prepared guidance for Registered Social Landlords on the application of the Directives.

In view of the public acknowledgement by the UK Government, the Commission sees no need to continue its proceedings before the Court of Justice and has decided to close the case.

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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GUIDANCE 04b

2005

LATEST EU PUBLIC PROCUREMENT INFRINGEMENT PROCEDURES

PART TWO 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.

GERMANY – TRANSPORT OF WORKS OF ART AND SERVICE CONTRACTS/CONCESSIONS IN HINTE, EISENHÜTTENSTADT, RHEIN-NECKAR KREIS, LOWER SAXONY, BRANDENBURG AND OESTRICH-WINKEL

The European Commission has decided to pursue seven infringement cases against Germany over the award of service contracts and concessions without competition.

In December 1999 the Municipality of Hinte in Lower Saxony awarded a service concession to the Oldenburgisch-Ostfriesischer Wasserverband for the provision of wastewater disposal services. No transparent award procedure was carried out as required under EU law as interpreted by the European Court of Justice (C-324/98, 'Telaustria'). Germany argued that the Municipality of Hinte had not procured a service on the market, but rather that the service had been transferred between public bodies, which, it maintained, are not covered by the EU rules on public procurement. The Commission does not accept this view, since the ECJ has established that contracts concluded between public bodies are covered by the obligations of EU law. Thus, EU law was broken by the award of the service concession, and the Commission has therefore decided to refer the case to the Court of Justice.

Reasoned Opinions are being sent to the German authorities in six other cases.

Several German museums regularly award service contracts for the transport of works of art for temporary exhibitions to specifically



qualified transport companies, without carrying out transparent award procedures. Germany claims that the transparency obligation is reduced in these cases, which it argues – because of their low contract values – are not covered by the EC Public Procurement Directives. Furthermore, Germany maintains that direct awards are objectively justified because of the quality requirements for these services and the need to comply with conditions stipulated by lenders of the works of art. However, as a developed market for the transport of works of art exists in Europe, the Commission considers that the non-application of internal market rules is not justified in this field.

In November 2000, the Stadtwerke Eisenhüttenstadt GmbH awarded a service concession for the provision of broadband cable services in Eisenhüttenstadt. No transparent award procedure was carried out. Germany argues that the contract concluded concerns only the privatisation of the Telekommunikationsgesellschaft Eisenhüttenstadt mbH. However, the opinion of the Commission is based on the fact that, with the contract, specific rights and obligations relating to the service were assigned to the private service provider, and thus principles of EU law on the freedom of establishment and the freedom of services have been breached.

In 2002, the Abfallverwertungsgesellschaft des Rhein-Neckar Kreises mbH (AVR) awarded a contract for waste disposal services in the Rhein-Neckar Kreis to the AVR Service GmbH, of which it owns 51% of the shares. Germany claims that the award is not subject to public procurement law, in accordance with ECJ case law in the 'Teckal' case (C-107/98), which establishes that EU procurement laws do not apply when contracts are awarded to an 'in-house' entity within the authority awarding the contracts. However, the Commission has concluded that the 'in-house' criteria were not met in this case, and that there was therefore a breach of the provisions of Directive 92/50/EEC on the award of public service contracts.

In 1995, the German Landkreise (districts) of Rotenburg (Wümme), Harburg, Soltau-Fallingb. and Stade, all in the Federal State of Lower Saxony, awarded a service contract for waste disposal services to be provided until the year 2019 directly to Stadtreinigung Hamburg. Germany argues that the contract concerns cooperation between municipalities outside the scope of the Public Procurement Directives. As the ECJ has ruled that contracts between public bodies fall under EU law, the Commission concludes that Directive 92/50/EEC was infringed.

The Federal State of Brandenburg set up four external platforms for its policy to support its foreign economic relations. In this context, four contracts for consultancy services, public relations services and advertising services were directly awarded in 2001 without procurement procedures. The German authorities claim that the contracts are not covered by EU procurement obligations. However, the Commission considers that the contracts concern services provided for remuneration and fall under the scope of Directive 92/50/EEC.

In 2003, the City of Oestrich-Winkel directly awarded a service contract for planning services without any form of advertising. The contract was below the threshold value above which 92/50/EEC applies, but services below that threshold nevertheless have to be awarded in compliance with the principles of the EC Treaty. The German authorities acknowledge that, but argue that the award procedure was sufficiently transparent. The Commission disagrees with this view. As the service contract was directly awarded without any form of advertising or publicity, the principles stemming from the EC Treaty were clearly breached.

GREECE – TECHNICAL ASSISTANCE FOR FARMERS AND CONSTRUCTION OF THE LAVRIO THERMOELECTRIC PLANT

The Commission has decided to refer Greece to the Court of Justice over irregularities in the award of several contracts to provide technical assistance to Greek farmers. To help farmers benefit from certain European Union support under the Common Agricultural Policy, the Greek Government signed technical assistance contracts with specialised firms every year, on the basis of a competitive procedure. However, in 2001 it departed from that approach and directly awarded contracts for the management of a framework programme and for the detailed implementation of that programme, without following the procedures for notification and competitive tendering required by Directive 92/50/EEC.

The Commission does not accept the Greek authorities' argument that despite their disagreement with the Commission, they have in

practice complied with the Reasoned Opinion sent in December 2003 (see IP/03/1763) by having subjected the contracts to competition in line with the Directive, and through the Secretary-General of the Agriculture Ministry issuing a circular. According to the information available to the Commission, the alleged opening up to competition of the contracts in question since 2003 is no more than theoretical as, through the application of various mechanisms, the same association of farmers has been awarded the contracts. The Commission in addition considers that there is a continued risk of similar infringements occurring in future, and that the Secretary-General's circular did not, as drafted, allow the infringement to be corrected, and could even have led to a repetition of it.

The Hellenic Public Power Corporation (DEI) launched a call for tenders for the construction of a thermoelectric plant in Lavrio. 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 which might have participated if they had known that the contracting entity would not apply the terms it had itself set in the tender.

SPAIN – INADEQUATE REVIEW PROCEDURES AND EXCLUSION OF CERTAIN BODIES FROM THE CONCEPT OF CONTRACTING AUTHORITY

The Commission has decided to bring Spain before the Court of Justice in connection with a case of incorrect implementation of Directive 89/665/EEC on the application of review procedures to the award of public supply and public works contracts. The Commission considers that Spanish law is not in line with the Directive, on the grounds that by allowing the award to coincide with the conclusion of the contract, it denies unsuccessful tenderers the possibility of challenging, in good time, the validity of the award decision, and taking legal action against it at a stage when infringements can still be rectified. The Commission considers that allowing reasonable time for unsuccessful tenderers to challenge the award decision would be the solution that would, in legal terms, best meet the requirement of the Directive on review procedures as interpreted in ECJ case law.

In addition, Spanish law stipulates that, if the cancellation of a contract could seriously affect service to the public, it may be decided that the provisions of the contract could continue to apply on the same terms after its cancellation, until urgent measures had been taken in order to prevent an undermining of the public interest. The Commission considers that making a declaration of invalidity subject to an exception for the protection of service to the public could also render the provisions of Directive 89/665/EEC ineffective, since, under Spanish law, the scope is very broad, covering, in addition to cases of (automatic) absolute invalidity of decisions, the pure and simple cancellation of illegal decisions.

The Commission has also decided to send Spain a Reasoned Opinion on incorrect implementation of Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts. The Commission considers that Spanish law, even after an amendment in 2003, does not correctly implement the concept of bodies governed by public law within the meaning of the Directive, since it excludes certain bodies governed by private law, such as foundations, from the definition, and hence from the scope of the Directive.

ITALY – RENEWAL OF CONTRACTS WITHOUT COMPETITION, WASTE TREATMENT IN SICILY, POLICE AND FIRE BRIGADE HELICOPTERS, MOTORWAY CONCESSION IN LOMBARDY, AMBULANCE SERVICES IN TUSCANY

The Commission has decided to bring an action against Italy before the European Court of Justice for infringement of Community law on public procurement if the Italian Parliament, before which the question is currently pending, fails within three months to withdraw the provision set out in Article 44 of Law 724/1994 (in conjunction with Article 6 of Law 573/1993), which has already, in December 2003, been the subject of a Reasoned Opinion addressed to the Italian Government (IP/03/1763). The Commission considered that this provision was contrary to the abovementioned Community rules, to the extent that it authorises contracting authorities in Italy to renew a public supply or service contract without any tendering procedure.

Following a Reasoned Opinion sent to the Italian authorities in July 2004 (IP/04/951), the Commission also intends to bring Italy before the Court of Justice for infringement of Directive 92/50/EEC on public procurement in the choice, by the competent authorities, of operators to provide the service of processing all the urban waste produced in Sicily by converting it into electricity. This contract has been awarded for a period of 20 years. Even though the awarding authority published a notice in the Official Journal of the European Union, this did not contain the information required under the EU Directives with a view to enabling potential candidates to take part in the tendering procedure.

The Commission has sent Italy a Reasoned Opinion on a decree issued by the Minister of the Interior on 11 July 2003, which permitted 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 this decree constitutes an infringement of that Directive, since Italy has not demonstrated that one of the strict conditions for derogations, and in particular the one concerning contracts the execution of which must be accompanied by special security measures, is met in this case. The Commission has already decided to bring Italy before the Court of Justice in two other cases also concerning the procedures applied by the Italian Government for the purchase of helicopters for civil use, the first being in connection with a Government Order authorising the Italian body responsible for the surveillance of woodland (Corpo forestale dello Stato) to purchase helicopters without competition (see IP/03/1037). The second case concerns the Italian Government's practice of awarding contracts for the purchase of helicopters for its main public services directly to the company Agusta (IP/04/875).

The Commission has also addressed a Reasoned Opinion to Italy on the direct award, without prior competition at European Community level, of the construction and operation of the motorway linking the Ospitaletto toll-area (A4), the new Poncarale toll-area (A21) and Montichiari Airport in Lombardy. The Commission considers that this direct award constitutes an infringement of Directive 93/37/EEC, which stipulates that contracting authorities wishing to conclude a public works concession contract must announce their intention by means of a notice published in the Official Journal of the European Union. The Commission also considers that the justifications adduced by Italy for the legality of this direct award are not tenable.

A third Reasoned Opinion has been sent to Italy for infringement of the rules on the award of public service contracts set out in Directive 92/50/EEC on the occasion of the award, by Tuscany, of a contract for transport services in connection with healthcare on the regional territory (essentially ambulance services). More specifically, the Opinion addresses the conclusion, between the regional authorities and several consortia in 1999, 2003 and 2004, of agreements on these services without applying the tendering procedures provided for under Community law on public procurement.



AUSTRIA – WASTE DISPOSAL

In 2001, the City of Villach concluded a waste disposal service contract for a minimum period of 15 years, after selecting a service provider from a limited number of companies operating in Austria that already had an establishment in the Austrian State of Carinthia. The Austrian authorities claim that the contract concerns a service concession, and therefore does not fall under the scope of the specific rules on public service contracts set out in Directive 92/50/EEC. However, the Commission concluded that the contract is covered by the Directive, and should have been advertised in accordance with the rules applying to public service contracts. But even if it did qualify as a service concession, the selection procedure applied by the City of Villach would breach the general principles of the EC Treaty, and in particular the principle of non-discrimination on grounds of nationality. A Reasoned Opinion has therefore been sent.

PORTUGAL – NON-CONFORMITY OF NATIONAL LAW IN THE WATER, ENERGY, TRANSPORT AND TELECOMMUNICATIONS SECTORS

The Commission has decided to bring two cases of incorrect implementation by Portugal of Directives 93/38/EEC and 92/13/EEC before the Court of Justice. The first of these Directives concerns the coordination of procurement procedures in the water, energy, transport and telecommunications sectors, while the second is aimed at ensuring effective application of the first by providing suppliers, entrepreneurs and service providers with effective and rapid remedies in the event of infringement of Community law in that field or national rules implementing that law.

The Commission considers that Portuguese law is not in conformity with Community legislation, particularly as regards its scope and application thresholds, deadlines for receipt of bids, competition and abnormally low bids.

FINLAND – AIR-TRAVEL SERVICES FOR GOVERNMENT OFFICIALS

The Commission has decided to issue a Reasoned Opinion against Finland concerning a decision by the Ministry of Finance to award a framework contract for air-travel services for government officials using discriminatory award criteria, thus infringing the public services Directive 92/50/EC. The Ministry of Finance had awarded the contract on the basis of non-published criteria, compared ticket prices that were not based on equal or similar terms, and included a destination among the routes to be served that was already reserved for a certain

