JUDGMENT OF THE COURT (First Chamber)

14 October 2004 *

In Case C-340/02,

ACTION under Article 226 EC for failure to fulfil obligations,

brought on 24 September 2002,

Commission of the European Communities, represented by M. Nolin, acting as Agent, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues, S. Pailler and D. Petrausch, acting as Agents,

defendant,

* Language of the case: French.

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, S. von Bahr and K. Schiemann (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after considering the observations submitted on behalf of the parties,

after hearing the Opinion of the Advocate General at the sitting on 11 March 2004,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration that by virtue of the award by the Communauté urbaine du Mans (the municipal community of Le Mans; 'the MCLM') of a study contract for, inter alia, assistance to the *maître d'ouvrage* (responsible contracting authority) in respect of the Chauvinière sewage treatment plant, without publication of a contract notice in the *Official Journal of the European Communities*, the French Republic has failed to

fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1; 'the Directive'), and in particular Article 15(2) thereof.

Legal background

2 Article 7(1) of the Directive states:

'This directive shall apply to public service contracts, the estimated value of which, net of VAT, is not less than ECU 200 000.'

3 Pursuant to Article 8 of the Directive, contracts which have as their object services listed in Annex I.A thereto must be awarded in accordance with the provisions of Titles III to VI of that directive.

4 Article 15(2), which appears in Title V of the Directive, entitled 'Common advertising rules', states:

'Contracting authorities who wish to award a public service contract by open, restricted or, under the conditions laid down in Article 11, negotiated procedure, shall make known their intention by means of a notice'.

5 Article 11(3), which appears in Title III of the Directive, entitled 'Choice of award procedures and rules governing design contests', provides for derogation from the obligation of prior publication of a contract notice as follows:

'Contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice in the following cases:

...

(c) where the contract concerned follows a design contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidates. In the latter case, all successful candidates shall be invited to participate in the negotiations;

...'

6 Article 1(g) of the Directive states:

'[For the purposes of the Directive] design contests shall mean those national procedures which enable the contracting authority to acquire, mainly in the fields of area planning, town planning, architecture and civil engineering, or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes'.

Facts

7 The MCLM issued a number of calls for tenders for the provision of services connected with improvements to the Chauvinière sewage treatment plant.

8 To that end, a scheme of works was drawn up, consisting of the following three phases:

— First phase: feasibility study for a water treatment network with a view to bringing the Chauvinière sewage treatment plant into compliance with European environmental laws;

— Second phase: study contract to (1) assist the *maître d'ouvrage* in drawing up detailed technical specifications on the basis of the solution chosen in the first phase, (2) draw up an impact assessment analysing all the effects of the works on the environment, and (3) assist the *maître d'ouvrage* in appraising offers submitted in relation to the procedure comprising the third phase;

— Third phase: planning of the works and their execution.

9 Two contract notices were published, one in the Official Journal of 30 November 1996, Series S, No 233, and the other in the Official Journal of 10 December 1998, Series S, No 239.

10 The notice published on 30 November 1996 concerned a call under the restricted procedure, for tenders in respect of a design contest for the feasibility study required in the first phase. That design contest carried a prize of FRF 200 000 for each of the three selected participants, amounting to a total sum of FRF 600 000.

11 Point 2 of that notice also provided that the candidate whose solution was successful in the design contest relating to the first phase 'may be invited to cooperate in the execution of his idea, under a study contract for [inter alia] the provision of assistance to the *maître d'ouvrage*' envisaged in the first and third parts of the second phase.

12 The notice published on 10 December 1998 related to the third phase.

The pre-litigation procedure

13 By letter of 7 October 1999, the Commission called upon the French authorities to submit to it their observations on the circumstances and arrangements under which the calls for tenders referred to above had been conducted.

14 Since the French authorities failed to give any official response to that letter, on 3 August 2000 the Commission sent them a letter of formal notice in which it raised three complaints, alleging infringement of Article 27(2), Article 15(2) and Article 36(1) of the Directive.

15 By letter of 21 November 2000, the French authorities disputed all the complaints raised by the Commission. Finding that response unsatisfactory, the Commission delivered a reasoned opinion, by letter of 26 July 2001, in which it reiterated its complaints.

16 The French authorities replied to the reasoned opinion by letter of 4 February 2002. In that letter, they conceded that the first and third of the Commission's complaints were well founded.

17 In those circumstances, the Commission decided to bring the present action which concerns only the second complaint raised in the reasoned opinion.

The action

Arguments of the parties

18 In its application, the Commission asserts that the contract for assistance to the *maître d'ouvrage*, which was the subject-matter of the second phase and the value of which was FRF 4 502 137.90, concerned services different from those relating to the design contest initiated by the notice of 30 November 1996. Therefore, that contract should have been advertised and put out to competition in accordance with the common rules on advertising and participation laid down in Titles V and VI of the Directive. In fact, that contract was awarded to the successful candidate in the design contest organised for the carrying out of the feasibility study provided for in the first phase, without any further advertising or putting out to competition at Community level.

19 The Commission submits that the statement in the contract notice published in 1996 that the successful candidate in the contest might be invited to cooperate in assisting the *maître d'ouvrage* within the framework of the second phase is of no relevance and that it in no way allowed the contracting authority to avoid its obligations under the Directive.

20 The Commission adds that the principle of equal treatment of tenderers established by the Directive requires that the subject-matter of the contract be clearly defined and that it be not extended in the course of the procedure. That principle also requires that the award criteria be clearly identified. However, not only did the successful candidate have neither any certainty, nor any right as regards the provision of other services under a later contract for the provision of technical assistance to the *maître d'ouvrage*, but, in addition, no award criterion had been identified for that later contract.

21 In its defence, the French Government submits, first, that the relevant provisions of the contract notice of 30 November 1996 and of the rules to which the notice refers for further information, left no room for doubt as to the intention of the MCLM to reserve the option of awarding the successful candidate in the design contest a study contract for the provision of assistance to the *maître d'ouvrage*. Consequently, the contract for assistance to the *maître d'ouvrage* could legitimately be awarded to the successful candidate in the design contest without prior publication of a new contract notice.

22 Second, the French Government submits that, pursuant to Article 11(3)(c) of the Directive, the requirement of prior publication of a contract notice does not apply in the present case.

23 The French Government maintains that the Commission's argument that, in breach of the principle of equal treatment of candidates, the award criteria for the contract for assistance to the *maître d'ouvrage* were not defined in the contract notice of 30 November 1996 must be regarded as inadmissible in so far as it was first advanced in

the application and the French Government was thus not able to defend itself against that charge during the pre-litigation procedure.

24 On that last point, the Commission submits that that argument is not a new charge but an observation in support of its position, namely that the subject-matter of the contract related only to the design contest.

Findings of the Court

Admissibility

25 It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the charges formulated by the Commission (see, in particular, Case C-152/98 *Commission* v *Netherlands* [2001] ECR I-3463, paragraph 23, and Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 10).

26 It follows that, first, the subject-matter of proceedings under Article 226 EC is delimited by the pre-litigation procedure governed by that provision. Accordingly, the application must be founded on the same grounds and pleas as the reasoned opinion. If a charge was not included in the reasoned opinion, it is inadmissible at the stage of proceedings before the Court (see, in particular, *Commission* v *Italy*, cited above, paragraph 11).

27 Second, the reasoned opinion must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the EC Treaty (see, in particular, Case C-207/96 *Commission* v *Italy* [1997] ECR I-6869, paragraph 18, and Case C-439/99 *Commission* v *Italy*, cited above, paragraph 12).

28 In the present case, at paragraphs 20 and 21 of the reasoned opinion the Commission claims, in connection with the second complaint, that 'the reference in the contract notice to the option for "the successful candidate to cooperate in the execution of the selected idea" ... provided the successful candidate with no certainty, nor any right as regards the provision of other services under a later contract for the provision of technical assistance to the *maître d'ouvrage*' and '... that the contracting authority unlawfully failed to apply an advertising and competition procedure to the various services to assist the *maître d'ouvrage*, planned for the second phase of the comprehensive scheme of works in question'.

29 In those circumstances, it must be held that, by submitting that, in breach of the principle of equal treatment of candidates, the award criteria for the contract to provide assistance to the *maître d'ouvrage* were not defined in the contract notice of 30 November 1996, the Commission merely expanded on the charge set out in paragraphs 20 and 21 of the reasoned opinion and did not formulate a new charge. It follows that the defence of inadmissibility raised by the French Government must be rejected.

Substance

30 In this action, the Commission is essentially alleging that the French authorities awarded the contract for assistance to the *maître d'ouvrage* provided for in the second phase without implementing the tendering procedure laid down in the Directive.

31 At the outset, it should be noted that the parties do not dispute that the conditions for application of the Directive are met in the present case. The studies and the assistance to the *maître d'ouvrage* which are the subject-matter of the second phase constitute services within the meaning of Article 8 of and Annex I.A to the Directive. Moreover, the minimum value of the contract laid down in Article 7(1) of the Directive was exceeded.

32 Consequently, pursuant to Article 8 of the Directive, the contract for the provision of those services could be awarded only in accordance with the rules laid down in Title III of the Directive, in particular Articles 11 and 15(2) thereof. The latter provision required the contracting authorities to publish a contract notice.

33 The French Government submits, however, that the option, set out in the notice of 30 November 1996, of awarding the contract relating to the second phase to the successful candidate in the design contest releases the contracting authority from the obligation to publish another notice prior to the award of that contract.

34 That argument cannot be accepted. The principle of equal treatment of service providers, laid down in Article 3(2) of the Directive, and the principle of transparency which flows from it (see, by analogy, Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraphs 51 to 53, and Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 61) require the subject-matter of each contract and the criteria governing its award to be clearly defined.

35 That obligation exists where the subject-matter of a contract and the criteria selected for its award must be regarded as decisive for the purposes of determining which of the procedures provided for in the Directive is to be implemented and assessing whether the requirements related to that procedure have been observed.

36 It follows that in the present case the mere option of awarding the contract relating to the second phase according to criteria laid down in respect of a different contract, that is the one related to the first phase, does not amount to awarding the contract in accordance with one of the procedures laid down in the Directive.

37 The French Government also relies on Article 11(3) of the Directive, which authorises contracting authorities using a negotiated procedure to derogate from the obligation of prior publication in certain cases which are exhaustively listed. In particular, derogation is permissible under Article 11(3)(c) of the Directive 'where the contract concerned follows a design contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidates.'

38 In that regard, it should be recalled that, as the Commission correctly points out, that provision, as a derogation from a fundamental rule of the Treaty, must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances (see Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 58).

39 In the present case, as the Advocate General observes in point 40 of his Opinion, some of the services which make up the second phase do not come within the definition of a design contest given in Article 1(g) of the Directive, which refers to 'a plan or design'. While the first part of the second phase (assistance to the *maître d'ouvrage* in drawing up detailed technical specifications on the basis of the solution chosen in the first phase) could perhaps be regarded as a plan or design within the meaning of Article 1(g) of the Directive, the third part of the second phase could not. The provision of assistance to the *maître d'ouvrage* in appraising offers submitted in relation to the procedure planned for the third phase clearly does not constitute a plan or design within the meaning of Article 1(g) of the Directive.

40 In any event, the conditions for applying the derogation provided for in Article 11(3)(c) of the Directive are not met in the present case. It is clear from the wording of that provision that it is permissible to forgo publication of a notice only where the contract concerned follows a design contest and must be awarded to the successful candidate or to one of the successful candidates in that contest.

41 As the Advocate General stated in point 45 of his Opinion, the expression 'follows a design contest' as used in Article 11(3)(c) of the Directive implies that there must be a direct functional link between the contest and the contract concerned. Since the contest in question related to the first phase and was organised for the purpose of awarding the contract envisaged in that phase, the contract in the second phase cannot be regarded as following that contest.

42 Moreover, point 2 of the contract notice of 30 November 1996 simply provides for the option, but not the obligation, to entrust the second phase to the successful candidate in the contest relating to the first phase. Therefore, it cannot be asserted that the contract relating to the second phase must be awarded to the successful candidate or to one of the successful candidates in the contest.

43 Accordingly, the derogation from the obligation to publish a contract notice, provided for in Article 11(3)(c) of the Directive, does not apply in this case.

44 It follows from the foregoing considerations that, although the second phase came within the scope of the Directive, it was not the subject of a contract notice published in accordance with the rules of that directive.

45 In the light of the foregoing, it must be held that, by virtue of the award by the MCLM of a study contract for assistance to the *maître d'ouvrage* in respect of the Chauvinière sewage treatment plant, without publication of a contract notice in the Official Journal, the French Republic has failed to fulfil its obligations under the Directive, and in particular Article 15(2) thereof.

Costs

46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by virtue of the award by the Communauté urbaine du Mans of a study contract for assistance to the *maître d'ouvrage* in respect of the Chauvinière sewage treatment plant, without publication of a contract notice in the *Official Journal of the European Communities*, the French Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, and in particular Article 15(2) thereof;**

2. **Orders the French Republic to pay the costs.**

Signatures.