JUDGMENT OF THE COURT (Sixth Chamber)
16 October 2003 *

In Case C-252/01,

Commission of the European Communities, represented by H. van Lier, acting as Agent, assisted by J. Stuyck, avocat, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by A. Snoecx, acting as Agent, assisted by K. Ronse, avocat, with an address for service in Luxembourg,

defendant,

* Language of the case: Dutch.

APPLICATION for a declaration that:

— by failing, in respect of a contract to perform services involving coastal surveillance by means of aerial photography, to place a notice in the *Official Journal of the European Communities*, as required under Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1); and

— by making use, without justification, of the negotiated procedure without prior publication of a contract notice,

the Kingdom of Belgium has failed to fulfil its obligations under that directive and, in particular, Articles 11(3) and 15(2) thereof,

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, V. Skouris, N. Colneric, and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 30 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 3 April 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 29 June 2001, the Commission of the European Communities brought an action under Article 226 EC for a declaration that:

— by failing, in respect of a contract to perform services involving coastal surveillance by means of aerial photography, to place a notice in the *Official Journal of the European Communities*, as required under Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1); and

— by making use, without justification, of the negotiated procedure without prior publication of a contract notice,

the Kingdom of Belgium has failed to fulfil its obligations under that directive and, in particular, Articles 11(3) and 15(2) thereof.

Legal framework

2 Article 4(2) of Directive 92/50 provides:

'This directive shall not apply to services which are declared secret or 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 State concerned or when the protection of the basic interests of that State's security so requires.'

3 Article 8 of Directive 92/50 states:

'Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.'

4 Article 9 of Directive 92/50 provides:

'Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.'

5 Article 11(3) of Directive 92/50 states:

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

...

(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider;

...'

6 Under Article 15(2) of Directive 92/50:

'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.'

7 By virtue of Article 30(1) of Directive 92/50:

'In so far as candidates for a public contract or tenderers have to possess a particular authorisation or to be members of a particular organisation in their home country in order to be able to perform the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.'

8 Annex I A, Category 12, to Directive 92/50 is set out as follows:

Category No	Subject	CPC Reference No
12	Architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services	867

9 Annex I B, Category 27, to Directive 92/50 is set out as follows:

Category No	Subject	CPC Reference No
27	Other services	

Facts and pre-litigation procedure

10 On 7 April 1988, the Belgian waterways and maritime affairs authority issued a restricted invitation to tender for surveillance of the Belgian coast by means of aerial photography.

11 The contract was awarded to the Belgian undertaking Eurosense Belfotop NV (hereinafter 'Eurosense Belfotop'), which was adjudged to be technically and financially the best candidate.

12 In view of the forthcoming regionalisation of the Belgian State, the then Ministerial Committee for Economic and Social Industrialisation decided to award the contract for one year only.

13 On 29 July 1989, the Flemish Government decided to extend the contract by six years on the basis of the 1988 tender.

14 That contract mainly concerned the provision of regular surveillance by means of aerial photography of the chain of dunes and beaches, both newly emerged and submerged, on the Belgian coast and the processing of the data obtained.

15 From 1992, the Flemish authorities examined the possibility of amending the contract by means of an addendum.

16 On 13 April 1995, following a negotiated procedure without prior notification, the Flemish minister for public works signed an addendum to the contract with Eurosense Belfotop, in the amount of BEF 534 000 000 (excluding VAT), for a duration of nine years.

17 On 27 December 1995, the Commission sent the Kingdom of Belgium a letter of formal notice claiming that the contract extended by the addendum of 13 April 1995 (hereinafter 'the contract in issue') fell within the scope of Directive 92/50 and that, according to Article 15(1) and (2), an indicative notice and a contract notice should have been published in the *Official Journal of the European Communities*. The fact that no notice was published in respect of that contract constitutes an infringement of Article 15(1) and (2) of Directive 92/50. Furthermore, the award of a privately negotiated public contract cannot be justified on the basis of Article 11(3) thereof, which lays down the conditions under which awarding authorities may award their contracts by negotiated procedure without prior publication of a contract notice, since none of the conditions referred to in that paragraph had been met.

18 In its reply of 2 February 1996, the Belgian Government rejected the objections set down in the letter of formal notice of 27 December 1995.

19 First, Directive 92/50 does not apply to the contract in issue by virtue of Article 4(2) thereof. Next, the award of the contract by negotiated procedure was justified under Article 11(3)(b) of that directive. In that regard, the criteria set in the present case for awarding the contract by negotiated procedure are as follows: (a) possession of a military security certificate; (b) possession of a licence from the aviation authorities to engage in aviation activity; (c) possession of the requisite know-how, technology and equipment; (d) the above three elements to be in the possession of a single undertaking; (e) sufficient financial capacity to be able to provide services annually to the value of some BEF 80 000 000. Finally, other factors justified awarding the contract by negotiated procedure, such as the existence of exclusive rights (copyright), the availability of aircraft within two hours' flying time of the Belgian coast and knowledge of Dutch.

20 As those replies did not enable the Commission to withdraw its objections, it sent the Kingdom of Belgium a reasoned opinion on 10 March 1999, pursuant to Article 226 EC, in which it reiterated its objections and found that:

— by failing to cause to be published in the *Official Journal of the European Communities* the indicative notice and the contract notice required by Directive 92/50; and

— by failing to justify use of the negotiated procedure without prior publication of a contract notice,

the Kingdom of Belgium has failed to fulfil its obligations under Directive 92/50, in particular Articles 11(3) and 15(2) thereof.

21 The Commission called on the Kingdom of Belgium to take the measures necessary to comply with the reasoned opinion within two months of its notification.

22 The Belgian Government responded to the reasoned opinion by a letter of 1 June 1999. In particular, it claimed that the main object of the contract was to provide aerial photography services, which fall not within Category 12 of Annex I A to Directive 92/50 but within Category 27 ('Other services') of Annex I B. For the remainder, the Belgian Government referred to its reply to the letter of notice.

23 Not satisfied with that response, the Commission decided to bring the present action.

Substance

Pleas in law and arguments of the parties

24 By its action, the Commission essentially claims that the award of the contract in issue by way of a negotiated procedure without prior publication of a contract notice infringes Directive 92/50.

25 The Belgian Government puts forward three pleas in law in its defence. First, Directive 92/50 does not apply to the contract in issue because its performance must be accompanied by special security measures within the meaning of Article 4(2) thereof. Secondly, the services to which that contract relates fall within Annex I B to Directive 92/50 and, accordingly, the contract in issue is not subject to the provisions of that directive limiting the use of the negotiated procedure and requiring publication of a contract notice. Thirdly, use of the negotiated procedure is justified under Article 11(3) of the directive, in particular for technical reasons and for reasons to do with protection of exclusive rights.

26 By its first plea in law, the Belgian Government notes that one of the five criteria for obtaining award of the contract in issue was possession of a military security certificate. Undertakings which, when executing a public contract, have access to data, sites or equipment classified by the national authorities or NATO, can

obtain a military security certificate after undergoing security checks. Those undertakings which do not possess a military security certificate must, before processing the data, transmit the results of their photography to the general intelligence services (SRG), which check to see whether they contain classified objects and, if necessary, make the latter unidentifiable. Those undertakings which do possess such a certificate receive a list of the classified items, allowing them to work directly on the results of their photography and, before publishing or distributing them, themselves conceal the classified objects. The intention behind that rule is obvious: classified material is of great strategic importance. The dissemination of geographical information concerning such objects entails serious risks of terrorism, sabotage or espionage. Thus, the military security certificate is a special security measure within the meaning of Article 4(2) of Directive 92/50, and it therefore does not apply to the contract in issue.

27 The Commission claims that the exception provided for by Article 4(2) of Directive 92/50, which must be interpreted strictly, does not apply in the present case. According to Belgian law, those undertakings which do not possess a military security certificate must, before processing their data, transmit the results of their photography to the Belgian security services, which then check whether such photography contains classified objects and conceal them as necessary. The whole purpose of obtaining a military security certificate is to allow undertakings which possess it to be exempt from such measures. Indeed, it would not be necessary for the security services to check the photography of an undertaking possessing such a certificate since the undertaking is authorised to work directly with uncensored aerial photographs.

28 It follows, in the Commission's submission, that the condition stipulated in the contract in issue that the contracting undertaking should possess a military security certificate constitutes a particular authorisation required of tenderers

within the meaning of Article 30(1) of Directive 92/50 rather than a special security measure within the meaning of Article 4(2) thereof. The former provision does not preclude the application of Directive 92/50 but merely allows the adjudicating authority to impose an additional requirement. The requirement of a military security certificate in the context of the contract in issue does not therefore entail the non-application of the abovementioned directive.

Findings of the Court

29 Article 4(2) of Directive 92/50 provides in particular that the directive is not to apply to services 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 State concerned.

30 It is not disputed that the Kingdom of Belgium is responsible for protecting the security not only of its national installations but also of the installations of international organisations within its territory, such as NATO. It is therefore for the Belgian authorities to lay down the security measures necessary for the protection of such installations.

31 The Belgian Government stated to the Court, without being contradicted by the Commission, that all aerial photography in Belgium must be submitted to the Belgian security services for checking and possible censoring, unless the undertaking concerned possesses a military security certificate, in which case it is for that undertaking itself to conceal images of sites classified secret before any dissemination of its photographs.

32 The Belgian Government further stated, without being contradicted on the point by the Commission, that the procedure for obtaining the military security certificate is strictly applied and involves a thorough vetting of the undertaking concerned. The past record, circle of contacts, trips abroad and membership of organisations of every member of staff who has access to the photographs, as well as of the shareholders and managers of that undertaking, is looked into in detail.

33 Moreover, again according to the uncontradicted submission of the Belgian Government, in order to guarantee the protection of classified information in its possession, the undertaking in question must fulfil conditions as to security commensurate with the level of confidentiality of the information held. Special procedures for accessing the recorded material are necessary and the equipment for storing and using the uncensored results of photography must meet certain security requirements, such as that photographs and related documents must be kept in a bombproof building with a metal-clad main door protected by a double alarm system permanently linked to a security firm.

34 Obtention of a military security certificate does not, therefore, constitute a merely administrative formality but requires that certain operational conditions be met by the certified undertaking. Furthermore, it means that the undertaking continues to meet security requirements in subsequent operations.

35 Obtention of a military security certificate does not have the effect of exempting the certified undertaking from taking any other security measure. The only difference is that the systematic involvement of the national security services is

obviated, while the certified undertaking remains subject to security requirements, in particular the obligation to conceal any classified objects itself prior to the possible dissemination of the photographs.

36 In view of the Belgian provisions as a whole as they have been laid before the Court, it must be concluded that execution of the services under the contract in issue must be accompanied by special security measures within the meaning of Article 4(2) of Directive 92/50, including the obtention by the undertaking providing the service of a military security certificate.

37 It follows that, in accordance with that provision, Directive 92/50 does not apply to the services covered by the contract in issue.

38 Accordingly, the application must be dismissed, without there being any need to examine the second and third pleas in law advanced by the Belgian Government in its defence.

Costs

39 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 Belgian Government has not applied for costs, the parties must be ordered to bear their own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Puissochet Schintgen Skouris

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 16 October 2003.

R. Grass

Registrar

V. Skouris

President