OPINION OF ADVOCATE GENERAL JACOBS

delivered on 24 February 2000 *

1. The issue in this case concerns the basis for calculating the value of a works contract in order to determine whether the Community provisions on procurement procedures apply. Specifically, where contracts for work on electricity supply and street lighting networks are to be carried out in a number of localities within the same overall administrative area, are all or any of them to be aggregated for the purposes of Council Directive 93/38 [1] ('the Directive') when, although awarded by separate local authorities, they are supervised and coordinated by a single agency set up by those authorities to provide technical and administrative support, when the content of the contracts is largely identical for each type of network and similar as between them, when the work is to be carried out over the same period and when the invitations to tender are all published simultaneously?

The relevant provisions of the Directive

2. The Commission alleges a failure to fulfil the obligations laid down by Article 4(2), Article 14(1), (10) and (13) and Articles 21, 24 and 25 of the Directive. A number of the definitions given in Articles 1 and 2 are also relevant.

3. Article 1(1) defines, *inter alia*, 'public authorities' as 'the State, regional or local authorities, bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law'. Under Article 2(1), the Directive is to apply to 'contracting entities which: (a) are public authorities ... and exercise one of the activities referred to in paragraph 2; ...'. Those activities include the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity, or the supply of electricity to such networks.

* Original language: English.

1 — Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1993 L 199, p. 84.

4. Article 4(2) provides: 'Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.'

5. Article 14 provides:

'1. This Directive shall apply to contracts the estimated value, [net] of VAT, for which is not less than:

...

(c) ECU 5 000 000 in the case of works contracts.

...

10. The basis for calculating the value of a works contract for the purposes of paragraph 1 shall be the total value of the work. "Work" shall mean the result of building and civil engineering activities, taken as a whole, which are intended to fulfil an economic and technical function by themselves.

In particular, where a supply, work or service is the subject of several lots, the value of each lot shall be taken into account when assessing the value referred to in paragraph 1. Where the aggregate value of the lots equals or exceeds the value laid down in paragraph 1, that paragraph shall apply to all the lots. However, in the case of works contracts, contracting entities may derogate from paragraph 1 in respect of lots the estimated value net of VAT for which is less than ECU 1 million, provided that the aggregate value of those lots does not exceed 20% of the overall value of the lots.

...

13. Contracting entities may not circumvent this Directive by splitting contracts or using special methods of calculating the value of contracts.'

6. Articles 21, 24 and 25 of the Directive fall within Title IV, 'Procedures for the award of contracts'. Article 21(1) provides that calls for competition are to be made by means of a notice drawn up in accordance with one of the annexes to the Directive, which is to be published in the *Official Journal of the European Communities* (the 'OJEC') in accordance with Article 21(5). The relevant annex in the present case is Annex XII, which lists in detail the information to be provided. Under Article 24(1), contracting entities which have

awarded a contract are to communicate the results of the awarding procedure to the Commission within two months of the award, again by means of a notice drawn up in accordance with one of the annexes (in the present case Annex XV), to be published in the OJEC in accordance with Article 24(2). Under Article 25(1), contracting entities must be able to supply proof of the date of dispatch of both of the above types of notice. Article 25(5) prohibits publication in any other way before notices are dispatched to the Office for Official Publications of the European Communities.

Facts

7. In the French *département* of Vendée, various municipal authorities have formed *syndicats intercommunaux* (joint municipal groupings) for the purpose of administering their electricity supply networks. [2] In 1950, all of those *syndicats intercommunaux* and two individual municipalities (hereinafter all referred to together as the 'local entities') set up a *syndicat départemental*, now known as the Syndicat Départemental d'Électrification de la Vendée or by its acronym 'SYDEV'. [3] The local entities did not thereby cease to exist, but SYDEV took over responsibility for certain of their tasks. It appears from documents produced by the French Government that SYDEV's competences were governed at the material time (1994-95) by an *arrêté préfectoral* (prefectoral order) of 3 October 1960, although the relevant provisions were subsequently modified (in 1997).

8. Under Article 1 of the 1960 *arrêté préfectoral*, SYDEV's objects were to include:

'(1) joint exercise of the rights conferred on local authorities by statute or regulation as regards the production, transport, distribution and use of electrical energy, in particular under the Law of 8 April 1946 on the nationalisation of electricity and gas, and of all the responsibilities conferred on the member *syndicats* and municipalities;

(2) joint organisation of the services which they are to provide in order to ensure the

2 — Although the legal framework has not been explained to the Court by either the Commission or the French Government, it appears that the normal situation in France, governed principally by Laws of 15 June 1906 and 8 April 1946, is that local authorities are responsible for electricity supply within their areas, in respect of which they grant concessions, on standard terms, to the national corporation Électricité de France (EDF), which enjoys a near-monopoly in the production and supply of electricity in that country. See, for example, J. Bergougnoux and W. Varoquaux, 'Caractéristiques du service public de l'électricité', *Cahiers juridiques de l'électricité et du gaz* (CJEG), 1987, Librairies Techniques, Paris, p. 811; P. Sablière, 'Le nouveau modèle de cahier des charges pour la concession à Électricité de France de la distribution publique d'électricité', CJEG, 1993, p. 1; P. Sablière, 'Le nouveau cahier des charges type de la concession du réseau d'alimentation générale en énergie électrique', CJEG, 1995, p. 87.

3 — This type of arrangement appears to be the norm in France: see the Opinion of Madame Devillers, Commissaire du gouvernement, in SIEP c/État et SDE, Cour administrative d'appel de Nantes, 17 September 1997, CJEG, 1998, p. 398.

proper operation and best possible exploitation of their distribution of electricity;

(3) in general, interest and participation, where appropriate, in all activities pertaining to electricity and its use within the framework of the laws and regulations in force.'

9. Article 2 gives a non-exhaustive list of the activities in which SYDEV was to engage in pursuit of those objects. They include: representing the member authorities; organising administrative, legal and technical planning and research services; drawing up the general inventory of the requirements of the *département* and promoting the general and periodic programmes of works relating to electricity infrastructure in the *communes*; harmonising the rates charged for electricity; entering into agreements with electricity operators holding a concession; and implementing technical and financial measures.

10. Under SYDEV's 1997 statutes, but not under the 1960 *arrêté préfectoral*, it is to act both as *'maître d'œuvre'* (supervisor/manager) and as *'maître d'ouvrage'* (contracting authority) on behalf of its members.

11. On 21 December 1994, SYDEV sent for publication in the *Bulletin Officiel des Annonces des Marchés Publics* (the official French bulletin of notices concerning public works and service contracts, the 'BOAMP') invitations to tender for a number of works contracts, 37 of which are in issue in the present case.[4] The contracts in question related to extension and maintenance work to be carried out, over a period of three years, on existing electricity supply and/or street lighting networks under the responsibility of the members of SYDEV. All the invitations to tender were published in the BOAMP on 12 January 1995.

12. The notices to which this case relates involve 20 of SYDEV's 23 members and, in all but three cases, there are notices for both electrification and street lighting works for each member. In numerical terms, they thus cover some 80% of all the electricity supply and street lighting networks in the *département*.

13. In all the notices published in the BOAMP for the 37 contracts in question, the 'awarding body' was stated to be SYDEV and tenders were to be sent to the Works Department of SYDEV at its address, although the name of the local entity concerned was to be added in each case. The description of the work to be carried out on the electricity supply networks was the same in all cases: 'electrification work and associated generated work

4 — The Commission refers, throughout the pre-litigation procedure and in its written pleadings, to 36 contracts. Since the number of contracts notified in the BOAMP was in excess of that number, the Court requested clarification. In reply, the Commission identified the 37 contracts to which it considered the case related, and the French Government has not objected to that definition of the scope of the action.

such as, for example, civil engineering on the telephone network, civil engineering on the cable television network, the public address system'. The work on the lighting networks was described in all cases as: 'street lighting work and associated generated work such as, for example, the public address system'.

14. In most of the notices published in the BOAMP, the estimated value of each individual contract over three years was below the threshold of ECU 5 000 000 (equivalent, at the material time, to FRF 33 966 540) [5] for the application of the Directive to works contracts. Their aggregate value was, however, FRF 609 000 000 (FRF 483 000 000 for the electrification contracts and FRF 126 000 000 for the lighting contracts). For one of the electrification contracts and 13 of the lighting contracts, the estimated value was below the threshold of ECU 1 000 000 (equivalent to FRF 6 793 308 at the material time) for the derogation in the second half of the second subparagraph of Article 14(10) of the Directive, subject to their aggregate estimated value being also less than 20% of the relevant total.

15. Five of the electrification contracts were nevertheless for an estimated value in excess of the ECU 5 000 000 threshold, and notices regarding those contracts and one other slightly below the threshold (for FRF 30 000 000) were sent by SYDEV for publication in the OJEC. Although the requests for publication were sent on SYDEV's headed paper, the notices bore, first, the name of the local entity in question, followed by an indication that the work was to be supervised by SYDEV. Again, tenders were to be sent to SYDEV at its address, with the name of the local entity to be added in each case. The six notices were published in the OJEC on 6 January 1995, [6] although the information provided (identical to that published in the BOAMP) was insufficient to enable all the headings set out in Annex XII to the Directive to be completed. In each case, the name of the contracting entity was published as SYDEV, followed in all but one case by the name of the relevant local entity.

16. The award procedure was of a type comprising three stages. First, a short list of tenderers was drawn up on the basis, it appears from the records of the award procedures produced by the French Government, of whether tenderers had produced all the required certificates as to compliance with administrative requirements and capacity to perform the work in question. Second, one of those tenderers was selected, apparently on the basis of the best offer made. Offers were in the form of a percentage difference from the proposed list of prices, the offer representing the lowest price being accepted in all the cases in respect of which documents have been produced. Finally, the successful tenderer

5 — See the notice published by the Commission on 18 December 1993, OJ 1993 C 340, p. 10.

6 — OJ 1995 S 3, pp. 211 to 213.

was to be given orders to carry out specific items of work over the three-year period.

17. Notices concerning the award of the 37 contracts with which this case is concerned, including the six published in the OJEC, were published in the BOAMP on 29 September 1995, the 'body which awarded the contract' being identified in each case as SYDEV. No notice concerning the award of any of them was ever sent for publication in the OJEC. In all cases, the notices show that a firm with a local address was awarded the contract. However, at least some of the successful tenderers were in fact large undertakings with branches throughout France; four of the same names were also successful tenderers for similar contracts in Dordogne cited by the Commission in its application. In 10 of the 17 cases where both electrification and lighting work was to be carried out for the same local entity, the same tenderer was awarded both contracts, in three cases one of the contracts was shared with another tenderer and in the remaining four separate contracts were awarded to different tenderers. Overall, there were 10 successful tenderers for the 37 contracts, their 'success rate' ranging from a single shared contract to eight full contracts and two shared contracts, and from FRF 6 000 000 to FRF 114 000 000 plus a share of FRF 48 000 000.

18. The French Government has produced records of the award procedure for the electrification and lighting contracts for three of the local entities on whose behalf an invitation to tender (for the electrification contract) was published in the OJEC. They do not indicate whether any 'non-local' firms submitted tenders (no addresses are given), but it is possible to see that: (i) all the records are presented in an identical format and bear SYDEV's name at the top; (ii) the general terms of the invitations to tender state that 'the work will be carried out on the territory of the *Syndicat*, the exact specification of the works to be constructed ["des ouvrages à construire"] being communicated in due course by SYDEV to the contractor chosen'; (iii) the members of the boards which opened and decided on the tenders were different for the different local entities (a representative of SYDEV being present on some, though not all, occasions) and tenders were opened on different days or at different times; (iv) the lists of tenderers are similar, though not identical, for the three local entities and for the two types of contract for each of them; and (v) the offers of each individual tenderer for the same type of work in different localities were not always identical.

Procedure

19. On 17 January 1996, its attention having been drawn to the possibility that the above procedures infringed Community law, the Commission sent the French Republic a letter of formal notice alleging

that separate lots had been treated as separate contracts, that two -thirds of those contracts had not been notified in the OJEC and that an inappropriate procedure had been used. On 7 April 1997, following the French Government's denials, the Commission sent a reasoned opinion under Article 169 of the EC Treaty (now Article 226 EC) alleging that: (i) inaccurate information of the volume of work had been given, thus discriminating against tenderers from other Member States; (ii) a single programme of works had been split on geographical and technical pretexts in order to avoid publication of a number of lots in the OJEC; (iii) the concepts of contracting entity, association of contracting entities, lots and contracts had been misapplied; and (iv) the procedure used was not provided for in the Directive.

20. On 22 January 1998, the Commission brought the present action, in which it seeks a declaration that 'in the procurement procedure issued by the Syndicat Départemental d'Electrification de la Vendée in December 1994 for the award of contracts for electrification and street lighting work, the French Republic failed to fulfil its obligations under Articles 4(2), 14(1), (10) and (13), and also under Articles 21, 24 and 25, of Directive 93/38/EEC'. The Commission and the French Republic presented oral argument at the hearing on 16 November 1999.

Analysis

Applicability of the directive

21. The contracts in issue were advertised and awarded in early 1995. From the Court's judgment in Case C-311/96 *Commission* v *France*,[7] it is clear that the Directive had not been transposed in France at that time, but it is not disputed that the relevant authorities should have complied with it or that the Commission is entitled to bring an action concerning an individual instance of failure to comply with a directive which has not yet been implemented.[8]

The alleged infringements

22. The Commission makes two basic claims. First and foremost, it claims that SYDEV separated on both technical and geographical pretexts what was for the purposes of the directive a single works contract into a number of smaller contracts, thereby avoiding for the most part the requirement of publication in the OJEC, misleading potential tenderers as to the true scope of the work and making it

7 — [1997] ECR I-2939.

8 — See Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraphs 19 to 23 of the judgment.

appear considerably less attractive for other than local firms to submit a tender, to the disadvantage in particular of tenderers from other Member States. Secondly, it asserts that the notices of invitation to tender sent for publication in the OJEC were incomplete and no notices of the awards were ever sent.

Failure to provide certain details and to send notices of awards

23. The French Government does not, essentially, dispute the second claim, which relates to failure to comply with Articles 21 (as regards the missing information which should have been provided in the notices which were sent to the OJEC), 24 and 25 of the Directive.[9] It admits that the information sent was incomplete and that no notices of the awards were sent. It is thus undisputed that, by failing to provide full details in accordance with Annex XII in respect of the six calls for competition published in the OJEC and by failing to communicate details of the award of those contracts, the French Republic failed to fulfil its obligations under Articles 21(1) and 24(1) and (2) of the Directive.

24. However, in view of the admission that no notices were sent other than in respect of the six calls for competition which were published, I do not consider it necessary or appropriate for the Court to make a declaration as regards failure to supply proof of the date of dispatch in accordance with Article 25(1) of the Directive. Nor was there any infringement of Article 25(5) in respect of the notices which were sent, since the documents produced to the Court establish that they were dispatched on the same day to the OJEC and the BOAMP.

Scope of the allegation relating to separate treatment of the contracts

25. The main issue is whether the contracts should have been aggregated for the purposes of Article 14(10) and/or whether their separation constituted illegitimate splitting, contrary to Article 14(13), leading in either case specifically to a failure to publish notices in the OJEC where such notices should have been published under Article 21.

26. In the French Government's view it was correct to treat them all as separate contracts for separate works.

27. The Commission considers that for the purposes of the Directive they should have been treated as lots of the same overall works contract and not separately, whether

9 — See paragraph 6 above.

on a geographical basis (separate contracts for each local entity) or on a technical basis (separate contracts for electrification and lighting).

28. There are three possible configurations in the Commission's allegation: that the electrification and lighting work should have been treated as a whole for each local entity but not for the *département*, that all the electrification work and all the lighting work should have been treated as two separate wholes for the whole *département*, or that all the work of both types should have been treated as a single whole for the whole *département*. The remaining possibility is, of course, that argued for by the French Government.

29. Of the 37 notices with which this case is concerned, five were for an estimated value of over ECU 5 000 000, those five and one more (all for electrification contracts) were in fact published in the OJEC and 14 (all but one of which were for lighting contracts) were for amounts below ECU 1 000 000.

30. If the electrification and lighting contracts had been aggregated for each local entity separately (if separation were justified on geographical but not technical grounds) the value would have risen above the ECU 5 000 000 threshold in only one case — in which a notice was in fact published in the OJEC for the electrification contract (FRF 30 000 000) and the lighting contract was for less than ECU 1 000 000 and 20% of the total for the local entity. Thus, if it were to be found that there were justifiably separate contracts for each local entity, but that the separation between electrification and lighting was not justified, the infringement would be confined to the failure to publish calls for competition for lighting work for the five remaining local entities where notices of the electrification contracts were published and where the lighting contracts were worth more than ECU 1 000 000.

31. If, on the other hand, all the contracts for the *département* were aggregated in each category (if separation were justified on technical but not on geographical grounds), both categories would be well above the ECU 5 000 000 threshold. One electrification contract (for FRF 6 000 000) would then have been exempt from the need for publication by being under the threshold of ECU 1 000 000 and 20% of the total for electrification. Those of the lighting contracts which fall below the threshold total more than 20% of the total for lighting, but up to six of them could be exempted before that percentage (some FRF 25 000 000) was reached. Thus, if separation were justified on technical but not geographical grounds, the infringement would concern 12 electrification contracts and 12 lighting contracts.

32. Finally, if all the contracts in both categories were aggregated together for the *département* (if separation were unjustified on either technical or geographical grounds), then all 14 under the ECU 1 000 000 threshold would be exempt from the need for publication because they would amount to less than 20% of the aggregate total. The infringement would thus concern 12 electrification contracts but only 5 lighting contracts.

33. It is therefore necessary to look at both types of separation because the effects of the three possible approaches to aggregation would be different.

Article 14(10) and Article 14(13): aggregation and splitting

34. It will be recalled that Article 14(1) provides that the Directive is to apply to works contracts for an estimated value of at least ECU 5 000 000. Under Article 14(10), where work is the subject of several lots, it is the aggregate value of all the lots which is to be taken for the purposes of Article 14(1). Article 14(13) provides that contracting entities may not circumvent the Directive by splitting contracts.

35. It might be thought that those provisions of Article 14(10) and Article 14(13) express the same rule in different terms. I consider, however, that they should be distinguished.

36. Article 14(10) sets out purely objective criteria on the basis of which it may be determined whether the Directive applies. The term 'work' is defined and it is the total value of that work, arrived at where necessary by aggregating the values of any lots into which it may be divided, which determines the need to comply with the provisions of the Directive.

37. Article 14(13), on the other hand, introduces a subjective element. It speaks of 'circumventing' the Directive by specific types of conduct, namely splitting contracts or using special methods of calculating value. That wording implies a degree of intent in the conduct adopted. Circumvention, like the equivalent concepts used in other language versions, involves deliberate conduct rather than a fortuitous escape. Both the splitting of contracts and the use of special methods of calculation require some intention on the part of the splitter or calculator.

38. It is also true, however, that Article 14(13) of Directive 93/38 appears to contrast with the equivalent provision

(Article 6(4)) of Directive 93/37, [10] adopted on the same day, which provides: 'No work or contract may be split up *with the intention of avoiding* the application of this Directive' (my emphasis). Nevertheless, I consider that the difference is not significant; the import is the same and there is no indication of any will on the part of the legislature to remove the element of intent from the prohibition. Had that been the case, a more neutral wording would certainly have been chosen. It may be noted in this connection that the Commission's 'Guide to the Community rules on public works contracts', produced in response to a request by the Court, states of the prohibition in Directive 93/37 that it 'catches any splitting which is not justified on objective grounds and is thus solely designed to circumvent the rules laid down in the Directive'.

39. I thus take the view that a breach of Article 14(13) cannot be established in the absence of intent.

40. Article 14(13), moreover, prohibits the 'splitting' of contracts. That concept, in addition to emphasising the element of intent, presupposes the existence of a contract which would, in the normal course of events, have been treated as a single whole but which has been — abnormally — divided into separate contracts.

41. Has the Commission established that the contracts in issue would normally have been treated as a whole by the relevant entities but were deliberately separated to circumvent the application of the Directive?

42. I consider that it has not.

43. On the contrary, no evidence has been put forward that the practice of SYDEV or the various local entities was any different in relation to the contracts in issue in the present case from what it would otherwise have been. The documents produced by the French Government are consistent with its contention that the course followed was the normal one in Vendée and no evidence to the contrary has been submitted by the Commission. At the hearing, the French Government made the point that, had there been any intention to circumvent the Directive, an effort would have been made to do so more discreetly.

44. The Commission's references to practices followed in two other *départements* are of no particular relevance in that regard, in the absence of evidence of any consistent practice systematically applied

10 — Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ 1993 L 199, p. 54.

throughout France.[11] Nor is it relevant whether, as the Commission alleges, common sense may dictate that electricity supply and street lighting work should be dealt with together — a matter which I shall examine more fully in the context of Article 14(10) — unless it is established that they were deliberately separated in defiance of such an approach. And common sense is often an elusive guide.

45. For an allegation of breach of Article 14(13) to be successful, it would be necessary to establish an intent to circumvent the provisions of the Directive, possibly on the basis of a departure from what would otherwise have been the practice. No specific evidence of either has been produced by the Commission, nor in my view can they be inferred from the circumstances as a whole, which I shall analyse in greater detail below. I thus consider that the Court should not find that in this instance the French Republic has failed to fulfil its obligations under Article 14(13) of the Directive.

46. None of the foregoing, however, detracts from the possibility that the provisions of the Directive should have applied on objective grounds in accordance with Article 14(10) thereof and that the French Republic may have failed to fulfil its obligations thereunder. The examination of that provision will, therefore, be crucial in my analysis.

Identity of the contracting entity

47. First, however, it is necessary to consider a matter debated at some length between the parties: is it significant whether there was, for the purposes of Community law, a single contracting entity (SYDEV) or a number of separate contracting entities (SYDEV's members, the local entities)?

48. The French Government's point of view is, essentially, that it is impossible to separate the question of the unity of the work involved from that of the unity of the contracting entity; there cannot be a single work where there are separate contracting entities. It has thus argued, vigorously, that each local entity was a separate contracting entity (a *maître d'ouvrage* in French law) whereas SYDEV was legally incapable at the material time of acting other than as a technical supervisor, manager and coordinator of the different works (as *maître d'œuvre*).

49. The Commission, after appearing to seek to refute that argument, asserting that the true contracting entity was SYDEV in

11 — Indeed, it may be noted that the notices of award of contracts for the *département* of Dordogne produced with the application in fact show that, in addition to the procedure to which the Commission refers, separate procedures were followed simultaneously for the northern, north-eastern and south-western parts of the *département*.

all cases, stated in response to a question at the hearing that the identity of the contracting entity was not in its view an essential factor in the application of Article 14(10) of the Directive, the aggregation requirement in which could apply also to contracts awarded by a number of different contracting entities, provided that they were for a single 'work' within the meaning of that provision.

50. I agree with that latter view.

51. The definition of 'work' in Article 14(10) makes no reference to the identity of the contracting entity and it is logical that it should not. The aim of the Directive, as is clear from its preamble, its provisions and the surrounding context of other Community public procurement legislation, is to open up the market to Community-wide competition in the areas to which it relates. The principal means which it employs for that purpose are the requirements that standard procedures must be used, that calls for competition must be published at Community level and that there must be no discrimination between tenderers. However, no purpose would be served, and a great deal of unnecessary administrative work would be generated, if those requirements were to apply to all contracts, regardless of their value and of the likelihood that they would interest potential tenderers from other Member States. The thresholds (of ECU 5 000 000 and ECU 1 000 000 for works contracts) are clearly designed to deal with that concern. In order to ensure, though, that those thresholds are effectively observed, there are provisions to prohibit deliberate circumvention (Article 14(13)) and to avert a possible failure to apply them if a single overall works project is subdivided on other — and possibly otherwise legitimate — grounds (in Article 14(10)).

52. The aim is thus to ensure that undertakings in other Member States have the opportunity to tender for contracts or bundles of contracts which, on objective grounds of estimated value, are likely to interest them. Whether such contracts are to be awarded by one contracting entity or by several is not a significant factor in that context. There may well be legitimate reasons, administrative or other, for contracts for portions of a single works project to be awarded separately by different entities, but that will not seriously reduce the interest which the whole project is likely to represent for an appropriately qualified undertaking in another Member State. One might imagine, for example, work to be carried out on a road passing through the territories of different local authorities each having administrative responsibility for a section of highway. The aim of the Directive would not be achieved if its application were to be excluded on the ground that the estimated value of each section was only ECU 3 000 000.

53. It is true that the definition of a works contract in Article 1(4) of the Directive

specifies that it is a contract concluded by '*one* of the contracting entities referred to in Article 2' (my emphasis), which might suggest that for the purposes of Article 14 each works contract must be concluded with a separate entity. However, Article 2 refers to 'contracting entities' in the plural, classifying them in two basic categories, those which are public authorities or undertakings and those which are not. It thus seems more probable that the definition in Article 1(4) is intended to refer to contracting entities of *one of the types* referred to in Article 2. Moreover, as the Commission has pointed out, the definition of 'public authorities' includes 'associations formed by one or more of such authorities', which means that a contracting entity need not be a single public authority and need not be the body which actually concludes the contract. It is clear also that the criterion of the 'total value of the work' in Article 14(10) is not the value of a single contract, or the provision would be self-defeating. On the basis of those considerations, I suggest that too much significance should not be attached, for the purposes of Article 14, to the use of the singular in Article 1(4).

54. I therefore take the view that, as regards a possible infringement of Article 14(10) of the Directive in the present case, it is not necessary to decide whether there were a number of separate contracting entities or a single contracting entity in the form of SYDEV.

Article 14(10): a single 'work' or several?

55. The crucial point to be decided is whether the contracts awarded separately for electrification and street lighting work by each of the local entities formed a single 'work' — or a number of larger 'works' aggregated either geographically or technically — for the purposes of the Directive and should thus have been treated together.

56. A 'work' is defined in Article 14(10) as 'the result of building and civil engineering activities, taken as a whole, which are intended to fulfil an economic and technical function by themselves'. This is not a particularly precise definition, nor is any specific help to be found in the guidelines produced by the Commission. As one commentator has put it, 'identifying a single work should be like defining the proverbial elephant: awarding authorities will know one when they see it'. [12] In the present case, however, the Court is called upon to provide some guidance on how to recognise an elephant.

57. One possibility is to start from the purpose of the rules laid down in the Directive. As I have stated, that aim is

12 — Adrian Brown, 'Getting to Grips with Aggregation under the EC Public Procurement Rules', *Public Procurement Law Review* 1993, p. 69, at p. 72.

essentially to ensure that undertakings throughout the Community enjoy the opportunity to compete for contracts exceeding a certain fixed threshold value above which it is likely to be economically profitable to do so. Since in several instances contracts for both electrification and street lighting work were awarded to the same tenderer in different localities — from which it may be deduced that, in theory, a single contractor could have performed all the work of both kinds throughout the *département* — and since seven of the ten successful tenderers were awarded contracts totalling considerably more than ECU 5 000 000, it would seem logical that tenderers from other Member States should have been given an opportunity to compete. At the hearing, the Commission argued that the requirement to treat a number of contracts as forming a single 'work' and to publish them in the OJEC arises when the contracts are so linked that a Community undertaking is likely to regard them as a single economic operation and to wish to tender for the whole, as it claims was the case here.

58. However, I do not consider that to be the correct approach. Article 14(10) refers to the economic and technical function which the contracted activities are intended to fulfil by themselves and not to the interest which a potential tenderer may have in being fully informed, even though one of the overall aims of the Directive is to protect and further that interest. Although the provisions of the Directive should be interpreted in the light of its aims, the criterion here is specific. It is to the intended economic and technical function that we must look, rather than to the way in which the work may be seen by potential tenderers.

59. I take the criterion set out in Article 14(10) to mean that the boundary between work which must be aggregated for the purposes of the Directive and work which may legitimately be treated separately lies between bundles of contracts which, as regards their intended objective, share a common economic and technical function and those which do not.

60. The Commission's position is, essentially, that the work to be done in the present case formed a multiannual electrification programme covering the whole of Vendée and thus had a single economic and technical function. It stresses that the work descriptions are identical within each category and similar as between categories, with all the work to be carried out over the same period within the same geographical and administrative area. The concept of a 'work' cannot be confined in a case such as the present to that of a specific structure or construction.

61. The French Government contends that separate improvement and extension operations on a number of independent

networks cannot be regarded as forming a single 'work' intended to fulfil a single economic and technical function. It considers that, in the absence of a specific structure or construction, it is for the contracting entity to define its needs and thus determine the identity of the 'work'. In the present case, each local entity defined its own needs in respect of its own networks, independently of any hypothetical overall 'work'.

62. Neither of the parties has provided the Court with a very full description of the networks involved. However, it appears from what has been said by the French Government, and not denied by the Commission, that the local entities are responsible for individual low-voltage electricity supply networks radiating from transformer substations and serving consumers within their areas; that those networks are interconnectable; and that the street lighting networks, controlled by the individual local entities, are powered from those electricity supply networks.

— Electrification and street lighting: technical considerations

63. The Commission stresses that the description of both types of work (electrification and street lighting) includes work on the public address system and that both types of work were included in the same invitation to tender published by the bodies equivalent to SYDEV in two other French *départements* (Calvados and Dordogne) in 1995. The French Government emphasises that the work on the electricity supply network is essentially underground, whereas the street lighting work is essentially above ground, and that the two types of work fall under different headings ('civil engineering' and 'installation' respectively) in the NACE classification as set out in Annex XI to the Directive. At the hearing, it suggested that work on the street lighting networks might not fall within the scope of the Directive at all, since those networks do not involve the production, supply, transport or distribution of electricity [13] but rather its consumption for the benefit of the public.

64. Of those considerations, I consider only the last to be significant. It highlights — even without there being any need to consider that street lighting falls entirely outside the scope of the directive — the distinction which may legitimately be drawn, in terms of intended economic and technical function, between the two types of network. An electricity supply network is intended, technically, to transport electricity from a supplier to individual end-consumers who, economically, must pay that supplier for what they consume. A street lighting network provides lighting in public places. It is itself an end-consumer of

13 — See Article 2(2) of the Directive, cited in paragraph 3 above.

the electricity delivered to it by the electricity supply network. The authority providing the service must itself assume the cost — recovering it, presumably, from the population served through some such means as local taxation rather than on the basis of any individual benefit derived.

65. It is thus clear, in my view, that an electricity supply network and a street lighting network are intended to fulfil different economic and technical functions. That being so, I do not consider that work to maintain, improve and/or extend networks of the two different types, whether in the same area or not, can be treated together as a single 'work' for the purposes of Article 14(10) of the Directive.

66. That conclusion is not outweighed by the other considerations put forward by the Commission. The fact that a public address system is mentioned in both types of invitation to tender, as 'associated generated' work, does not imply a single economic or technical function. Different parts of a public address system may be carried by electricity supply ducts and by street lighting masts, so that work on either network may generate work on that system, without affecting the economic or technical functions of the networks themselves. Nor does the fact that some other contracting entities may have chosen to offer a single contract for work on both types of network determine whether, in principle, such civil engineering activities, taken as a whole, are intended to fulfil a single economic and technical function.

67. It is thus unnecessary to decide for the purposes of this case whether street lighting falls within the scope of the Directive or not, an issue which has in any event not been properly debated before the Court. If it does not, however, then clearly there can be no question of aggregating such work with electrification work for the purposes of the Directive.

68. I conclude that it was not necessary to aggregate the values of the electrification and lighting contracts for the purposes of the Directive, whether for the *département* as a whole or for each local entity. The question remains, however, whether the contracts should have been aggregated for the whole *département* for either category individually.

— Electrification: technical and geographical considerations

69. It appears [14] that each local entity is responsible for the electricity supply net-

14 — See note 2 and paragraph 62 above.

work in its area, although the networks are interconnected and the electricity is supplied by the national corporation EDF. The Commission stresses the geographical contiguity of the networks, the simultaneity of the work programmes, the identical nature of the work descriptions and the overall coordination by SYDEV. The French Government emphasises above all that each local entity entered into a separate contract for its own network.

70. That latter consideration, I have concluded, [15] is not relevant to the question of determining whether there was a single 'work' for the purposes of the Directive. Indeed, the present situation would appear comparable to the example which I have cited of a public highway passing through the territories of several local authorities. Although, for administrative reasons, the different local entities have responsibility for the low-voltage supply networks within their areas, those interconnectable networks taken as a whole are intended to fulfil a single economic and technical function: the conveyance and sale to consumers of electricity produced and supplied by EDF.

71. It is true that, as the French Government has pointed out, that reasoning would apply to the whole of the national electricity supply system. However, I agree with the Commission that the 'work' in the present case is clearly circumscribed by what one might call the three unities — of place, time and action. All the electrification contracts in issue were for work to be done within the same *département* over the same period, bearing the same general description and subject to the same technical control. There is no suggestion that there was work of the same nature to be carried out at the same time over any wider area — covering neighbouring *départements* or regions, or even the whole national network. In particular, it is implausible that any such work would have come under the supervision of SYDEV. Had that been the case, however, then it could indeed have been argued that all such work constituted a single 'work' for the purposes of the Directive. And in that case, I consider, the conclusion would be not the *reductio ad absurdum* which the French Government seeks to establish but rather that all the invitations to tender would have had to be notified in the OJEC.

72. The fact that the contracts are for a series of separate operations to be carried out at different points in time and space (within the same period of time and the same geographical area) does not mean that they should not be regarded as a single 'work'. If that reasoning were followed, each operation would be a separate 'work', and not even the French Government has suggested that such should be the case. On the contrary, a series of operations to be carried out within a specified period on a group of networks having a shared economic and technical function must itself be regarded as intended to fulfil a shared

15 — See paragraphs 51 to 54 above.

economic and technical function. In that connection, it may be recalled that the terms of the 1960 *arrêté préfectoral* [16] refer to the 'general inventory of the requirements of the *département*' — a wording which tends to confirm that conclusion.

73. I thus reach the view that all the electrification contracts in issue formed a single 'work' within the meaning of Article 14(10) of the Directive. Their values should have been aggregated for the purpose of determining whether calls for competition should have been published in the OJEC. Six such calls were in fact published, and one other contract was for an estimated value lower than ECU 1 000 000 and 20% of the total, thus qualifying for a derogation in accordance with the second subparagraph of Article 14(10). The failure to publish notices of the remaining 12 contracts, however, all for estimated values above that threshold and totalling somewhat over ECU 26 000 000, constituted an infringement of the Directive.

74. That infringement involved a failure to comply with not only Article 14(1) and (10) of the Directive, as regards the calculation of the value of the work, but also Article 21(1) and (5), because notices were not drawn up and sent for publication in the OJEC, and Article 25(5), because notices were published in the BOAMP.

16 — Cited in paragraph 9 above.

— Street lighting: technical and geographical considerations

75. I find it more difficult to apply the same reasoning to the work to be carried out on the street lighting networks. It is certainly true that the economic and technical function of each individual network is the same as that of all the others, but I do not consider that they thereby share a common function.

76. Whilst we have not been given any specific account of how street lighting is organised in Vendée, I think it not unreasonable to assume that the networks are independent of each other, as the French Government says. Since street lighting is an activity which consumes electricity, for which each local entity responsible must pay, there would not appear to be any purpose in interconnection, in contrast to the situation as regards the electricity network, which is a supply system with a single supplier. Each network is likely to be supplied from a separate point on the electricity supply system, enabling the consumption of each local entity to be determined. Lighting is, moreover, generally confined to built-up areas. Where such areas are separated by open countryside, as may well be predominantly the case in a largely rural *département* such as Vendée, the different networks are unlikely to be

contiguous. Different local entities may, furthermore, take quite different approaches to street lighting: some may seek to provide as generous a service as possible, whereas others may wish to save ratepayers' money by providing a strict minimum.

77. It is true that the above considerations are largely conjectural with regard to the specific circumstances of the present case. However, the French Government has stressed the mutual independence of the individual networks, and the Commission has produced no evidence to the contrary. In particular, there is no evidence of any unifying economic factor such as might be provided by, for example, a uniform system of local taxation throughout the *département* to pay for the cost of the lighting.

78. I thus consider that the Commission has not established the existence of a shared economic and technical function within the meaning of Article 14(10) of the Directive and that it was not necessary to aggregate the values of all the street lighting contracts in order to determine whether the Directive was applicable, even assuming that street lighting falls within the scope of the Directive.

Article 4(2): discrimination between contractors

79. The Commission's argument here is essentially that, by wrongly publishing only a selection of the invitations to tender in the OJEC, the French authorities placed tenderers from other Member States at a disadvantage since such tenderers, being unaware of the total value of the work and the extent to which it might interest them, would either decide not to compete or allow for proportionately higher fixed costs and thus submit less attractive bids than undertakings having gleaned fuller knowledge of the scope of the work from the BOAMP. The French Government, although it relies principally on its denial of any artificial splitting, asserts that there was no discrimination between tenderers, who were all required to bid a percentage difference from the estimated value of different categories of work with a view to carrying out specific items of work to be determined in the future.

80. Since Article 4(2) prohibits discrimination specifically between 'suppliers, contractors or service providers', it might be wondered whether it extends also to discrimination between tenderers or, *a fortiori*, potential tenderers (since we have not been informed that any undertaking from another Member State in fact submitted any tender in this case).

81. I consider that it does. For one thing, the terms 'supplier', 'contractor' and 'service provider' are not defined in the Directive, whereas 'tenderer' is defined in Article 1(6) as 'a supplier, contractor or service provider who submits a tender'. The term 'contractor' is thus not used in the Directive in the sense of one who has been awarded a contract but in the wider sense of one who aspires to be awarded a contract.

82. Indeed Article 4(1) — and it is worth noting that Article 4 is the first substantive provision in the Directive, defining to a certain extent the scope of what follows — requires contracting entities to comply with the Directive 'when awarding... contracts, or organising design contests'. The juxtaposition of 'awarding' and 'organising' suggests that the term 'awarding' too must be taken as embracing the whole procedure rather than just its final stages, and I consider that Article 4(2) must have the same scope.

83. The Court has, moreover, held the principle of equal treatment to be inherent in the original Community directive on public works contracts [17] and embodied in Article 4(2) of Directive 90/531, [18] the direct and almost identically-worded predecessor of Article 4(2) of the present Directive. Although the Court described the principle as that of equal treatment between tenderers, I consider that, by its very nature, it must apply also to those who may be discouraged from tendering because they have been placed at a disadvantage.

84. That being so, and in view of the conclusion I have reached regarding the failure to aggregate the electrification contracts, I consider that the Commission has established a breach of Article 4(2) of the Directive. Regardless of whether in this case tenderers from other Member States would in fact have been attracted — given the obvious desirability of a local establishment and the risk that they might be awarded only a portion of the total work, thus possibly compromising their calculations as to fixed costs — they were prevented from taking a decision on a proper basis because full information of the whole 'work' was not published in the OJEC as it should have been. Tenderers consulting the BOAMP, however, who will have been

17 — Council Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts, OJ, English Special Edition 1971(II), p. 682, as amended by Article 1(6) of Council Directive 89/440/EEC of 18 July 1989, OJ 1989 L 210, p. 1; see Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 33 of the judgment.

18 — Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1990 L 297, p. 1; see Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraphs 51 and 52 of the judgment.

predominantly French, had fuller information at their disposal.

85. However, with regard to the six calls for competition actually published in the OJEC, the information published in the OJEC was the same as that published in the BOAMP, so that the failure to communicate all the information required by Article 21(1) of the Directive read in conjunction with Annex XII thereto did not entail any discrimination.

Costs

86. Since, in my view, the Commission has established breaches of the Directive in respect of the failure to publish all the required details of the electrification contracts in the OJEC but has failed to establish a breach of Article 14(13) or any breach in respect of the lighting contracts in issue, I consider that, in accordance with Article 69(3) of the Rules of Procedure, the parties should each be ordered to pay their own costs.

Conclusion

87. In view of all the foregoing considerations, I consider that the Court should:

(1) declare that, by failing, in the course of the procurement procedure issued by the Syndicat Départemental d'Électrification de la Vendée in December 1994 for the award of contracts for electrification work:

— to publish a call for competition in the *Official Journal of the European Communities* for 12 contracts each with an estimated value exceeding ECU 1 000 000 and forming part of a single work within the meaning of

Article 14(10) of Council Directive 93/38/EEC, the French Republic failed to fulfil its obligations under Article 4(2), Article 14(1) and (10), Article 21(1) and (5) and Article 25(5) of that directive;

— to provide full details in accordance with Annex XII to Directive 93/38/EEC in respect of six calls for competition published in the *Official Journal of the European Communities*, the French Republic failed to fulfil its obligations under Article 21(1) of that directive;

— to communicate details of the award of all the contracts, the French Republic failed to fulfil its obligations under Article 24(1) and (2) of Directive 93/38/EEC;

(2) dismiss the remainder of the application;

(3) order the parties to bear their own costs.