JUDGMENT OF THE COURT (First Chamber)

18 November 2004 *

In Case C-126/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 20 March 2003,

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

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing, acting as Agent, and by H.-J. Prieß, Rechtsanwalt,

defendant,

* Language of the case: German.

THE COURT (First Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, A. Rosas, R. Silva de Lapuerta, K. Lenaerts and K. Schiemann,

Advocate General: L.A. Geelhoed,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 26 May 2004,

after hearing the Opinion of the Advocate General at the sitting on 24 June 2004,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, as the contract for the transport of waste from discharge points in the

region of Donauwald (Germany) to the Munich-North thermal power station was awarded by the City of Munich (Germany) in breach of the procedural rules laid down in Article 8 of 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), read in conjunction with Article 11(1) of that directive, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

Legal framework

2 Article 1(a) of Directive 92/50 provides that 'public service contracts' are 'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority', to the exclusion of the contracts listed in points (i) to (ix) of that provision.

3 Article (1)(b) of that directive states that 'contracting authorities' are 'the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law'.

4 Article 8 of Directive 92/50 provides that 'contracts which have as their object services listed in Annex IA shall be awarded in accordance with the provisions of Titles III to VI'.

5 Article 11(1) of Directive 92/50 states that in awarding public service contracts, contracting authorities are to apply the open, restricted or negotiated procedures defined in Article 1(d), (e) and (f), respectively, of the directive.

Facts and pre-litigation procedure

6 In 1997, the city of Munich, which operated the Munich-North thermal power station, concluded a contact with a private sector undertaking, Rethmann Entsorgungswirtschaft GmbH & Co. KG ('Rethmann'), under which it undertook to entrust to Rethmannn responsibility for the transport of waste from discharge points to that power station if the City of Munich was awarded the waste disposal contract for the region of Donauwald (Germany) which had been the subject of an invitation to tender issued by the Abfallwirtschaftsgesellschaft Donau-Wald mbH ('AWG Donau-Wald'), to which the City of Munich had responded.

7 Having been awarded that contract, the City of Munich entrusted responsibility for the transport of waste to Rethmann pursuant to the agreement concluded with that company, without, however, the transfer of that activity being the subject of an invitation to tender under Directive 92/50.

8 Having given the Federal Republic of Germany an opportunity to submit observations in that regard, the Commission sent a reasoned opinion to that Member State on 25 July 2001, in which it stated that the contract for the transport

of waste from the discharge points in the Donauwald region to the Munich-North thermal power station ('the contract at issue') should have been the subject of an invitation to tender published in the *Official Journal of the European Communities* in accordance with Directive 92/50. It invited the Member State to comply with its obligations under Community law within two months of the reasoned opinion being notified. Following the reply by the German authorities of 30 October 2001, in which they denied the infringement, the Commission brought the present action.

The action

The infringement

9 In support of its application, the Commission relies on a single complaint, alleging a breach of Article 8 of Directive 92/50, read in conjunction with Article 11(1) of that directive, on the ground that the City of Munich failed to make the contract at issue the subject of an invitation to tender.

10 It should be noted in that regard that under Article 8 of Directive 92/50, read in conjunction with Article 11(1) of that directive, public contracts which have as their object services listed in Annex IA must be awarded in accordance with the provisions of Titles III to VI of the directive, applying the open, restricted or negotiated procedures within the meaning of the directive.

11 'Public service contracts' are defined in Article 1(a) of Directive 92/50 as being contracts for pecuniary interest concluded in writing between a service provider and a contracting authority.

12 'Contracting authorities' are defined in Article 1(b) of Directive 92/50 as being 'the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law'.

13 Accordingly, Article 8 of Directive 92/50, read in conjunction with Article 1(a) and (b) and Article 11(1) of the directive, provides that, where contracts for pecuniary interest concluded in writing between a service provider and a regional or local authority have as their object the services listed in Annex IA to the directive, they must be the subject of an open, restricted or negotiated procedure within the meaning of that directive.

14 In the present case, it must be held that the contract at issue is a public contract for the purposes of Articles 8 and 11 of Directive 92/50, and that that contract should have been awarded in accordance with Titles III to VI of that directive.

15 The contract concluded between the City of Munich and Rethmann, under which that company undertook to transport waste from the discharge points in the Donauwald region to the Munich-North thermal power station, relates to a service covered by Annex IA to the directive and provided by an undertaking to a regional or local authority. It is accordingly a contract for pecuniary interest concluded in writing between a service provider and a contracting authority.

16 In that regard, the arguments relied on by the German Government to show that the contract at issue is not a public contract for the purposes of Articles 8 and 11 of Directive 92/50 cannot be accepted.

17 First of all, the German Government maintains that the City of Munich is not, in relation to the contract at issue, a 'contracting authority' for the purposes of Article 1(b) of Directive 92/50 and that the contract is not a 'public contract' for the purposes of Article 1(a) of the directive. According to that government, the contract does not fall within the scope of activities in the general interest of the City of Munich, but comprises an independent economic activity, which is clearly distinct and subject to competition, that is to say the operation of the Munich-North thermal power station.

18 It must be answered in that regard that, under Article 1(b) of Directive 92/50, regional or local authorities are, by definition, contracting authorities. It is clear from case-law that Article 1(a) of the directive makes no distinction between public contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those which are unrelated to that task (see, by way of analogy, in relation to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the awarding of public works contracts (OJ 1993 L 199, p. 54), Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 32). It is likewise irrelevant that the contracting authority intends to operate as a provider of services itself and that the contract in question aims, in that context, to subcontract a part of the activities to a third party. It is conceivable that the decision of the contracting authority as to the choice of that third party will be based on considerations that are not economic ones. It follows that, whatever the nature and context of the contract at issue may be, it constitutes a 'public contract' within the meaning of Article 1(a) of Directive 92/50.

19 As regards the argument that the activity of transporting waste carried on by Rethmann would, in the end result, be the subject of two invitations to tender, it is sufficient to observe that that activity is the subject of two separate public contracts, that is to say the one awarded by the City of Munich and the one, concerning more generally the disposal of waste in the Donauwald region, awarded by AWG Donau-Wald, each of which required to be the subject of an invitation to tender, and that the application of Directive 92/50 thus has the result that the service provided by Rethmann required to be the subject of two successive invitations to tender.

20 As regards the argument that there was no use of public resources of the City of Munich in the present case, it must be held that use of that kind is not a factor that determines whether or not there is a public contract for the purposes of Articles 8 and 11 of Directive 92/50.

21 The German Government also submits that, inasmuch as it was awarded for the purpose of resale to third parties, the contract at issue is excluded from the scope of Directive 92/50 by reason of Article 1(a)(ii) of that directive, read in conjunction with Article 7 of 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). In that regard, as the Advocate General observes at point 34 of his Opinion, it must be held that Article 1(a)(ii) of Directive 92/50 excludes from its scope contracts awarded in the fields covered by Directive 93/38, because the Community legislature wished those contracts to be covered only by Directive 93/38. The exception laid down in Article 7 of Directive 93/38 would therefore apply only if the contract at issue fell within the scope of that directive. Inasmuch as that contract does not come within the activities referred to in Article 2(2) of Directive 93/38, the exception laid down in Article 7 of that directive cannot apply in the present case.

22 The German Government also argues that it would have been impossible in practice to award the contract at issue in accordance with Titles III to VI of Directive 92/50, inasmuch as, in order to demonstrate its technical capability for the purposes of Article 32(2)(c) and (h) of that directive when the invitation to tender was issued by AWG Donau-Wald, the City of Munich needed to communicate the name of its subcontractor at the time its offer was lodged. In that regard it is true that a service provider which, with a view to being admitted to participate in a tendering procedure, intends to rely on the resources of entities or undertakings with which it is directly or indirectly linked must establish that it actually has available to it the resources of those entities or undertakings which are necessary for the performance of the contract but which it does not itself own (see, to that effect, Case C-176/98 *Holst Italia* [1999] ECR I-8607, paragraph 29; Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 92; and Case C-314/01 *Siemens and ARGE Telekom & Partner* [2004] ECR I-2549, paragraph 44). However, in the present case, it would in any event have been possible for the City of Munich to undertake an accelerated restricted procedure under Article 20 of Directive 92/50 between the issuing of the invitation to tender and the lodging of its offer.

23 The German Government maintains that the contract at issue could, by reason of Article 11(3)(d) of Directive 92/50, have been awarded using a negotiated procedure without prior publication of a contract notice. It should be pointed out in that regard that, as a derogation from the rules intended to ensure the effectiveness of the rights conferred by the EC Treaty in relation to public service contracts, Article 11(3)(d) of Directive 92/50 must be interpreted strictly and that 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). The application of Article 11(3)(d) of the directive is thus subject to three cumulative conditions. It requires the existence of an unforeseeable event, extreme urgency rendering the observance of time-limits laid down by other procedures impossible, and a causal link between the unforeseeable event and the extreme urgency resulting therefrom (see, in relation to Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), Case C-107/92 *Commission* v *Italy* [1993] ECR

I-4655, paragraph 12, and Case C-318/94 *Commission* v *Germany* [1996] ECR I-1949, paragraph 14). In the present case, as was held in paragraph 22 of this judgment, it would have been possible for the City of Munich to undertake an accelerated restricted procedure (see, in relation to Directive 71/305, Case C-24/91 *Commission* v *Spain* [1992] ECR I-1989, paragraph 14, and *Commission* v *Italy,* cited above, paragraph 13). It follows that the Federal Republic of Germany has not shown that a situation of extreme urgency existed.

24 In the light of the above, it must be held that, as the contract for the transport of waste from the discharge points in the Donauwald region to the Munich-North thermal power station was awarded by the City of Munich in breach of the procedural rules laid down in Article 8 of Directive 92/50, read in conjunction with Article 11(1) of that directive, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

The consequences of a judgment finding a failure to fulfil obligations

25 The German Government submits that, should there be a finding of failure to fulfil obligations, the Federal Republic of Germany would not be obliged to terminate the contract which has already been entered into.

26 In that regard, it is sufficient to reply that while, in proceedings for failure to fulfil obligations under Article 226 EC, the Court is only required to find that a provision of Community law has been infringed, it is clear from Article 228(1) EC that the Member State concerned is required to take the measures necessary to comply with the judgment of the Court.

Costs

27 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 Federal Republic of Germany has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Declares that, as the contract for the transport of waste from the discharge points in the Donauwald region to the Munich-North thermal power station was awarded by the City of Munich in breach of the procedural rules laid down in Article 8 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, read in conjunction with Article 11(1) of that directive, the Federal Republic of Germany has failed to fulfil its obligations under that directive;**

2. **Orders the Federal Republic of Germany to pay the costs.**

Signatures.