OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 19 January 1988 *

Mr President,
Members of the Court,

1. The Tribunal de commerce, Brussels, has referred to the Court two questions which have arisen in proceedings between l'Office belge de l'économie et de l'agriculture (Belgian Office for the Economy and Agriculture, hereinafter referred to as the 'OBEA') and Établissements Soules & Cie SA (hereinafter referred to as 'Soules') concerning the failure to perform a contract awarded by the tendering procedure for the supply of 550 tonnes of wheat flour as food aid for Sudan. Soules is challenging the conditions whereby the OBEA subsequently concluded a contract by the direct award procedure with another undertaking to remedy the default by Soules.

2. The second contract was concluded pursuant to Commission Regulation (EEC) No 1058/82 of 4 May 1982 opening a new invitation to tender for the mobilization of common wheat flour for the International Committee of the Red Cross as food aid (Official Journal 1982, L 123, p. 18).

3. Under Article 1 of that regulation the operation was to be implemented in accordance with the provisions of Commission Regulation (EEC) No 1974/80 of 22 July 1980 laying down general implementing rules in respect of certain food-aid operations involving cereals and rice (Official Journal 1980, L 192, p. 11).

4. As regards the direct award procedure, the first paragraph of Article 9 of the latter regulation provides as follows:

'Where it is decided to determine the supply costs by a direct award procedure the intervention agency designated for the purpose shall, after ensuring competition between several tenderers, conclude the contract on the basis of the most favourable terms'.

5. Before I examine the questions asked I feel obliged to make some remarks concerning certain problems raised during the course of the oral procedure by Counsel for Soules in order to explain why those problems are in my view outside the scope of these proceedings for a preliminary ruling.

6. (a) Counsel for Soules disputed first of all that the Commission and the OBEA were in a situation of urgency and stated that the circumstances certainly did not justify recourse to such hurried procedures as those which the Commission and the OBEA used.

7. In this respect it will suffice to note that the questions asked by the Tribunal de commerce do not concern the point whether the choice of the direct award procedure was justified in the circumstances of the present case.

8. In any event the fact that it was possible for 550 tonnes of flour to be mobilized pursuant to a decision of the Council of 1980 placing a certain quantity of cereals at the disposition of the International Red Cross cannot be invoked to dispute the urgency of this aid operation for the Sudan.

* Translated from the French.

In fact, the Council makes such commitments as precautionary measures. It is then up to beneficiaries to activate this promise of aid as and when the need arises. In this case the decision approving food aid for the Sudan was taken in December 1981 at the request of the Red Cross and the shipping period was fixed for the month of February 1982. There can be no doubt that matters had become particularly urgent when the operation had still not been carried out by the beginning of May.

9. (b) As for the difference between, on the one hand, the title and the second recital of the preamble to Regulation No 1058/82 which referred to a new invitation to tender, and, on the other, the annex to that regulation which provides that the procedure to be applied in order to determine supply costs is to be mutual agreement, it must again be said that the Belgian court has not asked the Court any questions on that subject. Furthermore, that is quite understandable since the preamble clearly explains why the new regulation had to be adopted (failure to perform the contract tendered for) and the background to the operation. The annex, which is the operational part of the regulation, leaves no doubt that it was intended to set in motion a direct award procedure.

10. (c) Another question which was discussed at length in the oral procedure is whether or not the Commission delayed too much in opening the new procedure.

11. Yet again, this is a question which was not referred to the Court but it might be helpful to recall the terms of Article 21 of Regulation No 1974/80 which provides as follows:

'Where the same food-aid operation involves several intervention agencies in different Member States, the latter shall communicate to each other with the minimum delay all the information necessary for carrying out their respective tasks and for the successful conclusion of the operation'.

Article 22 (4) provides that:

'The intervention agency of the country of shipment . . . shall take the necessary measures to check that the goods taken over by the recipient leave the geographical territory of the Community from the port indicated'.

The Commission and the OBEA were therefore dependent on the information furnished by the OBEA and by the successful tenderer itself. It is apparent from an undated telex message sent by the Italian intervention agency to the Commission and to the OBEA that the deadline for supplying the goods in question had been extended until 22 March 1982. However there is no evidence before the Court to show that the Commission was informed of the failure to perform the contract awarded under the tendering procedure a long time before it adopted the new regulation.

12. (d) Finally, Soules has stated that the price of wheat flour was falling between the months of January and May 1982 and it was therefore inequitable to make Soules bear the burden of the difference between the price fixed at the time of the tender of 8 January (BFR 14 479 per tonne) and the price agreed under the direct award procedure concluded on 10 May 1982 (BFR 17 510 per tonne), that is to say BFR 3 031.

13. However, it is apparent from the file in the main proceedings, which has been placed at the disposal of the Court, that before the Tribunal de commerce Soules argued that 'on the worst hypothesis it

would be liable to pay a difference in price of BFR 1 548 per tonne'. They did therefore acknowledge that there had been a rise in prices between January and May.

14. In any event, in the context of the Article 177 procedure there can be no question of the Court determining the questions of fact which are relevant in the main proceedings and which, quite rightly, are not the subject of the questions formulated by the national court. Consequently, I take the view that it is not for me to examine or draw conclusions from the price-lists which were communicated to the Court after the hearing.

15. However, I wish to turn now to an examination of the national court's questions which are set out in the Report for the Hearing. As those questions refer to the precise circumstances of the present case it is necessary to extract from them the questions concerning the interpretation of Community law which they entail.

I — The first question

16. In essence, the Tribunal de commerce, Brussels, wishes to know whether, when acting under Article 9 of Regulation No 1974/80, a national intervention agency is entitled to solicit tenders from only two undertakings, in this case the undertakings which had already unsuccessfully participated in the tendering procedure concerning the same food-aid operation.

17. In that respect it is important to note that there is no provision in the basic regulation, No 1974/80, or in Regulation No 1058/82 opening the direct award procedure, to the effect that undertakings which unsuccessfully took part in an earlier tendering procedure concerning the same operation should be excluded.

18. Secondly, it must be stated that the condition laid down in Article 9 of Regulation No 1974/80, which provides for 'ensuring competition between several tenderers' has been complied with since, in general usage 'several' means 'more than one'. As the Commission correctly pointed out, the Treaty itself utilizes the expression in that sense in Article 86 and the Court in Case 4/54 also spoke of 'one or more undertakings' (in the French text 'une ou plusieurs entreprises') (Judgment of 11 February 1955 *ISA* v *High Authority* [1954 to 1956] ECR 91, at p. 98).

19. Furthermore, I take the view that in this case the particular circumstances justified the way in which the OBEA proceeded. First of all, there is the fact that within the earlier tendering procedure, the OBEA had already ensured competition between all the Community undertakings which might be interested in supplying 550 tonnes of wheat flour.

20. Finally, bearing in mind the quantities to be delivered within the stipulated shipment period, it appears that the number of undertakings potentially interested in the contract in question *and* able to perform it was in any event limited. Only three undertakings participated in the abovementioned tendering procedure.

21. Finally, it must also be noted that Regulation No 1058/82 was published in the Official Journal on 6 May 1982. The direct award procedure was therefore known throughout the Community. Other undertakings could have expressed their dissatisfaction that the OBEA had not contacted them. However it has not been alleged that any other undertaking showed any interest in this contract.

22. I therefore suggest that the Court should reply as follows to the first question:

'An intervention agency responsible for implementing a direct award procedure under Article 9 of Regulation No 1974/80 is entitled to solicit offers from undertakings which have already unsuccessfully participated in a tendering procedure concerning the same food aid operation, even if only two undertakings are involved.'

II — The second question

23. In its second question the Belgian court asks whether a tender accepted by the intervention agency after the regulation opening the procedure has entered into force must be considered to be valid even though it was sought and made before the regulation entered into force and even before it was published in the Official Journal.

24. Like the Commission I would first point out that, from the legal point of view, Article 9 of Regulation No 1974/80 clearly distinguishes between two phases, that is to say:

(a) competition between tenderers;

(b) the conclusion of the contract.

25. Each of these two phases is subject to a condition. The competition must be between several tenderers and the conclusion of the contract must be on the basis of the most favourable terms.

26. Otherwise Article 9 leaves a great deal of discretion to the intervention agency.

27. Thus, unlike the chronology of events during a tendering procedure, where there must be a period of at least 10 days between the publication of the notice of invitation to tender and the expiry of the time-limit for the submission of tenders (Article 3 of Regulation No 1974/80), there is no condition laid down regarding the time at which the competent national agency may conclude the contract; to take an extreme example, it may therefore conclude the contract on the very day when the regulation enters into force. In this case it did so on the third day after the regulation came into force.

28. Furthermore, the regulation does not stipulate at what stage there must be competition between the tenderers. Consequently it may be assumed that time for assessing whether the conditions required by Article 9 have been complied with is the time when the contract is concluded by the tender being accepted.

29. In the present case it would certainly have been preferable to await the entry into force of the regulation before calling for tenders but, in circumstances such as these, I consider that the way in which the agency proceeded cannot be considered to affect the validity of the contract.

30. I have already pointed out that the direct award procedure was preceded by a tendering procedure concerning the same operation to supply flour as food aid. The

undertakings were, in effect, in competition on two occasions.

31. Furthermore, account must be taken of the 'urgency' caused by the exceptional circumstances of the successful tenderer's failure to perform the contract awarded and the subsequent delay in the delivery of the flour. It was that delay which rightly prompted the decision to have recourse to the direct award procedure and which also, in my view, justifies the organization of competition between the tenderers even before the regulation had been adopted. In this respect it is also relevant that the shipment period had been fixed from between 15 to 31 May 1982, beginning less than a week after Regulation No 1058/82 was to enter into force.

32. Finally there is nothing in the documents before the Court to suggest that the fact that tenders were called for and made before Regulation No 1058/82 entered into force caused any harm. By calling for and receiving tenders, the OBEA did not enter into any commitment. It was still free, if necessary, to invite other undertakings to tender.

33. For all the above reasons I propose that the second question should be answered as follows:

'In circumstances such as those in the main proceedings, an intervention agency responsible for implementing a direct award procedure is entitled to initiate the competition between the tenderers before the entry into force of the regulation setting in motion the procedure for a particular contract provided that the contract is concluded after the regulation has entered into force.'