OPINION OF ADVOCATE GENERAL ALBER

delivered on 3 April 2003 [1]

I — Introduction

1. In these infringement proceedings, the Commission is claiming that the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [2] (hereinafter: 'Directive 92/50' or 'the Directive' — articles cited without further definition are articles of the Directive). In particular, Belgium has infringed Article 11(3) and Article 15(2) by unfairly awarding a contract to perform services involving coastal surveillance by means of aerial photography by negotiated procedure (without prior publication of a notice) and failing to give prior notice of its intention to select that procedure. Belgium considers that the Directive is inapplicable because the contract involves security interests.

1 — Original language: German.

2 — OJ 1992 L 209, p. 1.

II — Legislative framework

Directive 92/50

2. According to the following articles:

Article 4(2):

'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.'

Article 8:

'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.'

Article 9:

'Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.' [3]

Article 10:

'Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

Article 11(3):

'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;

...'

Article 15(2):

'Contracting authorities who wish to award a public 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.'

Article 30(1):

'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.'

3 — Article 14 governs common rules in the technical field; and Article 16 lays down that the results of the tendering procedure are to be published.

Under Annex I A, Category 12:

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

Under Annex I B, Category 27:

Category No	Subject	CPC Reference No
27	Other services	—

3. CPC means the 'Central Product Classification' of the United Nations.

III — Facts and procedure

4. On 7 April 1988, the — at that time state-run — Belgian Administration of Waterways and Maritime Affairs[4] issued a restricted invitation to tender for surveillance of the Belgian coast by means of aerial photography. 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.

5. With a view to regionalisation, the then Ministerial Committee for Economic and Social Industrialisation decided to award the contract for one year only. On 29 June

4 — De administratie Waterwegen en Zeewezen/l'Administration des Voies hydrauliques et de la marine.

1989, the Flemish Government of the day decided to extend the contract by six years on the basis of the 1988 tender. The main purpose of the contract was to provide regular surveillance by means of aerial photography of the chain of dunes and the beaches, both above and below the waterline, the length of the Belgian coast, as well as to process the data obtained.

6. From 1992, the Flemish authorities examined the possibility of amending the contract by means of an addendum. On 13 April 1995, following a negotiated procedure without prior notification, the Flemish Minister for public contracts signed an addendum to the contract with Eurosense Belfotop, in the amount of BEF 534 million (without value added tax), to run for nine years.

7. Following an appeal, the Commission sent the Belgian authorities a letter of formal notice, on 27 December 1995, claiming that the addendum to the contract of 13 April 1995 fell within the scope of Directive 92/50 and that, according to Article 15(1) and (2), an 'indicative notice' and a notice of intention to award should have been published in the *Official Journal of the European Communities*. The failure to publish a notice constituted an infringement of Article 15(1) [5] and (2). In addition, the award of the contract by negotiated procedure without prior notification was not justified under Article 11(3) of the Directive.

8. By its reply of 2 February 1996, the Belgian Government rejected the criticisms. In the first place, according to Article 4(2), the Directive was not applicable to the contract at issue. Furthermore, the award of the contract by negotiated procedure was justified under Article 11(3)(b) of the Directive. Five criteria were set for the award of the contract:

(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 necessary know-how, the technology and the requisite equipment;

5 — Article 15(1) concerns the indicative notice of the anticipated total procurement for the budgetary year.

(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 million.

Finally, other factors justified awarding the contract by negotiated procedure, such as the existence of exclusive rights, in particular intellectual property rights, the availability of aircraft within two hours' flying time and command of the Dutch language.

9. None the less, on 10 March 1999, the Commission sent the Kingdom of Belgium a reasoned opinion in which it stood by its criticisms. The Belgian Government responded by a letter of 1 June 1999. In that letter, it claimed, in particular, that the main object of the contract was to provide aerial photography services, which fell not within Category 12 of Annex I A of the Directive but within Category 27 ('Other services') of Annex I B.

10. By an application of 29 June 2001, the Commission brought an action for failure to fulfil an obligation. The Commission is seeking a ruling that:

— pursuant to the first paragraph of Article 226 EC, the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, and Articles 11(3) and 15(2) thereof in particular,

— 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 the Directive; and

— by unjustifiably awarding the contract in question by negotiated procedure without prior publication of a notice;

— the Kingdom of Belgium should be ordered to pay the costs.

11. Although the Belgian Government has not formally submitted that the application should be dismissed, it expressly maintains that there is no infringement of the obligations flowing from Directive 92/50.

IV — Submissions of the parties

12. The arguments of the parties revolve around the statements of defence already submitted by the defendant Member State in the pre-litigation procedure. The following account of the submissions of the parties focuses on the three issues raised.

A — *Directive 92/50 is inapplicable on the basis of Article 4(2) thereof (special security measures)*

13. The *Commission* contends that the derogation under Article 4(2), which has to be strictly interpreted, is not applicable to this case. The fact that the undertaking commissioned to provide and process aerial photography has to have military security clearance cannot be considered to be a 'special security measure' within the meaning of that provision, but must in fact be deemed to be a licence or 'particular authorisation' which candidates within the meaning of Article 30(1) have to possess.

14. The *Belgian Government*, however, maintains that Article 4(2) is applicable because one of the selection criteria was possession of military security clearance. 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. Only authorised undertakings receive a list of the classified items, allowing them to operate in accordance with the original objective and to conceal the classified objects in any publications or reports, that is to say make them unidentifiable. Those undertakings which do not possess security clearance have, before processing the data, to transmit them to the general intelligence services, [6] which check to see whether they contain classified items and, if necessary, make the latter unidentifiable. That process is unworkable because it results in delays incompatible with emergency measures, in the event of storms for example, and also because relevant information is lost, where the negatives had been rendered unidentifiable.

B — *Directive 92/50 is inapplicable pursuant to Annex I B thereof*

15. The *Commission* contends that the contract falls under Reference No 867 (architectural, engineering and other technical services) of the CPC and, consequently, Category 12 of Annex I A of the Directive, with the result that the provisions of the Directive have to apply without exception. Category No 867

6 — Algemene Dienst Inlichting en Veiligheit/Service de renseignements généraux, SRG.

embraces several subcategories, such as, for example No 8675 (Engineering related scientific and technical consulting services), which are also broken down into subcategories. The services under the contract in question fall under Category No 86753 (Surface surveying services) and Category No 86754 (Map making services).

16. Although the contract covers services for the provision of aerial photography, which could of themselves fall within subcategory 87404 CPC, the contract has a far wider remit, being closely connected with the coastal surveillance programme drawn up by the authorities with the aim of guaranteeing the security of the coastal area and its inhabitants.

17. Moreover, the value of the services for the provision of aerial photography does not account for the bulk of the total contract value. The Commission estimates that of a total contract value of BEF 527 194 225, aerial photography accounts for BEF 245 464 732, that is to say 46.56%.

18. The *Belgian Government* claims that the main element of the contract comprises services for the provision of aerial photography which fall not under Category 12 of Annex I A of the Directive, but under Category 27 (Other services) of Annex I B of the Directive. None of the 27 categories listed in Annexes I A and I B of the Directive include the item 'services for the provision of aerial photography'. In addition to the categories listed, the Directive refers to the United Nations CPC Classification. That Classification lists aerial photography under No 87504.1. But that number is not to be found in the annexes to the Directive. However, Category 27 of Annex I B covers 'Other services', and is thus an open category containing no reference to CPC numbers. Aerial photography must therefore be assigned to that category.

19. Aerial photography is the main element of the contract. It covers both the taking of aerial photographs and the related processes and operations. In addition, the criteria governing the award of the contract in question relate to aerial photography. Finally, aerial photography accounts for BEF 295 202 732 of a total of more than BEF 527 194 225, so that the bulk of the monies, that is to say 56%, is taken up by aerial photography. The contract for the provision of services at issue has therefore to be classified as a service for the provision of aerial photography and, consequently, as 'another service'. It therefore follows that Directive 92/50 is not applicable.

C — *Justification for awarding the contract by negotiated procedure without prior notification in accordance with Article 11(3)(b) of the Directive*

20. The *Commission* considers the reference to Article 11(3)(b) to be incorrect. It first submits that the obligation to be in possession of military security clearance has nothing to do with 'technical reasons' within the meaning of that provision, and relates only to the possession of certain licences or authorisations.

21. Furthermore, the Belgian Government has neither claimed nor demonstrated that Eurosense Belfotop is the only undertaking to possess the requisite know-how, technology and equipment. Since the rules on the publication of public tenders were not applied, other candidates were prevented from proving that they met the conditions laid down. It has also to be pointed out that the contract requires the undertaking in question to develop a new technology, called aerial laser hypsometry. [7] But that technology has already been used abroad, confirming that the technical specifications were drawn up with a view to the undertaking in question and not vice versa. Nor can it be ruled out that, given a certain period of time, several undertakings would have been in a position to develop computer programs identical or comparable to the specialised programs hitherto utilised solely by Eurosense Belfotop.

22. The exclusive rights or intellectual property rights relating to the processes and programs in question cannot be considered to be exclusive rights within the meaning of Article 11(3) of the Directive, since they are merely the consequence of developing certain processes in implementation of the 1989 contract and, therefore, cannot be considered essential for performance of the contact. Any other party to a contract would similarly have had the opportunity to acquire certain exclusive rights in the process of executing the contract.

23. It is also conceivable that the results of the filming have become the property of the Region of Flanders and that, consequently, Eurosense Belfotop has no exclusive rights within the meaning of Article 11(3)(b). Finally, given that derogations have to be strictly interpreted, it is highly questionable whether intellectual property rights can be considered to be exclusive rights within the meaning of Article 11(3)(b).

24. The *Belgian Government* contends, solely in the event that the contract at issue is covered by Annex I A of the Directive — which it specifically rejects — that the award of the contract by negotiated procedure without prior notification is justified

7 — Measuring altitude.

pursuant to Article 11(3) of the Directive. Only Eurosense Belfotop could be awarded the contract to provide the services both for technical reasons and for reasons connected with the protection of exclusive rights.

25. The technical reasons are linked to the selection criteria the Region of Flanders adopted in the negotiations. Having military security clearance was thus a condition for performance of the contract. At the time of the negotiations, Eurosense Belfotop had that clearance, as, incidentally, did three other companies. The Region of Flanders could not have awarded that contract to an undertaking that did not yet have military security clearance. The procedure for obtaining the clearance was lengthy and costly. In addition, aerial filming required a licence for aerial photography within the field of specialist photography.

26. Furthermore, the results of the photography, that is to say the films containing the aerial and the multispectral scanner images, in execution of the contract, required very special treatment and had to be converted into numerical data, tables, graphs and maps, requiring the use of special techniques and specially developed computer programs. It was possible to record data using aerial filming, and to process and interpret that data, only by using highly technical equipment in the hands of specially trained technical staff.

27. It was also necessary for a single undertaking to possess the requisite know-how, technology and equipment, with no possibility of subcontracting. The military security certificate meant that the undertaking could be given a list of military secrets, which the undertaking itself could then make unidentifiable. Before that certificate could be obtained, thorough checks were carried out on both staff and installations. There was also a very strict procedure governing access to the photographic material. The archive and storage facilities, as well as those in which the basic documentation was to be used, had to meet many security requirements. One of the contractual obligations was that the contractor should store all the basic documentation in its own installations, which were approved under the military security certificate. That condition in fact precluded any temporary involvement of other contractors or the use of subcontractors.

28. In addition, the flight staff had to be available within two flying hours, and the Dutch language had to be used in order to be able to communicate with the Region of Flanders in this particularly complex area. The candidate had also to possess adequate

financial guarantees to ensure that it was able to continue to provide its services during the lifetime of a contract of such long duration. Both the experience of Eurosense Belfotop and that of the Belgian Administration for Waterways and Maritime Affairs had led to the conclusion that no other company was in a position to execute the contract and ensure programme continuity.

29. As regards the exclusive rights, and indeed both intellectual property rights in the various programs and exclusive rights to the data obtained, the Region of Flanders had concluded that Eurosense Belfotop was the only undertaking with which it could negotiate. The undertaking had itself developed the programs and techniques for carrying out the measurements and drawing the maps for surveillance of the Belgian coast. They were unique. Eurosense Belfotop had intellectual property and patent rights over them. In addition, the original contact of 1989 had provided that the photographs were to remain the exclusive property of Eurosense Belfotop. That contract had also provided that the results of the photography filming could be utilised by the Region of Flanders for its 'personal use' only. They could not be passed on to third parties without the permission of Eurosense Belfotop. That obligation was valid for the lifetime of the contract and a further three years. Consequently, another undertaking would not have been able to use the data obtained by Eurosense Belfotop, and would thus not have been in a position to reproduce the changes to the Belgian coastline.

V — Analysis

A — *Directive 92/50 is inapplicable pursuant to Article 4(2) thereof*

30. It is first necessary to consider whether Directive 92/50 is in any way applicable to the contract at issue. Under Article 4(2), the Directive specifically does not apply to public service contracts the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of the Member State concerned. The Belgian Government takes the view that the contract at issue is a contract requiring special security measures of that nature.

31. It is true that the Belgian Government does not cite any laws, regulations or administrative provisions which, on the one hand, require the intelligence services to check all aerial photography — that requirement constituting, in the view of the Belgian Government, a 'special security measure' within the meaning of the abovementioned provision — or, on the other,

indicate that this automatic duty to conduct checks can be replaced by military security clearance. Even though the Belgian Government does not cite specific provisions, there is no reason to doubt their existence. At any event, the Commission has expressed no doubts as to the existence of that requirement or its legal basis, but has merely queried its classification as a 'special security measure' within the meaning of Article 4(2).

32. The first question which arises is in fact how far the general requirement that the intelligence services check aerial photography can be cited for the purpose of classifying the contract at issue, since that requirement lapses immediately an undertaking has a security certificate, which was made a condition for the award of the contract in this case.

33. I consider it perfectly tenable for supervision by the intelligence services of all aerial photography to be considered to constitute 'special security measures' for reasons of security policy. In that connection, the Belgian Government referred to possible acts of sabotage or terrorist attacks, requiring certain military installations or strategic locations to be kept secret. In the oral proceedings, the representative of the Belgian Government cited the example of the military base at Koksijde, on the Belgian coast. I therefore have no doubt that the adoption of certain security measures in relation to aerial photography and the classification of those measures as 'special security measures' within the meaning of Article 4(2) of the Directive, is justified.

34. What is questionable, however, is whether it is possible to consider that special security measures are required for the 'execution' [8] of the contract, if the undertaking awarded the contract has military security clearance, and the intelligence services therefore no longer have to carry out automatic checks on the aerial photography in the context of that contract.

35. The Commission contends that the military security certificate laid down as one of the selection criteria has to be considered to be a 'particular authorisation' within the meaning of Article 30(1) of the Directive. It is one of the conditions governing the award of the contract. But if the contractor holds a military security certificate, no further 'special security measures' are required when the contract is executed.

8 — See the wording of Article 7(2) of Directive 92/50.

36. In my view, that argument does not take account of the fact that the issue or possession of a military security certificate does not obviate the need for any further security measures. Only the automatic checks by the intelligence services are no longer required. During the procedure before the Court, it was explained that an undertaking which holds a military security certificate is provided with lists of objects classified by the national authorities or NATO. It is the responsibility of the undertaking to take account of security requirements and, if appropriate, itself conceal militarily significant objects when aerial photographs are published. In my view, this amounts to transferring responsibility for the special security measures to the undertaking holding a military security certificate. That transfer of responsibility is probably also the reason why obtaining the military security certificate is such a time-consuming process. The security certificate does not just reflect the security status of an undertaking at a given point in time, it has also to provide a certain guarantee that security requirements will be met in relation to further activities.

37. I therefore consider that the requirement that the undertaking hold a military security certificate amounts to more than 'particular authorisation' within the meaning of Article 30(1), which would preclude a contract executed by an undertaking with a military security certificate from being considered to be a contract requiring special security measures.

38. Complete documentation of the Belgian coast, including the port of Zeebrugge, using aerial photographs — taken over a long period of time — therefore seems to me entirely likely to impinge on the security interests of the Belgian State. I therefore consider it also plausible that execution of the contract requires special security measures, as the Belgian Government maintains.

39. I also consider that it is largely for the government of a Member State to evaluate and define that State's security interests. If, then, the Belgian Government maintains that execution of the contract requires special security measures, and that assertion is not patently questionable, the Court should consider this sufficient for Article 4(2) of the Directive to be relied upon. I therefore consider that the Kingdom of Belgium can properly invoke Article 4(2) of the Directive, with the result that the Directive is inapplicable. In those circumstances, the Belgian Government cannot be deemed to have infringed the Treaty.

40. Only if the Court does not agree with that analysis will it be necessary to consider the further submissions of the parties.

B — *Directive 92/50 is inapplicable if the contract is classified under Annex I B of the Directive*

41. If we assume that Directive 92/50 is in principle applicable to the contract for the provision of services at issue, the next question to arise is whether the services in question should be assigned to Annex I A or to Annex I B. The Directive provides for 'two-tier application.' [9] According to the 21st recital of the Directive: 'full application of this Directive must be limited, for a transitional period, to contracts for those services where its provisions will enable the full potential for cross-frontier trade to be realised;... contracts for other services need to be monitored for a certain period before a decision is taken on the full application of this Directive...'.

42. According to the seventh recital: 'the field of services is best described, for the purpose of application of procedural rules and for monitoring purposes, by subdividing it into categories corresponding to particular positions of a common classification; whereas Annexes I A and I B of this Directive refer to the CPC nomenclature (common product classification) of the United Nations;... that nomenclature is likely to be replaced in the future by [a] Community nomenclature ...'. [10]

43. Under Article 8 of the Directive, contracts which have as their object services listed in Annex I A are to be awarded in accordance with the provisions of Titles III to VI. Under Article 9 of the Directive, contracts which have as their object services listed in Annex I B are to be awarded in accordance with Articles 14 and 16. Only the common rules in the technical field under Article 14 and the obligation to publish the result of the tendering procedure under Article 16 then apply. It is therefore essential to determine to which category of Annex I the services underpinning the contract belong in order to meet the requirement under Community law to comply with the rules on awarding contracts.

44. The Commission contends that the contract at issue falls into category 12 of Annex I A, whereas the Belgian Government maintains that the contract is covered by category 27 of Annex I B. It seems to me to be indisputable that the contract in question contains elements of landscape architectural services and related scientific

9 — See the heading of Title II of the Directive.

10 — A Community classification of goods for statistical purposes was adopted in the form of Council Regulation (EEC) No 3696/93 of 29 October 1993 on the statistical classification of products by activity (CPA) in the European Economic Community (OJ 1993 L 342, p. 1).

and technical consulting services. But, undeniably, the contract also has as its object aerial photography which does not a priori fall into category 12 of Annex I A. It is also undeniable that aerial photography is not specifically listed in either Annex I A or Annex I B.

45. The Belgian Government has pointed out that the CPC nomenclature specifically contains the item 'aerial photography', in subcategory 87504. The Community nomenclature, the CPA,[11] in Regulation No 3696/93, contains a category 74.81.2 'photographic services' corresponding to CPC Reference No 875. Subcategory 74.81.25, designated 'aerial photography', corresponds to CPC subcategory 87504.1.[12] Since it does not fit into any of the other categories in Annex I of the Directive, it is covered by category 27 'Other services'. This is a kind of catch-all category. It is the only category to which no CPC reference numbers are attached. Consequently, there can be no serious doubt that aerial photography falls into category 27. The Court also ruled in its judgment in *Tögel*[13] that the reference to the CPC nomenclature in Annexes I A and I B of Directive 92/50 is binding.

46. The sole question which arises concerns the rules according to which the contract must be awarded if parts of its object have to be assigned to Annex I A, while other parts are covered by Annex I B. Article 10 contains binding rules governing cases of that nature:

'Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

47. In its judgment in *Swoboda*,[14] the Court ruled that Article 10 'provides an unequivocal test for the determination of the regime applicable to a contract composed of several services, which is based on the comparison *of the value of the services* referred to in Annex I B.'[15]

48. In that judgment, the Court specifically rejected the view that the main object of a contract determines the regime applicable

11 — See Article 2(1) of Regulation No 3696/93 (cited in footnote 10 above).

12 — See Regulation No 3696/93 (cited in footnote 10 above), p. 113 et seq.

13 — Case C-76/97 *Tögel* [1998] ECR I-5357, paragraph 37.

14 — Case C-411/00 *Felix Swoboda* [2002] ECR I-10567.

15 — Case C-411/00 (cited in footnote 14 above), paragraph 52. My emphasis.

to it.[16] It left no doubt that though the services under a contract to be awarded might be different in nature, they served to achieve a single purpose, so that the contract should be awarded uniformly.[17]

49. It is therefore essential to determine the value of the individual services. In its judgment in *Swoboda*, which it delivered in the context of a reference for a preliminary ruling, the Court held that 'the classification of services in Annexes I A and I B to Directive 92/50 is primarily a question of fact *for the contracting authority* to determine, subject to review by the national courts.'[18]

50. In this case, however, there is no question of a review by the national courts, since these are infringement proceedings. The question of fact will therefore have to be decided by the Court of Justice in this instance.

51. Both the Commission and the Belgian Government have calculated the proportion of the contract taken up by aerial photography. The Commission arrived at a figure of 46.56%, whereas the Belgian Government has drawn up various calculations, which I do not wish to discuss in detail here, but all of which indicate that, in financial terms also, aerial photography clearly accounts for more than 50% of the contract.

52. The Belgian Government countered the Commission's suggestion of 46.56% with another calculation. According to the Belgian Government, the Commission had taken into account in its calculation only services of category I, II and II of the contract to provide services, but had failed to suggest a percentage to cover services in category IV 'sum in reserve'[19] in relation to aerial photography. The purpose of the 'sum in reserve' is to cover all kinds of requirements that might prove necessary but could not be anticipated at the time the

16 — Case C-411/00 (cited in footnote 14 above), paragraph 49.

17 — Case C-411/00 (cited in footnote 14 above), paragraphs 56 and 59.

18 — Case C-411/00 (cited in footnote 14 above), paragraph 62. My emphasis.

19 — 'Voorbehouden som/somme réservée'. The description of services in category IV in Clause 7 of the contract of 13 January 1995 reads as follows: 'The sum in reserve (service category IV — ...) amounts to BEF 15 million (except for contract years 1998/1999 when, for budgetary reasons, only BEF 12.5 million is provided for) and can *in particular* be used:
1. for the checks, after every photogrammetric flight, of the condition of the beach and dunes, as regards both the beach morphology and the dune construction, measured according to the standards and rules laid down in both the "Doindecreet" and the "Normstelling Kust 2000";
2. for supplying the survey results on a magnetic disk compatible with the equipment used by the authorities;
3. to allow the contracting parties to observe ISO standards for activities essential to the performance of this contract;
4. for new or revised techniques which emerge during the life of the contract and can be used qualitatively or quantitatively to improve the contract.'

contract was entered into. The term 'in particular'[20] indicates that the sum can be used for services other than those covered by Clause 7 of the contract to provide services, that is to say it may also be used for services comparable to services in categories I, II and III.

53. If the percentage the Commission suggests to cover aerial photography in relation to services in categories I, II and III, that is to say 61.80%, is taken as a basis, and that percentage is transferred to services in category IV, we have to assume that aerial photography accounts for a total of 61.80% of the contract. That figure seems appropriate based on the *ex ante* assessment, which had to be made when the contract was awarded. It is clear, if we look at the services actually provided in the context of an assessment *ex post facto*, that aerial photography accounts for 56% of category IV services. In any event, the percentage taken up by aerial photography clearly represents more than 50% of the contract.

54. I do not consider that there can be any fundamental objections to the submissions of the Belgian Government, as set out above. In addition, I consider that the wording of the *Swoboda* judgment,[21] according to which the classification of services in Annexes I A and I B of the Directive is for the contracting authority to determine, indicates that the Court accords the contracting authority a margin of discretion in classifying the contract.

55. I therefore see no reason to call into question the Belgian Government's assessment that aerial photography accounts for the predominant value of the contract. Accordingly, the contract falls under Annex I B, with the result that the tendering procedure under Community law, under Titles III to VI of Directive 92/50, does not have to be followed. From that point of view also, the action for failure to fulfil an obligation must, therefore, be dismissed.

56. The question whether the Belgian Government can successfully rely on Article 11(3)(b) can therefore be left aside.

VI — Costs

57. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be order to pay the costs. The Belgian Government has not, however, applied for costs. It follows that the parties must be order to bear their own costs.

20 — See the wording of Clause 7 of the contract of 13 January 1995 (cited in footnote 19 above).

21 — Case C-411/00 (cited in footnote 14 above), paragraph 62.

VII — Conclusion

58. In the light of the foregoing, I therefore propose that the Court:

(1) declare the action dismissed;

(2) order each party to bear its own costs.