JUDGMENT OF THE COURT
18 May 1995 *

In Case C-57/94,

Commission of the European Communities, represented by Antonio Aresu, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, also of the Commission's Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Umberto Leanza, Head of the Contentious Diplomatic Affairs Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adelaïde,

defendant,

APPLICATION for a declaration that, in so far as the provincial administration of Ascoli Piceno awarded a private contract for the eleventh and twelfth supplementary reports for the completion of the section of rapid transit highway 'Ascoli-Mare' entitled 'Stage IV — Project 5134' and failed to publish a notice of invitation to tender in the *Official Journal of the European Communities*, the Italian Republic has failed to fulfil its obligations under 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),

* Language of the case: Italian.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler (Rapporteur), P. J. G. Kapteyn and P. Jann (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, J. L. Murray, J.-P. Puissochet, G. Hirsch and H. Ragnemalm, Judges,

Advocate General: M. B. Elmer,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 14 February 1995,

after hearing the Opinion of the Advocate General at the sitting on 28 March 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 9 February 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, in so far as the provincial administration of Ascoli Piceno awarded a private contract for the eleventh and twelfth supplementary reports for the completion of the section of rapid transit highway 'Ascoli-Mare' entitled 'Stage IV — Project 5134' and failed to publish a notice of invitation to tender in the *Official Journal of the European Communities*, the Italian Republic has failed to fulfil its obligations under 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, hereinafter 'Directive 71/305').

2 At the beginning of the 1970s, the provincial administration of Ascoli Piceno awarded various public works contracts relating to the construction of a rapid transit highway to link the town of Ascoli Piceno to the A 14 motorway and national highway No 16, which runs along the Adriatic coast. The work was divided into four stages.

3 Stage IV was awarded to the undertaking Rozzi Costantino. Twelve supplementary reports were subsequently produced on the work relating to that stage, which involved a substantial prolongation of the route as initially conceived. The work envisaged by those reports was also awarded to Rozzi Costantino. On 21 May 1990 the provincial administration of Ascoli Piceno awarded to that undertaking a private contract for work envisaged by the eleventh and twelfth reports for a total amount of LIT 36 250 million.

4 The Commission considered that the award of the public works contracts envisaged in those two reports fell within the scope of Directive 71/305 and was not covered by any of the derogations provided for in Article 9 and that consequently a notice of invitation to tender should have been published in the *Official Journal of the European Communities* in accordance with the requirements of the directive. Accordingly, by letter of 17 January 1991 the Commission called on the Italian Government, pursuant to Article 169 of the EEC Treaty, to submit its observations on the alleged infringement within 30 days.

5 Since no reply was received from the Italian Government within that period, the Commission reiterated its views in the reasoned opinion which it sent to the Italian Republic on 1 August 1991, concluding that 'in so far as the provincial

administration of Ascoli Piceno awarded a private contract for the eleventh and twelfth supplementary reports for the completion of the section of rapid transit highway "Ascoli-Mare" entitled "Stage IV — Project 5134" and failed to publish a notice of invitation to tender in the *Official Journal of the European Communities*, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC'. The Commission called on the Italian Republic to comply with the reasoned opinion within two months.

6 By letter of 30 December 1991 the Italian Government sent to the Commission a letter of 31 October 1991 in which the provincial administration of Ascoli Piceno provided further information about the contract in question and relied on Article 5(b) of Law No 584 of 8 August 1977, which transposed Article 9(b) of Directive 71/305 into Italian law, to justify the award of the contract at issue to the undertaking Rozzi Costantino.

7 Since the Commission did not regard that communication as a satisfactory response to its reasoned opinion, by application lodged at the Court Registry on 6 July 1992 it brought an action requesting the Court to declare that, by allowing the provincial administration of Ascoli Piceno to award a private contract for the eleventh and twelfth supplementary reports for the completion of the section of rapid transit highway 'Ascoli-Mare' entitled 'Stage IV — Project 5134' and to fail to publish a notice of invitation to tender in the *Official Journal of the European Communities*, and by not taking steps to preclude at the outset the legal effects thereof which infringed Community law, the Italian Republic had failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts.

8 Finding that the conclusions in the Commission's reasoned opinion and the form of order sought in its application to the Court were not the same, by judgment of

12 January 1994 the Court dismissed the application as inadmissible (Case C-296/92 *Commission* v *Italy* [1994] ECR I-1) on the ground that the scope of an action brought under Article 169 of the Treaty is delimited by the pre-litigation procedure provided for by that article and that consequently the action cannot be founded on any complaints other than those formulated in the reasoned opinion.

9 Following that judgment the Commission lodged the present application without initiating a fresh pre-litigation procedure.

Admissibility

10 The Italian Government considers that, following the Court's judgment of 12 January 1994, the Commission should have recommenced the entire pre-litigation procedure laid down in Article 169 of the Treaty, or at the very least have supplemented the reasoned opinion of 1 August 1991 by a further opinion.

11 In that connection the Italian Government claims, first, that the Court did not hold the application in Case C-296/92 inadmissible on the basis of defects affecting the pre-litigation documents or defects affecting the procedural documents taken separately, but rather the necessary functional correlation between the two.

12 That argument is unfounded. The judgment of 12 January 1994 makes it clear that inadmissibility resulted from the fact that inasmuch as it sought a declaration from the Court that the Italian Republic had failed to fulfil its obligations under Directive 71/305 by allowing the provincial administration of Ascoli Piceno to award the public works contract by way of a private agreement and to fail to publish a

notice of invitation to tender in the *Official Journal of the European Communities*, without taking steps to preclude the effects thereof, the Commission was founding its action on a basis different from that formulated in the reasoned opinion, in which the Commission had complained to the Italian Republic about the conduct of the provincial administration of Ascoli Piceno itself.

13 It should, moreover, be pointed out that the facts on which Case C-296/92 was founded and those of the present case are exactly the same. Both cases concern the award by the provincial administration of Ascoli Piceno of the contract in question by a private agreement procedure and a failure to publish a notice of invitation to tender in the *Official Journal of the European Communities*.

14 In the circumstances it must be concluded that in order to remedy the defects found by the Court in its judgment of 12 January 1994 it sufficed for the Commission to submit an application based on the same complaints, pleas in law and arguments as the reasoned opinion of 1 August 1991.

15 The Italian Government observes, secondly, that in its reasoned opinion of 1 August 1991 the Commission claimed that recourse to a private contract procedure was not justified by a situation of extreme urgency as provided for in Article 9(d) of Directive 71/305, whereas in its application the Commission maintains that recourse to that procedure could not be founded on 'technical reasons' within the meaning of Article 9(b) of that directive.

16 No argument can be drawn from that fact. As the Advocate General stated in point 12 of his Opinion, the discrepancy pointed out by the Italian Government

arose from the fact that the Italian Government did not reply to the letter of formal notice addressed to it by the Commission on 17 January 1991 and only in its belated response to the Commission's reasoned opinion did it for the first time rely on Article 9(b) of Directive 71/305 to justify the award of the contract by a private agreement procedure.

17 It should, moreover, be noted that, in view of the Italian Government's failure to adduce any justification within the prescribed period, the Commission would have been entitled to confine itself, both during the pre-litigation procedure and in its application initiating proceedings, to stating that the case did not fall within any of the exceptional circumstances capable of justifying, under Article 9 of Directive 71/305, recourse to a private contract procedure, without examining in detail either circumstance, which, it appeared, given the lack of adequate information, might be relied on in particular.

18 It follows from the foregoing that the action is admissible.

Substance

19 The parties agree that in the circumstances only application of Article 9(b) of Directive 71/305 could justify recourse to a private contract procedure in awarding the contract in question. Pursuant to that provision, authorities awarding works contracts may do so without applying the provisions of the directive, in particular those providing for publication of an invitation to tender in the *Official Journal of the European Communities*, 'when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor'.

20 The Italian Government contends, first, that even if the term 'technical reasons' in Article 9(b) of Directive 71/305 should be interpreted restrictively, that interpretation cannot go so far as to deprive that derogating provision of all practical significance. Thus it argues that 'technical reasons' capable of justifying the carrying out of works by a particular contractor should not be construed as the technical capacity of a particular undertaking alone to carry out certain works and considers that objective circumstances and conditions which affect the execution of works in a particular situation may constitute such reasons.

21 The Italian Government maintains, secondly, that in this case 'technical reasons' within the meaning of Article 9(b) of Directive 71/305 justified the contract in question being awarded to a particular contractor, namely the undertaking already responsible for carrying out the works in progress. In that connection it refers to the technical interplay between the works in progress and the work involved in the contract at issue. Thus it would have been impossible to complete the work which was the subject of the tenth supplementary report before putting in place part of the structures which were the subject of the eleventh and twelfth reports, to set up two different building sites at the same time because of the shortage of space, and to carry out the work in progress separately from the work at issue, because of the close structural connection of the foundations.

22 The Commission denies that those circumstances can constitute 'technical reasons' within the meaning of Article 9(b) of Directive 71/305. For that purpose it refers to a technical opinion given by an independent expert from which it appears, in substance, that the three arguments relied on by the Italian Government express a single technical need, that of planning, coordinating and supervising the works, and that in any event coordination of the timing and siting of the work in progress

and the work at issue was required even if all the works were awarded to one undertaking.

23 It follows from the Court's judgment in Case 199/85 *Commission* v *Italy* [1987] ECR 1039, at paragraph 14, that the provisions of Article 9 of Directive 71/305, which authorize derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public works contracts, must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances.

24 In view of the wording of Article 9(b) of Directive 71/305, the Italian Government was obliged, in order to justify recourse to a private contract procedure for the works in question, not only to establish the existence of 'technical reasons' within the meaning of that provision, but also to prove that those 'technical reasons' made it absolutely essential that the contract in question be awarded to the undertaking Rozzi Costantino, which was responsible for the works in progress.

25 Even assuming that the circumstances relied on by the Italian Government could constitute 'technical reasons' within the meaning of Article 9(b) of Directive 71/305, it is clear that the Italian Government has not adduced proof that those circumstances made it absolutely essential that the contract at issue be awarded to the undertaking in question.

26 The Italian Government did produce plans relating to the works in question, together with a series of photographs, and, referring to the technical explanations

of the chief engineer of the provincial administration of Ascoli Piceno itself, pointed to the technical interplay between the work in progress and the work in question.

27 The Italian Government has not, however, convincingly shown, in order to challenge, if necessary by obtaining its own technical report from an independent expert, the findings and conclusions contained in the technical opinion submitted by the Commission, that the difficulties arising from those technical interconnections could not have been surmounted if the works in question had been awarded to an undertaking other than the one already responsible for the works in progress, so that the contract had to be awarded to that undertaking.

28 It follows from the above that the Commission's action is founded.

Costs

29 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, in so far as the provincial administration of Ascoli Piceno awarded a private contract for the eleventh and twelfth supplementary reports for the completion of the section of rapid transit highway 'Ascoli-Mare' entitled 'Stage IV — Project 5134' and failed to publish a notice of invitation to tender in the *Official Journal of the European Communities*, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts;**

2. **Orders the Italian Republic to pay the costs.**

Rodríguez Iglesias Schockweiler Kapteyn Jann

Mancini Kakouris Moitinho Almeida Murray

Puissochet Hirsch Ragnemalm

Delivered in open court in Luxembourg on 18 May 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President