JUDGMENT OF THE COURT (First Chamber)

2 June 2005 *

In Case C-394/02,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 8 November 2002,

Commission of the European Communities, represented by M. Nolin and M. Konstantinidis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by P. Mylonopoulos, D. Tsagkaraki and S. Chala, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Greek.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, K. Lenaerts, J.N. Cunha Rodrigues, M. Ilešič and E. Levits, Judges,

Advocate General: F.G. Jacobs,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 8 December 2004,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration by the Court that, by reason of the award by the public electricity company Dimosia Epicheirisi Ilektrismoy (hereinafter 'DEI') of a contract for the construction of a conveyor-belt system for the thermal-electricity generation plant at Megalopolis by means of a negotiated procedure without prior publication of a contract notice, the Hellenic Republic has failed to fulfil its obligations under 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), as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1) ('Directive 93/38'), and in particular Article 20 et seq. of that directive.

Relevant provisions

2 Under Article 15 of Directive 93/38, '... works contracts ... shall be awarded in accordance with the provisions of Titles III, IV and V'.

3 Article 20(1) of Directive 93/38 provides that '[c]ontracting entities may choose any of the procedures described in Article 1(7) [that is open, restricted and negotiated procedures], provided that, subject to paragraph 2, a call for competition has been made in accordance with Article 21'.

4 Article 20(2) provides:

'Contracting entities may use a procedure without prior call for competition ... :

...

(c) when, for technical ... reasons ... , the contract may be executed only by a particular ... contractor ... ;

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time limits laid down for open and restricted procedures cannot be adhered to;

...'

5 Article 21(1) of Directive 93/38 lays down the means whereby the call for competition may be made, in essence the publication of a notice in the *Official Journal of the European Communities* drawn up in accordance with the models contained in the annexes to the directive.

Facts and pre-litigation procedure

6 In October 1997, DEI, for the purposes of an environmental impact assessment under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), submitted to the competent authority, namely the Ministry of Environment, Planning and Public Works, a project concerning the installation of a system for the

de-sulphuration, stabilisation, transport and deposit of solid waste from the Megalopolis thermal-electricity generation plant.

7 By decisions of 29 October 1998 and 30 December 1999, that Ministry gave its approval for that project, subject, on the one hand, to DEI lodging a request within nine months, that is by September 2000, for final authorisation for the elimination of the waste produced by that plant and, on the other hand, to the installation within 12 months, that is by December 2000, of a conveyor-belt system for the transport of the ash between that plant and the mine of Thoknia, where the ash would be treated.

8 In view of those deadlines, DEI, on 27 July 1999, decided to carry out a negotiated award procedure without publication of a notice and invited the Koch/Metka consortium and Dosco Overseas Engineering Ltd ('Dosco') to submit their offers.

9 On 18 January 2000, Dosco stated that it did not wish to take part in that procedure.

10 On 29 August 2000, after several months of negotiations, DEI awarded the contract for the construction of the conveyor-belt system for the transport of ash between the Megalopolis thermal-electricity generation plant and the mine of Thoknia (hereinafter 'the contract at issue') to the Koch/Metka consortium.

11 After giving the Hellenic Republic formal notice to submit its observations, the Commission, on 21 December 2001, issued a reasoned opinion stating that the

contract at issue should have been made the subject of a notice in the *Official Journal of the European Communities*, in accordance with Directive 93/38. It therefore invited that Member State to adopt the measures necessary to comply with the reasoned opinion within a period of two months from the date of its notification. Since it was not satisfied by the Greek authorities' reply by letter of 3 April 2002, the Commission decided to bring this action.

The action

Admissibility

12 The Greek Government raises four pleas of inadmissibility on the grounds, respectively, of the Commission's lack of interest in bringing proceedings, the want of any purpose to the action, the imprecision of the reasoned opinion and abuse of process.

The Commission's lack of any interest in bringing proceedings

13 The Greek Government submits that the Commission had no legitimate interest in opening the procedure for failure to fulfil obligations since the alleged infringement of Community law had, when the period for compliance with the reasoned opinion expired, been fully or at least in large measure completed.

14 In that regard, it must be noted that, when exercising its powers under Article 226 EC, the Commission does not have to show that there is a specific interest in bringing an action (see Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 15, and Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 29).

15 The Commission's function is to ensure, in the general interest, that the Member States give effect to Community law and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end (see *Commission* v *France*, cited above, paragraph 15, and *Commission* v *Germany*, cited above, paragraph 29 and the case-law there cited).

16 Article 226 EC is not therefore intended to protect that institution's own rights. It is for the Commission alone to decide whether or not it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfil its obligations, and, depending on the circumstances, because of what conduct or omission those proceedings should be brought (see, to that effect, Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 22; Case C-476/98 *Commission* v *Germany* [2002] ECR I-9855, paragraph 38, and *Commission* v *Germany*, cited in paragraph 14 above, paragraph 30).

The action's want of any purpose

17 The Greek Government submits that the action lacks any purpose, since the contract for works concluded between DEI and the Koch/Metka consortium for the purposes of the contract at issue, had, when the period fixed by the reasoned opinion expired, been almost fully performed. At that time, the works in question had been

largely completed, that is to say to the extent of 85% of them. In actual fact, it was therefore no longer possible to comply with the reasoned opinion.

18 In that regard, it is indeed the case that, as far as concerns the award of public procurement contracts, the Court has held that an action for failure to fulfil obligations is inadmissible if, when the period prescribed in the reasoned opinion expired, the contract in question had already been completely performed (see, to that effect, Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraphs 11 and 13).

19 Here, the contract concluded between DEI and the Koch/Metka consortium for the purposes of the contract at issue, was, when the period prescribed by the reasoned opinion expired, in course of performance, since only 85% of the works had been completed. That contract had therefore not been fully performed.

The imprecision of the reasoned opinion

20 The Greek Government submits that the reasoned opinion was too imprecise, in that the Commission had not specified the measures to be adopted in order to comply with it.

21 In that regard, it is clear from settled case-law that, while the reasoned opinion must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the EC Treaty, the Commission is not, however, obliged to set out

in that opinion the steps to be taken to remedy the infringement complained of (see, to that effect, Case C-247/89 *Commission* v *Portugal* [1991] ECR I-3659, paragraph 22, and Case C-328/96 *Commission* v *Austria* [1999] ECR I-7479, paragraph 39).

22 The purpose of the pre-litigation procedure is to define the subject-matter of the action for failure to fulfil obligations in order to give the Member State an opportunity to comply with its obligations under Community law and to avail itself of its right to defend itself against the complaints made by the Commission (see, to that effect, *Commission* v *Austria*, cited above, paragraph 34, and Case C-476/98 *Commission* v *Germany*, paragraphs 46 and 47).

23 Consequently, it is only where the Commission intends to make failure to adopt measures to enable the infringement complained of to be remedied the subject-matter of its action for failure to fulfil obligations that it has to specify those measures in the reasoned opinion (see, to that effect, *Commission* v *Austria*, cited above, paragraph 39).

24 Here, the subject-matter of the action is limited to a declaration of failure to fulfil obligations by reason of the award of the contract at issue without prior publication of a notice. It does not therefore seek a declaration of a further infringement, based on failure to adopt measures to enable the first infringement to be remedied.

Abuse of process

25 The Greek Government submits that, instead of bringing an action for failure to fulfil obligations, the Commission should have intervened directly and ordered the

suspension of the award of the contract at issue under Article 3 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

26 In that context, as regards the energy sector, it is not Directive 89/665, but Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), which is applicable.

27 Even if the Greek Government had cited Article 8 of Directive 92/13, which provides for a procedure essentially identical to that under Article 3 of Directive 89/665, it follows from settled case-law that, even were it preferable that the Commission use the procedure for direct intervention established by those directives, such a procedure is a preventive measure which can neither derogate from nor replace the powers of the Commission under Article 226 EC (see, in the context of Directive 89/665, Case C-359/93 *Commission* v *Netherlands* [1995] ECR I-157, paragraph 13; Case C-79/94 *Commission* v *Greece* [1995] ECR I-1071, paragraph 11; Case C-353/96 *Commission* v *Ireland* [1998] ECR I-8565, paragraph 22; and *Commission* v *Austria*, cited above, paragraph 57). The fact that the Commission used or did not use that procedure is therefore irrelevant where it is a matter of deciding on the admissibility of infringement proceedings.

28 The Commission alone is competent to decide whether it is appropriate to bring proceedings under Article 226 EC for failure to fulfil obligations (see, to that effect, Case C-431/92 *Commission* v *Germany*, paragraph 22, and Case C-476/98

Commission v *Germany*, paragraph 38). Thus, the choice between the two procedures is within its discretion.

29 It follows from the foregoing considerations that the pleas of inadmissibility must be rejected.

Substance

30 In support of its action, the Commission relies on a single complaint alleging, in essence, breach of Article 15 of Directive 93/38, read in conjunction with Articles 20 (1) and 21 of that directive, on the ground that DEI awarded the contract at issue without prior publication of a contract notice in the *Official Journal of the European Communities*.

31 In that regard, it must be stated that the Greek Government does not dispute that the contract at issue is covered by Article 15 of Directive 93/38 and should therefore, as a rule, have been awarded in accordance with Titles III to V of that directive, which provide, in particular, for contracts to be put out to tender by the publication of a notice in the Official Journal.

32 The Government contends, however, that, under Article 20(2)(c) and (d) of Directive 93/38, the contract at issue could, in exceptional circumstances, have been awarded without publication of a notice. In its submission, first, only the Koch/Metka consortium was in a position to carry out the works in question in the light of the

particular characteristics of the product to be transported and of the site's subsoil, as well as the need to attach the conveyor belts to the existing system. Secondly, the carrying out of those works was very urgent because of the time-limits set by the Ministry of Environment, Planning and Public Works.

33 In this respect, it should, as a preliminary point, be noted that, as derogations from the rules relating to procedures for the award of public procurement contracts, the provisions of Article 20(2)(c) and (d) of Directive 93/38 must be interpreted strictly. Also, the burden of proof lies on the party seeking to rely on them (see, to that effect, in the context of Directives 71/305 and 93/37, Case 199/85 *Commission* v *Italy* [1987] ECR 1039, paragraph 14; Case C-57/94 *Commission* v *Italy* [1995] ECR I-1249, paragraph 23; and Case C-385/02 *Commission* v *Italy* [2004] ECR I-8121, paragraph 19).

34 As regards, first of all, Article 20(2)(c) of Directive 93/38, it follows from the case-law that the application of that provision is subject to two cumulative conditions, namely, first, that there are technical reasons connected to the works which are the subject-matter of the contract and, second, that those technical reasons make it absolutely necessary to award that contract to a particular contractor (see, to that effect, in the context of Directives 71/305 and 93/37, Case C-57/94 *Commission* v *Italy*, paragraph 24, and Case C-385/02 *Commission* v *Italy*, paragraphs 18, 20 and 21).

35 In this case, as the Advocate General noted in paragraphs 40 to 45 of his Opinion, while the works in question involve technical reasons in the sense of Article 20(2)(c) of Directive 93/38, the Greek Government has not convincingly shown that the Koch/Metka consortium was alone in a position to carry them out and that it was, as a result, absolutely necessary to award it the contract.

36 Neither the particular characteristics of the product to be transported, nor the instability of the subsoil and the need to attach the system of conveyor belts to the existing one proves, by itself, that that consortium of companies was the only contractor in the Community with the necessary expertise to carry out the works in question.

37 Moreover, since it also invited Dosco to tender, DEI itself considered that a contractor other than the Koch/Metka consortium was, in principle, also capable of carrying out the works.

38 In addition, it is clear from the Court file that, as regards similar works to be carried out on the same site, DEI had, in the past, initiated public procurement procedures by publication of a contract notice.

39 It cannot therefore be maintained that, because of technical reasons, the contract at issue could be performed only by the Koch/Metka consortium.

40 As regards, secondly, the derogation under Article 20(2)(d) of Directive 93/38, the case-law has made it subject to three cumulative conditions, namely an unforeseeable event, extreme urgency rendering impossible the observance of the time-limits laid down for calls for tenders, and a causal link between the unforeseeable event and the extreme urgency resulting therefrom (see, to that effect, in the context of Directive 71/305, 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).

41 The Greek Government has not shown that those conditions were met in this case.

42 The need to carry out the works in question within the time-limits imposed by the competent authority for the environmental impact assessment cannot be regarded as extreme urgency resulting from an unforeseeable event.

43 The fact that an authority which must approve the project concerned may impose time-limits is a foreseeable part of the procedure for approving that project (see, to that effect, in the context of Directive 71/305, Case C-318/94 *Commission* v *Germany*, cited above, paragraph 18).

44 Also, DEI could, as regards the contract at issue, have launched the contract award procedure with publication of a contract notice when the procedure for the environmental impact assessment started, that is about three years prior to the expiry of the time-limits imposed.

45 It can therefore be no better maintained that extreme urgency resulting from events unforeseeable by DEI did not enable the time-limits laid down for calls for tenders to be observed.

46 In the light of all the foregoing, it must be declared that, by reason of the award by DEI of the contract for the construction of a conveyor-belt system for the thermal-electricity generation plant at Megalopolis by means of a negotiated procedure without prior publication of a contract notice, the Hellenic Republic has failed to fulfil its obligations under Directive 93/38 and, in particular, Articles 20(1) and 21 thereof.

Costs

47 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 Hellenic Republic has been unsuccessful, it must be ordered to pay the costs.

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

1. **Declares that, by reason of the award by the public electricity undertaking Dimosia Epicheirisi Ilektrismoy of the contract for the construction of a conveyor-belt system for the thermal-electricity generation plant at Megalopolis by means of a negotiated procedure without prior publication of a contract notice, the Hellenic Republic has failed to fulfil its obligations under Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 98/4/EC of the European Parliament and the Council of 16 February 1998, and, in particular, under Articles 20(1) and 21 thereof;**

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

[Signatures]