JUDGMENT OF THE COURT (Fifth Chamber)
28 March 1996 *

In Case C-318/94,

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, and, initially, by Angela Bardenhewer, and, subsequently, by Claudia Schmidt, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry for Economic Affairs, and Gereon Thiele, Assessor in the same ministry, acting as Agents, D-53107 Bonn,

defendant,

APPLICATION for a declaration that, the Waterways and Navigation Office, Emden having awarded the public works contract for the dredging of the lower Ems between Papenburg and Oldersum by negotiated procedure without prior publication of a tender notice in the *Official Journal of the European Communities*, the Federal Republic of Germany 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), as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J. C. Moitinho de Almeida, P. Jann (Rapporteur), L. Sevón and M. Wathelet, Judges,

Advocate General: M. B. Elmer,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 8 February 1996,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 6 December 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, the Waterways and Navigation Office, Emden having awarded the public works contract for the dredging of the lower Ems between Papenburg and Oldersum by negotiated procedure without prior publication of a tender notice in the *Official Journal of the European Communities*, the Federal Republic of Germany 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), as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1, hereinafter 'the Directive').

2 In September 1989, at the request of the town of Papenburg, a plan was drawn up to alter the bed of the lower Ems with a view to making it navigable for 'Panama' class vessels with a 6.80 metre draught. The deepening of this section of the Ems river was of major economic significance for the region. Moreover, during 1990, the Meyer-Werft shipyard, the largest employer in the region, contracted to deliver a 'Panama' class vessel by 18 February 1992 at the latest. A *per diem* penalty of USD 80 000 was laid down in the event of failure to comply with that scheduled delivery date. Delivery of the vessel on that date could take place only after completion of this work.

3 Under German legislation, the plans for deepening the lower Ems had to be approved by a procedure requiring, in particular, the agreement of the Weser-Ems Regional Authority. At the end of May 1991, the date envisaged for conclusion of this procedure, the Weser-Ems Regional Authority, which had not previously raised any objection, gave notice that it did not agree to the project on ecological grounds. A decision was then taken to continue the procedure with a view to obtaining approval only of the plans for that part of the project which consisted in temporarily deepening the river bed in order to enable the vessel being built by the Meyer-Werft shipyard to pass through. The plans for this partial project were definitively approved on 15 August 1991.

4 However, on 15 April 1991, the Waterways and Navigation Office, Emden (hereinafter 'the Office'), which intended to award the work in accordance with the

open procedure, sent a prior information notice concerning the work envisaged which was published in a supplement to the *Official Journal of the European Communities* on 20 April 1991.

5 Given the delay in approving the plans, the Office decided to abandon the open procedure and to award the contract by negotiated procedure without prior publication of a tender notice. The contract was awarded on 15 August 1991 pursuant to the latter procedure.

6 By formal notice of 12 November 1991, the Commission instituted Treaty-infringement proceedings against the Federal Republic of Germany under Article 169 of the Treaty on the ground that it had acted in breach of the rules governing the procedure for the award of public works contracts. The Commission pointed out that, in this case, the choice of negotiated procedure could not be justified under Article 5(3)(c) of the Directive. In a letter of 6 March 1992, the German Government disputed that contention.

7 In its reasoned opinion of 27 April 1993, the Commission restated its view and called on the German Government to take the measures necessary to comply with the reasoned opinion and, in particular, to suspend the contract in question, as well as any other contract negotiated on the same terms, within two months of notification of the opinion.

8 In its statement of position of 28 September 1993, the German Government stressed that it was imperative for the work to be completed by 18 February 1992, the date on which the vessel was to be delivered, so that it had to be begun by no

later than mid-August 1991. In view of the difficulties arising in the procedure for approval of the plans, it was not possible to follow the open procedure, which would have lasted at least 72 days.

9 The Commission took the view that this reply was unsatisfactory and brought the present action.

10 It is necessary to consider whether the Federal Republic of Germany was entitled, on the basis of Article 5(3)(c) of the Directive, to award the contract in question by negotiated procedure without prior publication of a tender notice. Article 5(3)(c) provides that:

'The contracting authorities may award their public works contracts by negotiated procedure without prior publication of a tender notice, in the following cases:

...

(c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseen by the contracting authorities in question, the time-limit laid down for the open, restricted or negotiated procedures referred to in paragraph 2 above cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities ...'.

11 Before Directive 71/305 was amended by Directive 89/440, Article 9 of the earlier directive provided that:

'Authorities awarding contracts may award their works contracts without applying the provisions of this Directive, except those of Article 10, in the following cases:

...

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought [about] by events unforeseen by the authorities awarding contracts, the time-limit laid down in other procedures cannot be kept ...'.

12 In so far as Article 5(3)(c) of the Directive reproduces the wording of the former Article 9(d), those provisions must be given the same interpretation.

13 The Court has held in this regard 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 relation to public works contracts, 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 (Case C-57/94 *Commission* v *Italy* [1995] ECR I-1249, paragraph 23).

14 The Court has also held that, according to Article 9(d) of Directive 71/305, the derogation for which it provides, namely exemption from the obligation to publish a notice of a call for tenders, is available only if three conditions are fulfilled concurrently. That derogation requires the existence of an unforeseeable event,

extreme urgency, rendering the observance of time-limits laid down by other procedures impossible, and, finally, a causal link between the unforeseeable event and the extreme urgency resulting therefrom (Case C-107/92 *Commission* v *Italy* [1993] ECR I-4655, paragraph 12). If one of those conditions is not satisfied, use of the negotiated procedure will not be justified.

15 According to the German Government, the event which the contracting authorities could not have foreseen was the totally unexpected refusal by the Weser-Ems Regional Authority to grant its approval following its deliberation.

16 That argument cannot be accepted.

17 It must be stressed that, in order to take account of the public and private interests concerned in procedures for approving public works projects, Member States may confer on natural or legal persons potentially concerned by a project certain rights which the competent authorities must respect.

18 The possibility that a body which must approve a project might, before expiry of the period laid down for this purpose, raise objections for reasons which it is entitled to put forward is, consequently, something which is foreseeable in plan approval procedure.

19 The refusal of the Weser-Ems Regional Authority to approve the project for dredging the lower Ems, thereby obliging the competent authorities to amend that

project, cannot therefore be regarded as an event unforeseen by the contracting authorities within the meaning of Article 5(3)(c) of the Directive.

20 It follows from the foregoing, without its being necessary to determine whether the other derogation conditions were satisfied in this case, that, the Waterways and Navigation Office, Emden having awarded the public works contract for the dredging of the lower Ems between Papenburg and Oldersum by negotiated procedure without prior publication of a tender notice in the *Official Journal of the European Communities*, the Federal Republic of Germany 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, as amended by Council Directive 89/440/EEC of 18 July 1989.

Costs

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

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, the Waterways and Navigation Office, Emden having awarded the public works contract for the dredging of the lower Ems between Papenburg and Oldersum by negotiated procedure without prior**

publication of a tender notice in the *Official Journal of the European Communities*, the Federal Republic of Germany 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, as amended by Council Directive 89/440/EEC of 18 July 1989;

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

Edward Moitinho de Almeida Jann

Sevón Wathelet

Delivered in open court in Luxembourg on 28 March 1996.

R. Grass D. A. O. Edward

Registrar President of the Fifth Chamber