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JUDGMENT OF THE COURT

5 October 2000 (1)

(Failure to fulfil obligations - Public procurement contracts in the transport sector - Directive 93/38/EEC - Applicability *ratione temporis* - Rennes urban district light railway project - Contract awarded by negotiated procedure without a prior call for competition)

In Case C-337/98,

**Commission of the European Communities**, represented by M. Nolin, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

**French Republic**, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and A. Viéville-Bréville, chargé de mission in the same Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

APPLICATION for a declaration that, by its decision of 22 November 1996 to award the turnkey contract for the Rennes urban district light railway project to Matra-Transport, the French 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), and Articles 4(2) and 20(2)(c) thereof in particular,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida and L. Sevón (Presidents of Chambers), P.J.G. Kapteyn, J.-P. Puissochet, P. Jann, H. Ragnemalm, M. Wathelet and V. Skouris (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 2 February 2000, at which the Commission was represented by M. Nolin and the French Republic by J.-F. Dobelle, Deputy Director of the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent, and K. Rispal-Bellanger,

after hearing the Opinion of the Advocate General at the sitting on 23 March 2000,

gives the following

## Judgment

1.

By application lodged at the Court Registry on 14 September 1998 the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by its decision of 22 November 1996 to award the turnkey contract for the Rennes urban district light railway project to Matra-Transport (hereinafter 'Matra'), the French 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, hereinafter 'the Directive'), and Articles 4(2) and 20(2)(c) thereof in particular.

### Legal background

*The Community legislation*

Directive 93/38

2.

Article 4(1) and (2) of Directive 93/38 provides:

'1. When awarding supply, works or service contracts, or organising design contests, the contracting entities shall apply procedures which are adapted to the provisions of this Directive.

2. Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.

3.

Article 20(2)(c) of Directive 93/38 provides:

'Contracting entities may use a procedure without prior call for competition in the following cases:

(c) when, for technical or artistic reasons or for reasons connected with protection of exclusive rights, the contract may be executed only by a particular supplier, contractor or service provider.

4.

Article 45(1) and (3) of Directive 93/38 provides:

'1. Member States shall adopt the measures necessary to comply with the provisions of this Directive and shall apply them by 1 July 1994. ...

...

3. Directive 90/531/EEC shall cease to have effect as from the date on which this Directive is applied by the Member States and this shall be without prejudice to the obligations of the Member States concerning the deadlines laid down in Article 37 of that Directive.

Directive 90/531/EEC

5.

Apart from certain differences in drafting, the provisions of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1), concerning the principle of non-discrimination between suppliers or contractors (Article 4) and authorised use of a procedure without prior call for competition (Article 15) were essentially the same as the corresponding provisions of Directive 93/38, reproduced at paragraphs 2 and 3 of this judgment.

6.

Article 37(1) and (2) of Directive 90/531 provides:

'1. Member States shall adopt the measures necessary to comply with this Directive by 1 July 1992. They shall forthwith inform the Commission thereof.

2. Member States may stipulate that the measures referred to in paragraph 1 shall apply only from 1 January 1993.

...

*The national legislation*

7.

Article 104, II, of the *Code des Marchés Publics* (Public Procurement Code) reads as follows:

'Negotiated contracts may be entered into without a prior call for competition when only one specific contractor or supplier is capable of carrying them out.

This applies in the following cases:

(1) when requirements can be met only by [work or supplies] which necessitate recourse to a patent, a licence or exclusive rights held by a single contractor or supplier;

(2) when requirements can be met only by [work or supplies] which, by reason of technical necessity, substantial preliminary investment, special plant or equipment or know-how, can be contracted out only to a specific contractor or supplier;

(3) in the case of the [work or supplies] mentioned in the last sentence of Article 108.

Such contracts need not be the subject of a public competition notice pursuant to Article 38.

#### **Background to the dispute**

8.

By resolution No 89-18 of 26 October 1989, the committee of the Syndicat intercommunal des transports collectifs de l'agglomération rennaise (the joint municipal grouping responsible for public transport in the Rennes district, hereinafter 'Sitcar') voted:

'(1) to confirm previous decisions to provide a reserved-track network for the district,

(2) to confirm, for the first line, the main principles set out in the TAU research, that is to say:

- a service for Villejean from West to East;
  - a line through the historic centre from North to South;
  - a service to the station with improved connections between the three urban, inter-urban and rail networks;
  - a service for the suburbs of Alma-Châtillon and Blosne in the most important South-Eastern sector ...
- (3) to opt for the VAL automatic light railway system,
- (4) to seek the highest possible level of government funding,
- (5) to establish all such contacts as may be useful with the Region and the *Département* on the basis previously indicated ...
- (6) to authorise the Bureau to engage in the necessary consultations with a view to consideration at a forthcoming meeting of the Committee of the contract for drawing up preliminary specifications ...
- (7) to investigate at the earliest possible date an amendment to the current apportionment of the contribution of the municipalities to Sitcar ...

9.

By resolution No 90-25 of 19 July 1990, the Committee of Sitcar voted:

'(1) to record that the design and execution of the system and equipment linked to the system will be the subject of a turnkey contract with Matra-Transport once it is in a position to agree to a guaranteed guide price,

(2) to approve in principle the conclusion with that company of a support and research contract to accompany the preliminary specifications for the Civil engineering work and equipment not linked to the system part of the work and to authorise the chairman of the Committee to sign it.

10.

In a letter dated 9 July 1991 from its chairman and managing director to the chairman of the Committee of Sitcar, Matra stated that the guaranteed price for the reference programme of March 1991 was FRF 987 million at January 1991 prices. However, the chairman and managing director of Matra pointed out that on the basis of that price Matra had, at Sitcar's request, sought savings both by means of additional contributions from Matra-Transport and proposed adjustments to programmes which did not adversely affect the standard of the service provided. On that basis, the chairman and managing director of Matra suggested certain changes to the programme data to Sitcar and announced that if those new data were approved the 'system part of the VAL project could be reduced to a guaranteed price of FRF 953.2 million excluding tax and at January 1991 prices.

11.

By resolution No 93-44 of 30 March 1993, the Urban District Council of Rennes (hereinafter 'the District Council), which replaced Sitcar in 1992, first, approved the turnkey contract offered by Matra under the negotiated procedure and, second, authorised the semi-public company operating public transport in the Rennes conurbation (hereinafter 'Semtcar) to sign the contract with Matra in accordance with the provisions of the mandate agreement approved by the District Council by decision of 15 January 1993.

12.

By judgment of 16 February 1994 the Tribunal Administratif (Administrative Court), Rennes, annulled the declaration of public interest of 15 February 1993 concerning the Rennes urban district light railway project (hereinafter 'the UDP), which meant, *inter alia*, that the proposed State subsidy to finance the work could not be paid.

13.

By resolution No 95-233 of 22 September 1995, the District Council decided to withdraw its previous resolution of 30 March 1993 approving the contract with Matra and authorising its signature by Semtcar, 'that resolution not having been implemented even inchoately and having become redundant. By resolution No 95-234 it also decided to request Semtcar to 'resume detailed negotiation/finalisation of the contract with Matra within the framework of the provisional budget for the operation and to submit it anew to the District Council for approval.

14.

Finally, by resolution No 96-280 of 22 November 1996 the District Council approved the terms of the draft negotiated contract to be concluded with the company Matra-Transport International for the work on the system and equipment linked to the system, the total amount of the contract being FRF 1 054 360 000 without tax and at November 1996 prices, comprising a fixed part amounting to FRF 1 050 490 000 without tax and a conditional part amounting to FRF 3 870 000 without tax. It also authorised Semtcar to sign the contract pursuant to Article 7.4 of the mandate agreement of 23 November 1993.

#### **Pre-litigation procedure**

15.

Having received a complaint concerning the award of the contract for the Rennes urban district light railway project to Matra, the Commission, by letter of 7 January 1997, asked the French authorities to provide it with certain information concerning the award of that contract and to justify their recourse, in awarding the contract, to a negotiated procedure on the basis of Article 104, II, of the Public Procurement Code without a prior call for competition.

16.

The French authorities replied to the Commission by letter of 17 February 1997 and by two additional notes of 25 February and 4 March 1997. They stated, *inter alia*, that the contract at issue had been awarded by a resolution of the Committee of Sitcar of 26 October 1989, the date on which the contracting entity had chosen a VAL type light railway supplied by Matra. According to the French authorities, that resolution awarded the contract before the entry into force on 1 January 1993 of Directive 90/531 and *a fortiori* before the entry into force, on 1 July 1994, of Directive 93/38 and Articles 4(2) and 20(2)(c) thereof in particular. Furthermore, the French authorities stated, as a secondary point, that Matra was the only company capable of meeting the requirements of the local authority. They contended, in that regard, that the company had already made significant preliminary investments at the Rennes site and concluded that no Community rule had been breached.

17.

As it considered that reply to be unsatisfactory, the Commission, by letter of 17 June 1997, gave the French authorities formal notice pursuant to Article 169 of the Treaty, that they should submit their observations within six weeks, *inter alia* concerning the compatibility of the provisions of Article 104, II, of the Public Procurement Code, which was the legal basis of the decision of the contracting entity, with the requirements of Article 20(2)(c) of Directive 93/38.

18.

By letter of 20 August 1997 the French authorities replied to the letter of formal notice, confirming that the decision to award the turnkey contract to Matra had been taken by resolution of 26 October 1989 and, contending, in the alternative, that Article 104, II, of the Public Procurement Code was compatible with Article 20(2)(c) of Directive 93/38. Two further replies were sent on 29 September and 7 November 1997.

19.

As it considered that those replies did not contain anything which addressed the complaints made in the letter of formal notice, the Commission, on 15 March 1998, sent the French Republic a reasoned opinion, to which it replied on 12 June 1998.

20.

It is against that legal and factual background that the Commission brought this action.

#### Merits

21.

The Commission contends that the award to Matra of the turnkey contract for the Rennes urban district light railway project by negotiated procedure without a prior call for competition constitutes a breach of Directive 93/38 and, in particular, Articles 4(2) and 20(2)(c) thereof.

22.

Since it is clear from paragraphs 8 to 11 of the present judgment that some of the events relating to the contract at issue took place before the expiry of the period prescribed for the transposition of Directive 93/38, it is necessary to consider, before deciding whether that directive has been infringed, as alleged, whether it is applicable to the procedure at issue.

23.

It is clear *inter alia* from the resolution by the Committee of Sitcar of 19 July 1990, and, in particular, the statement that the design and execution of the 'system and equipment linked to the system would be the subject of a turnkey contract with Matra-Transport once it was in a position to agree to a guaranteed guide price, that, on that date, negotiations between the contracting entity and Matra were already under way.

24.

Furthermore, in his letter of 9 July 1991 the chairman and managing director of Matra confirmed that if certain changes to the reference project which he proposed were approved the 'system part of the VAL project could be reduced to a guaranteed price of FRF 953.2 million without tax and at January 1991 prices, which is a serious indication that, on that date, negotiations between the contracting entity and Matra were at an advanced stage.

25.

It is thus clear that the negotiations between the contracting entity and Matra were begun before 1 July 1994, the date on which the period prescribed for transposition of Directive 93/38 expired, and even before 9 August 1993, the date of the publication of that directive in the *Official Journal of the European Communities*.

26.

Since negotiations are the defining characteristic of a negotiated procedure for the award of a contract, it must be held that, in the present case, the procedure at issue was initiated before the adoption of Directive 93/38 and *a fortiori* before the expiry of the period prescribed for its transposition. That directive does not lay down any transitional rules for procedures already initiated before 1 July 1994 and still in progress on that date.

27.

Accordingly, in order to rule on the application of the provisions of Directive 93/38 invoked by the Commission in the present case and since the procedure at issue took place over a long period, the law applicable to that procedure *ratione temporis* must first be ascertained.

28.

The Commission submits that, in determining the law applicable to an award procedure, the date of the award of the contract must normally be taken into account. The Commission does not rule out the possibility of also taking account of the date of the initiation of the award procedure. However, it states that the length of time between such initiation and the award of the contract must be reasonable, which it is not in this case.

29.

According to the Commission, the contract in question was not awarded until the resolution of 22 November 1996, that is to say, long after the entry into force of Directive 93/38. It maintains that the resolution of 26 October 1989 only concerned the decision to opt for the VAL light railway technology, which had been developed at the time by at least two manufacturers. Even on 19 July 1990 it was still not possible to speak of a contract with Matra, as there was no agreement on any price or on the terms of a contract. Accordingly, the decision to award the contract to Matra was not made until the resolution of the District Council of 30 March 1993, that is to say after that company had formally committed itself to a guaranteed price.

30.

The Commission states that, if everything had been decided by that date it would not have brought this action, although Directive 90/531 had already entered into force. However, it notes that, following the annulment of the UDP by the Tribunal Administratif, Rennes, the contracting entity withdrew the resolution of 30 March 1993, although there was no legal requirement that it do so. In French administrative law, withdrawal is equivalent to annulment in a contentious matter. The Commission concludes that, since the withdrawal was not challenged by Matra, it has become definitive, which means that the resolution is deemed never to have existed. The contract at issue was therefore awarded to Matra by the resolution of 22 November 1996.

31.

The French Government, on the other hand, contends that, even though public contracts are defined in Community law as contracts concluded in writing, that does not prevent the date of the initiation of the award procedure from being taken into account in determining the law applicable to that procedure. Moreover, the requirement that the time between the initiation of the procedure and the award of the contract should be reasonable if the initiation is to be taken into account in determining the applicable law has no foundation in either Community legislation or the case-law of the Court.

32.

The French Government contends that the appointment of Matra as the contractor does not date from the resolution of 22 November 1996 but, implicitly, from that of 26 October 1989, as, since VAL was one of Matra's products, no firm other than Matra could have been selected by the contracting entity as contractor. The resolution of 19 July 1990, it contends, constitutes a decision to award. According to the French Government, once the resolution became enforceable and Matra had committed itself to a price, Matra was entitled to rely on that resolution since it created subjective rights in that company's favour. As Matra had committed itself to an objective guaranteed price of FRF 953.2 million without tax on 9 July 1991, it had from that time a right to the conclusion of a turnkey contract with the Rennes Urban District Council.

33.

As regards the withdrawal of the resolution of 30 March 1993, the French Government submits, first, that it was imposed on the contracting entity and, second, that it was not the result of a wish to renegotiate the substantive terms of the contract. Moreover, it was not its purpose, or its effect, to call into question the decision taken on 19 July 1990 to enter into a contract with Matra. In withdrawing that measure, the District Council simply postponed the signature of the contract, thereby acting in consequence of the annulment of the UDP, an act of the *Préfet*, the annulment of which could be attributed neither to the Rennes urban district nor to Matra, the party to which the contract had been awarded.

34.

The French Government accepts that the withdrawal of that measure entails the eradication of the contract in law for the future and for the past. However, aside from purely formal, procedural considerations, the substantive contractual terms were, if not validated, at least beyond all reproach and, as a result, the procedure for the award of the contract was, in fact if not in law, merely suspended pending a new UDP. Consequently, the withdrawal of the resolution of 30 March 1993 was purely formal and cannot therefore undermine the continuity of the substantive procedure.

35.

It must be observed, first, that by this action for failure to fulfil obligations, the Commission claims that the French Republic has committed a breach of Directive 93/38 which stems from a specific decision taken by the contracting entity. That decision concerned the contracting entity's choice of a negotiated procedure without a prior call for competition in awarding the contract at issue. It is that choice, according to the Commission, which has no basis in Article 20(2) of Directive 93/38.

36. It must be borne in mind, second, that the decision by a contracting entity concerning the type of procedure to be followed and whether it is necessary for a prior call for competition to be issued for the award of a public contract constitutes a distinct stage in the procedure, a stage during which the essential characteristics of the execution of the procedure are defined and which may, as a rule, take place only at the point when that procedure is initiated.
37. Accordingly, in determining whether Directive 93/38 is applicable to such a decision and, therefore, what were the obligations of the contracting entity under Community law in that regard, account must be taken, as a rule, of the point in time at which that decision was adopted.
38. It is true that, in the present case, the decision to use a negotiated procedure without a prior call for competition forms part of an award procedure which did not end until November 1996, that is to say more than two years after the expiry of the period prescribed for transposition of Directive 93/38. However, according to the case-law on public procurement, Community law does not require an awarding authority in a Member State to intervene, at the request of an individual, in existing legal relations established for an indefinite period or for several years where those relations came into being before expiry of the period prescribed for transposition of the directive (see, to that effect, Case C-76/97 *Tögel* [1998] ECR I-5357, paragraph 54).
39. Whilst the judgment in *Tögel*, cited above, concerned a contract already concluded before the expiry of the period prescribed for the transposition of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), the general principle set out in it can none the less be applied to all the stages of a procedure for the award of a contract which are completed before the expiry of the period prescribed for transposition of a directive but form part of a procedure which ended after that date.
40. As regards the Commission's argument that the date to be taken for the purpose of determining the applicability of Directive 93/38 *ratione temporis* is that of the award of the contract, it need merely be observed that it would be contrary to the principle of legal certainty to determine the applicable law by reference to the date of the award of the contract since that date marks the end of the procedure, while the decision of the contracting entity to proceed with or without a prior call for competition is normally taken at the initial stage of that procedure.
41. In the present case, even though it is not clear from the documents before the Court that there was a formal decision by the contracting entity to proceed by way of negotiated procedure without a prior call for competition to award the contract at issue, it is important to bear in mind that, in its resolution of 19 July 1990, the Committee of Sitcar voted to 'record that the design and execution of the system and equipment linked to the system will be the subject of a turnkey contract with Matra-Transport. It is clear from that sentence that, by the date of that resolution at the latest, and thus well before the expiry of the period prescribed for transposition of Directive 93/38, the decision of the contracting entity to proceed by way of negotiated procedure without a prior call for competition had already been adopted.
42. Accordingly, it must be concluded that Directive 93/38 is not applicable to the choice made by the contracting entity to use a negotiated procedure without a prior call for competition to award the contract for the Rennes urban district light railway project.
43. However, it must be observed that, by two separate resolutions of 22 September 1995, the contracting entity, first, withdrew the resolution of 30 March 1993 awarding the contract to Matra and, second, asked Semtcar to continue negotiations with that company.
44. Accordingly, it must be considered whether the negotiations opened after 22 September 1995 were substantially different in character from those already conducted and were, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, so that the application of the provisions of Directive 93/38 might be justified.
45. In that regard, it must be observed, as a preliminary point, that, according to settled case-law, in proceedings under Article 169 of the Treaty for failure to fulfil an obligation, it is incumbent on the Commission to prove that the obligation has not been fulfilled and to place before the Court the evidence necessary to enable it to determine whether that is the case (see, *inter alia*, Case C-96/98 *Commission v France* [1999] ECR I-8531, paragraph 36).
46. It follows that, in the present case, it is for the Commission to adduce all such evidence as is necessary to prove that fresh negotiations were commenced after 22 September 1995 and were such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, which would justify the application of the provisions of Directive 93/98.
47. In that regard, the Commission submits that an analysis of the resolutions of 30 March and 22 November 1996 shows that they concerned different offers in terms of subject-matter and price. According to the Commission, the 1993 offer concerns the VAL 206 system for an amount of FRF 966.4 million without tax, while the 1996 offer proposes a VAL 208 system for FRF 1 054 million without tax.
48. First, the difference in the number serves in fact to distinguish two different versions of the VAL technology. Second, in financial terms, the two offers differed by almost FRF 90 million, that is to say there was an increase of 10% of the value of the contract between January 1993 and November 1996, which is more than the rate of inflation over that period.
49. The Commission concludes on the basis of that information that there are substantial differences in terms of technology and price between the two offers by Matra, which proves that they did not concern the same contract.
50. It must be observed, to begin with, that the fact that the 1993 offer concerned the VAL 206 system whereas the 1996 offer concerned the VAL 208 system does not constitute proof that an essential term of the contract was renegotiated, which would justify the application of Directive 93/38.
51. First, as the French Government has pointed out, that alteration in the terms of the contract is attributable to the development of equipment between 1993 and 1996 and concerns its dimensions, and then only marginally (2 cm in width). Second, it cannot be ruled out that, in a negotiated procedure which, by its nature, may extend over a long period of time, the parties might take account of technological developments which take place while the negotiations are under way, without that being regarded each time as a renegotiation of the essential terms of the contract justifying the application of new rules of law.
52. Second, as regards the Commission's argument concerning the difference in price between the contract proposed in 1993 and that proposed in 1996, it must be observed that, even if that difference was greater than the rate of inflation during that period, that fact likewise does not prove that the negotiations opened after the withdrawal of the resolution of 30 March 1993 were intended to renegotiate an essential term of the contract.
53. As the French Government has pointed out, without being contradicted by the Commission, the increase in price was a result of the exact application of the formula for the revision of prices contained in the draft contract approved by the two parties in 1993. That fact is thus an indication of the continuity of the procedure rather than evidence that an essential term of the contract had been renegotiated.
54. Third, it must be added that it is clear from certain documents placed before the Court that the negotiations in fact resumed shortly after 22 September 1995 on the basis of everything that had previously taken place.
55. First, the phrase 'resume detailed negotiation/finalisation used in the second resolution of 22 September 1995 clearly implies the continuation and updating of negotiations. Second, the French Government produced a letter dated 30 November 1995 sent by Matra to Semtcar, stating that Matra had studied the impact of adjustments to the planned execution of the work and, in view of the agreement to update the schedule of special administrative clauses, confirmed the continued validity until 30 September 1996 of its offer negotiated in early 1993.
- 56.

Accordingly, it must be held that the Commission has not adduced evidence capable of proving that fresh negotiations demonstrating the intention of the parties to renegotiate the essential terms of the contract were opened following the withdrawal of the resolution of 30 March 1993 and, therefore, after the expiry of the period prescribed for the transposition of Directive 93/38.

57.

Accordingly, having regard to all the foregoing considerations, the application must be dismissed.

**Costs**

58.

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 French Republic has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

**1. Dismisses the application;**

**2. Orders the Commission of the European Communities to pay the costs.**

Rodríguez Iglesias  
Moitinho de Almeida

Sevón

Kapteyn  
Puissochet

Jann

Ragnemalm

Wathelet

Skouris

Delivered in open court in Luxembourg on 5 October 2000.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President

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1: Language of the case: French.