JUDGMENT OF THE COURT

26 September 2000 *

In Case C-225/98,

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 office of C. Gómez de la Cruz, of the same 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,

* Language of the case: French.

APPLICATION for a declaration that, in the course of the various procedures for the award of public works contracts for the construction and maintenance of school buildings conducted by the Nord-Pas-de-Calais Region and the Département du Nord over a period of three years, the French Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) as well as 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), in particular under Articles 12, 26 and 29 thereof, and under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), in particular under Articles 8, 11, 22 and 30 thereof,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward, L. Sevón and R. Schintgen (Presidents of Chambers), J.-P. Puissochet, P. Jann, H. Ragnemalm and V. Skouris (Rapporteur), Judges,

Advocate General: S. Alber,
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 1 February 2000, at which the Commission was represented by M. Nolin and the French Republic by S. Pailler, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 14 March 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 22 June 1998, the Commission of the European Communities brought an action, pursuant to Article 169 of the EC Treaty (now Article 226 EC), for a declaration that, in the course of the various procedures for the award of public works contracts for the construction and maintenance of school buildings conducted by the Nord-Pas-de-Calais Region and the Département du Nord over a period of three years, the French Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) as well as 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; 'Directive 71/305'), in particular under Articles 12, 26 and 29 thereof, and under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), in particular under Articles 8, 11, 22 and 30 thereof.

The relevant legislation

Directive 93/37

2 According to the first recital in the preamble thereto, Directive 93/37 consolidated the provisions of Directive 71/305 for reasons of clarity and better understanding.

3 Article 8(3) of Directive 93/37 provides:

'For each contract awarded, the contracting authorities shall draw up a written report which shall include at least the following:

— the name and address of the contracting authority, the subject and value of the contract,

— the names of the candidates or tenderers admitted and the reasons for their selection,

— the names of the candidates or tenderers rejected and the reasons for their rejection,

— the name of the successful tenderer and the reasons for his tender having been selected and, if known, any share of the contract the successful tenderer may intend to subcontract to a third party,

— for negotiated procedures, the circumstances referred to in Article 7 which justify the use of these procedures.

This report, or the main features of it, shall be communicated to the Commission at its request.'

4 Under Article 11(1) of Directive 93/37, '[C]ontracting authorities shall make known, by means of an indicative notice, the essential characteristics of the works contracts which they intend to award and the estimated value of which is not less than the threshold laid down in Article 6(1)'.

5 According to Article 11(5) of Directive 93/37, 'Contracting authorities who have awarded a contract shall make known the result by means of a notice....'.

6 Article 11(7) of Directive 93/37 provides:

'The contracting authorities shall send the notices referred to in paragraphs 1 to 5 as rapidly as possible and by the most appropriate channels to the Office for Official Publications of the European Communities. In the case of the accelerated procedure referred to in Article 14, the notice shall be sent by telex, telegram or telefax.

The notice referred to in paragraph 1 shall be sent as soon as possible after the decision approving the planning of the works contracts that the contracting authorities intend to award.

The notice referred to in paragraph 5 shall be sent at the latest 48 days after the award of the contract in question.'

7 Article 11(11) of Directive 93/37 provides:

'The notice shall not be published in the official journals or in the press of the country of the contracting authority before the date of dispatch to the [Office for Official Publications] of the European Communities and it shall mention this date. It shall not contain information other than that published in the *Official Journal of the European Communities*.'

8 Article 12(1) and (2) of Directive 93/37 provides:

'1. In open procedures the time-limit for the receipt of tenders fixed by the contracting authorities shall be not less than 52 days from the date of dispatch of the notice.

2. The time-limit for the receipt of tenders laid down in paragraph 1 may be reduced to 36 days where the contracting authorities have published the notice [provided] for in Article 11(1), drafted in accordance with the specimen in Annex IV A, in the *Official Journal of the European Communities*.'

9 Article 13(3) and (4) of Directive 93/37 provides as follows:

'3. In restricted procedures, the time-limit for receipt of tenders fixed by the contracting authorities may not be less than 40 days from the date of dispatch of the written invitation.

4. The time-limit for the receipt of tenders laid down in paragraph 3 may be reduced to 26 days where the contracting authorities have published the notice provided for in Article 11(1), drafted in accordance with the model in Annex IV A, in the *Official Journal of the European Communities*.'

10 Under Article 22(2) of Directive 93/37:

'[W]here the contracting authorities award a contract by restricted procedure, they may prescribe the range within which the number of undertakings which they intend to invite will fall. In this case the range shall be indicated in the contract notice.... The range shall be determined in the light of the [nature] of the work to be carried out. The range must number at least 5 undertakings and may be up to 20.

In any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition.'

11 Article 27 of Directive 93/37 provides:

'1. Evidence of the contractor's technical capability may be furnished by:

(a) the contractor's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for carrying out the works;

(b) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where necessary, the competent authority shall submit these certificates to the contracting authority direct;

(c) a statement of the tools, plant and technical equipment available to the contractor for carrying out the work;

(d) a statement of the firm's average annual manpower and the number of managerial staff for the last three years;

(e) a statement of the technicians or technical bodies which the contractor can call upon for carrying out the work, whether or not they belong to the firm.

2. The contracting authorities shall specify [in the notice or] in the invitation to tender which of these references are to be produced.'

12 Finally, under Article 30(1) and (2) of Directive 93/37:

'1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the case referred to in paragraph 1(b), the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance.'

Directive 71/305

13 Apart from a number of differences in wording, the provisions of Directive 71/305, concerning the drawing up and communication of written reports (Article 5a), the detailed rules for publication with which the contracting authorities must comply (Article 12), the time-limits for the receipt of tenders and of requests to participate (Articles 13 and 14), proof of the contractor's technical knowledge or ability (Article 26) and the criteria for the award of contracts (Article 29(1) and (2)), had the same content as the corresponding provisions of Directive 93/37, set out in paragraphs 3 to 12 above.

Background to the dispute and pre-litigation procedure

14 The documents before the Court show that, at the beginning of 1993, the Commission's attention was drawn to the tendering procedure for a public works contract issued by open procedure and relating to the construction of the Lycée Polyvalent (multipurpose secondary school) at Wingles (Département du Pas-de-Calais). Since the value of that contract exceeded the Community threshold of ECU 5 million, a contract notice was published in the *Official Journal of the European Communities* ('the Official Journal') of 21 January 1993, in accordance with Directive 71/305.

15 The Commission received a complaint and took the view that Directive 71/305 had not been complied with. Accordingly, by letter of 27 September 1993, in accordance with the procedure laid down in Article 169 of the Treaty, it gave the French authorities formal notice to submit their observations within two months of the notification of that notice. The Commission's allegations related to the time-limit for the receipt of tenders, which was less than 52 days, the discriminatory description of the lots, the discriminatory minimum standards, the criteria for the award of the contract which did not comply with Directive 71/305, the improper award of the contract and the failure to inform an eliminated tenderer of the reasons for rejection of his tender.

16 By letter of 20 December 1993, the French authorities provided the Commission with some information in response to the allegations set out in the formal notice.

17 The Commission took the view that that letter was not satisfactory and on 8 September 1995 sent a reasoned opinion to the French Republic. No reply was sent by the French authorities.

18 Meanwhile, pursuant to Directive 93/37, the Nord-Pas-de-Calais Region published in the Official Journal of 18 February 1995 a series of 14 contract notices in connection with an operation known as 'Plan Lycées' (Secondary School Plan), with an aggregate value of FRF 1.4 thousand million. The notices were identical for all the contracts and concerned restricted invitations to tender relating to the completion of contracts of modernisation and maintenance works over a period of 10 years. Groupings of undertakings were permitted to tender and minimum standards for participation were imposed, in particular concerning references and qualifications. Furthermore, those notices stated that the tenders would be assessed by taking account of various award criteria, including the 'quality/price ratio of the technical response and the services', the 'time-limit for completion of the works of construction and renovation excluding maintenance, and the mode of action' and an 'additional criterion relating to employment'. A further contract notice was published in the Official Journal of 24 June 1995, concerning the design and building of a secondary school to a high environmental standard, which required higher levels of qualification and that the architect be qualified to practise in France.

19 On 10 February 1995, an agreement was signed between the President of the Commission PME-Marchés des Constructions Scolaires of the Fédération Régionale du Bâtiment, the President of the Fédération Régionale des Travaux Publics and the Nord-Pas-de-Calais Regional Delegate of the Syndicat National du Béton Armé et des Techniques Industrialisées in order to define the detailed arrangements according to which regional and local 'PME' (Petites et Moyennes Entreprises; small and medium-sized firms), represented by the signatories, could tender for the global contract for the construction and maintenance of the secondary schools of the Nord-Pas-de-Calais Region in the form of joint groupings of mutually supportive undertakings divided into three categories per contract notice published. That agreement was published in the *Moniteur du*

Bâtiment et des Travaux Publics of 17 February 1995, in the section entitled 'Textes Officiels' (official instruments).

20 By letter of 21 November 1995, also sent pursuant to Article 169 of the Treaty, the Commission gave the French authorities formal notice to submit their observations on the irregularities noted in the course of the procedure for the award of the contracts coming under the Plan Lycées. The Commission objected to the policy adopted by the Nord-Pas-de-Calais Region and, incidentally, the Département du Nord in awarding public works contracts for school buildings. Basing its assessment on the features of the Plan Lycées, but also on the precedent of the Wingles secondary school and certain procedures followed by the Conseil Général of the Département du Nord, the Commission called into question the policy of the contracting authorities of the Lille conurbation which was designed, in the long term, to award contracts for school buildings for which they were responsible to undertakings in the Nord-Pas-de-Calais Region. The Commission also called into question the use of an additional criterion relating to local employment which stemmed from Interministerial Circular TEFP 14/93 of 29 December 1993 (published in the *Moniteur du Bâtiment et des Travaux Publics* of 14 January 1994, p. 235).

21 The French authorities did not reply to that letter of formal notice. The Nord-Pas-de-Calais Region none the less republished in the Official Journal of 5 January 1996, for reasons of budgetary planning, four contract notices concerning four secondary schools which had already formed the subject-matter of the Plan Lycées in February 1995.

22 The Commission received information about the forward programme of investment for the secondary schools of the Nord-Pas-de-Calais Region for the period 1996-1998. The breadth of that programme led the Commission to consider all the contract notices relating to school buildings in the Nord-Pas-de-Calais Region and the Département du Nord which had been published since 1993, the year in which the Wingles secondary school contract was awarded. Those procedures related to contracts issued by the two contracting authorities, namely the Nord-Pas-de-Calais Region and the Département du Nord, over a period of three years.

23 By a supplementary letter of formal notice of 8 May 1996, the Commission restated its allegations and requested the French authorities, in particular, to send it all relevant information on the use by the Nord-Pas-de-Calais Region of the additional criterion relating to employment and its links with the Nord-Pas-de-Calais Region's plan known as 'Lycées Emploi Formation', the operation of the agreement published in the *Moniteur du Bâtiment et des Travaux Publics* of 17 February 1995, referred to in paragraph 19 above, the prior information and award notices and the written reports for all procedures for the award of the abovementioned contracts. It also requested them to take appropriate measures to ensure that the two contracting authorities in question fulfil their obligations under Community law within six weeks.

24 The French authorities replied on 9 August 1996 and provided various documents showing a marked improvement in the procedures for the award of contracts by the Nord-Pas-de-Calais Region in respect of its new contracts. As to the remainder, the French authorities disputed the allegations put forward by the Commission.

25 As in respect of the Wingles secondary school, the Commission took the view that that letter did not satisfactorily respond to all the allegations in the letter of formal notice and, on 7 April 1997, sent a reasoned opinion to the French Republic. The French authorities did not reply to that reasoned opinion.

26 The Commission then brought the present action based on eight complaints which relate to the prior information procedure, the additional criterion relating to employment, the number of candidates selected, the method known as 'award by reference to the Code des Marchés Publics (French Code of Public Procurement)', the mode of designating the lots, the minimum standards for participation, the procedure of information on contract awards and the failure to communicate the written reports.

Substance

The complaint relating to failure to observe the prior information procedure

27 The Commission claims that it is clear from Article 11(1), (7) and (11) of Directive 93/37 that prior information is a compulsory preliminary, to be effected first in the Official Journal, to publication of any individual contract notice. According to the Commission, the Nord-Pas-de-Calais Region in this case simply published 14 separate contract notices for the first time on 18 February 1995 without having recourse to a preliminary prior information procedure.

28 Furthermore, on the basis of an examination of the contract notices published in the Supplement (S) to the Official Journal in 1993, 1994 and 1995, the Commission considers that the Nord-Pas-de-Calais Region has only rarely adhered to the prior information procedure laid down in Articles 12 of Directive 71/305 and 11 of Directive 93/37.

29 The Commission also points out that it has not found any prior information notice published by the Département du Nord over the period concerned and finds, on the basis of the information at its disposal, that there has been a repeated failure to fulfil the obligations of prior information laid down in Articles 12 of Directive 71/305 and 11 of Directive 93/37.

30 The French Government does not deny that, considered in isolation, Article 11(1) of Directive 93/37 appears to be of a mandatory nature. It none the less contends that the compulsory nature of the advertising of a prior information notice before the advertising of any contract notice is not so clearly evident from Articles 12 and 13 of Directive 93/37. Those latter provisions provide that the time-limits for the receipt of tenders (52 days in open procedures and 40 days in restricted

procedures) may be reduced, respectively, to 36 and 26 days where the contracting authorities have published an indicative prior information notice, which implies, according to the French Government, that the prior information notice provided for under Article 11(1) of Directive 93/37 is not compulsory.

31 It should be borne in mind, first, that, under Article 11(1) of Directive 93/37, contracting authorities are to make known, by means of an indicative notice, the essential characteristics of the works contracts which they intend to award and the estimated value of which is not less than the threshold laid down in Article 6(1) of that directive.

32 Second, it follows from Articles 12(1) and (2) and 13(3) and (4) of Directive 93/37 that, as a general rule, the time-limits for the receipt of tenders may not be less than 52 days from the date of dispatch of the contract notice in respect of open procedures and 40 days from the date of dispatch of the written invitation in respect of restricted procedures, but that they may be reduced, respectively, to 36 and 26 days only where the contracting authorities have published the prior information notice.

33 Since the compulsory or optional nature of the prior information notice is not expressly clear from the wording of those provisions, it is necessary to take account of the scheme which Directive 93/37 was intended to establish overall and, consequently, to examine Articles 11(1), 12(1) and (2) and 13(3) and (4) of Directive 93/37 jointly and systematically in order to arrive at a coherent interpretation and application of that directive.

34 The prior information procedure is one of the rules on advertising laid down in Directive 93/37. As is clear in particular from the 10th recital in the preamble to that directive, the purpose of those rules is to ensure development, at the Community level, of effective competition in the field of public works contracts,

by ensuring that potential tenderers from other Member States are in a position to respond to the various invitations in circumstances comparable to those prevailing for national tenderers.

35 It follows that the purpose of the rules on advertising laid down in Directive 93/37, including publication of the prior information notice, is to inform all potential tenderers at the Community level in good time about the main points of a contract in order that they may submit their tender within the time-limits. That purpose shows that whether the prior information notice is compulsory must be determined by reference to the provisions of that directive relating to the time-limits for the receipt of tenders submitted by tenderers.

36 In this respect, Articles 12(1) and 13(3) of Directive 93/37, which fix as a general rule the normal time-limits for the receipt of tenders at 52 days in respect of open procedures and 40 days in respect of restricted procedures, make no reference to the preliminary publication of a prior information notice.

37 On the other hand, Articles 12(2) and 13(4) of Directive 93/37, which confer on the contracting authorities the power to reduce the time-limits laid down in Articles 12(1) and 13(3), expressly link that power to the preliminary publication of a prior information notice.

38 It follows that the publication of a prior information notice is compulsory only where the contracting authorities exercise their option to reduce the time-limits for the receipt of tenders.

39 If the publication of a prior information notice were compulsory for every award procedure, whatever the time-limit for the receipt of tenders, the reference to it in Articles 12(2) and 13(4) of Directive 93/37 would be superfluous.

40 By linking the exercise, by the contracting authorities, of the option to reduce the time-limits for the receipt of tenders to the obligation to publish a prior information notice, the Community legislature intended to give potential tenderers, as regards the time at their disposal to draw up their tender, safeguards comparable to those which they would have enjoyed if the normal time-limits had been applied.

41 That interpretation is furthermore borne out by the travaux préparatoires for Directive 89/440, which inserted the prior information procedure into Directive 71/305. In its proposal for a Council Directive amending Directive 71/305 (COM (86) 679 final), the Commission had initially proposed the insertion of an obligation to publish a prior information notice at least six months before the date on which such contracts are due to be put up for competition by also providing that the time-limit for the receipt of tenders would be doubled in the case of contracting authorities which had failed to fulfil that obligation. However, that proposal, which expressly characterised the prior information procedure as an obligation, was not accepted by the Council.

42 As regards, finally, the Commission's argument that the compulsory nature of the prior information notice was clearly acknowledged by the Court of Justice in Case C-272/91 *Commission* v *Italy* [1994] ECR I-1409, it is clear that that case concerned the indicative notice provided for under Article 9(1) of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as amended by Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62 and repealing certain provisions of Directive 80/767/EEC (OJ 1988 L 127, p. 1; 'Directive 77/62').

43 The indicative notice provided for under Article 9(1) of Directive 77/62 does not, unlike the notice provided for under Article 11(1) of Directive 93/37, introduce any possibility of reducing the time-limits for the receipt of tenders. The problem of interpretation at issue in *Commission* v *Italy*, cited above, did not therefore arise in terms analogous to those in the present case.

44 In the light of all the foregoing considerations and given the fact that, in this case, it is clear from the case-file that the contracting authorities in question did not reduce the time-limits for the receipt of tenders in relation to the disputed contracts, it must be concluded that those contracting authorities were not in breach of their obligations under Directives 71/305 and 93/37, as regards the prior information procedure.

45 Consequently, the Commission's complaint relating to failure to publish prior information notices must be rejected as unfounded.

The complaint relating to the additional criterion linked to the campaign against unemployment

46 The Commission claims that, in expressly setting forth as an award criterion in a number of contract notices a condition relating to employment linked to a local project to combat unemployment, the French authorities have infringed Article 30 of Directive 93/37. The Commission acknowledges that the taking into account of employment-related projects may be regarded as a condition of performance for the purpose of the rule in *Beentjes* (Case 31/87 *Beentjes* v *Netherlands State* [1988] ECR 4635, paragraphs 28 and 37), but it points out that, in the present case, that possibility was characterised as an award criterion in the contract notices in question. Under Article 30 of Directive 93/37, award criteria must be based either on the lowest price or on the most economically advantageous tender.

47 Relying on paragraphs 28 and 37 of *Beentjes*, the French Government contends that an additional award criterion of that kind has been permitted by the Court of Justice. It states, furthermore, that the award criterion in question in this case does not constitute a primary criterion, such as those referred to in Article 29 of Directive 71/305, the purpose of which is to make it possible to determine which is the most advantageous tender, but a secondary criterion which is not decisive.

48 The first point to be noted here is that, by this complaint, the Commission alleges that the French Republic has infringed Article 30(1) of Directive 93/37 purely and simply by referring to the criterion linked to the campaign against unemployment as an award criterion in some of the disputed contract notices.

49 Under Article 30(1) of Directive 93/37, the criteria on which the contracting authorities are to base the award of contracts are either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, technical merit.

50 None the less, that provision does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services (see, to that effect, *Beentjes*, paragraph 29).

51 Furthermore, even if such a criterion is not in itself incompatible with Directive 93/37, it must be applied in conformity with all the procedural rules laid down in that directive, in particular the rules on advertising (see, to that effect, on Directive 71/305, *Beentjes*, paragraph 31). It follows that an award criterion linked to the campaign against unemployment must be expressly mentioned in

the contract notice so that contractors may become aware of its existence (see, to that effect, *Beentjes*, paragraph 36).

52 As regards the Commission's argument that *Beentjes* concerned a condition of performance of the contract and not a criterion for the award of the contract, it need merely be observed that, as is clear from paragraph 14 of *Beentjes*, the condition relating to the employment of long-term unemployed persons, which was at issue in that case, had been used as the basis for rejecting a tender and therefore necessarily constituted a criterion for the award of the contract.

53 In this case, as has been stated in paragraph 48 above, the Commission criticises only the reference to such a criterion as an award criterion in the contract notice. It does not claim that the criterion linked to the campaign against unemployment is inconsistent with the fundamental principles of Community law, in particular the principle of non-discrimination, or that it was not advertised in the contract notice.

54 In those circumstances, the Commission's complaint relating to the additional award criterion linked to the campaign against unemployment must be rejected.

The complaint relating to the number of candidates selected

55 The Commission states that, in the contract notices published in the Official Journal of 18 February 1995, the text under heading 13 states: 'Maximum

number of candidates which may be invited to submit a tender: 5'. The Commission points out that, even if the French authorities seem to take the view, in their reply to the formal notice, that that maximum of five candidates fulfils the obligation to ensure genuine competition imposed by Directive 93/37, the disputed indication under heading 13 in the abovementioned contract notices suggests that the number of candidates invited to submit a tender might be less than five. Consequently, the French authorities have not fulfilled the obligation laid down in Article 22 of Directive 93/37.

56 The French Government, on the other hand, contends that the maximum number of five candidates fixed in the contract notices complies with the letter and the spirit of Article 22 of Directive 93/37 and, because of the characteristics of the type of contract in question, is sufficient in this case to fulfil the obligation to ensure genuine competition. The French Government infers from Article 22(2) of Directive 93/37 that there is nothing to prohibit a contracting authority from restricting to five the number of candidates invited to tender, so long as it considers that that number is sufficient to ensure genuine competition under objective and non-discriminatory conditions.

57 It should be recalled that, under the first subparagraph of Article 22(2) of Directive 93/37, where the contracting authorities award a contract by restricted procedure, they may prescribe the range within which the number of undertakings which they intend to invite will fall. Under the same provision, the range must number at least five undertakings and may be up to 20.

58 Furthermore, under the second subparagraph of Article 22(2) of Directive 93/37, the number of candidates invited to tender is, in any event, to be sufficient to ensure genuine competition.

59 It is true that Article 22(2) of Directive 93/37 does not provide for a minimum number of candidates which the contracting authorities are required to invite where they do not opt in favour of fixing a range as provided by that provision.

60 However, if the Community legislature considered that, in the context of a restricted procedure and where the contracting authorities prescribe a range, a number of candidates below five is not sufficient to ensure genuine competition, the same must be true *a fortiori* in cases where the contracting authorities opt for inviting a maximum number of candidates.

61 It follows that the number of undertakings which a contracting authority intends to invite to tender in the context of a restricted procedure cannot ever be less than five.

62 In this case, the conclusion to be drawn must be that, as the French Government itself accepts, the wording 'Maximum number of candidates which may be invited to submit a tender: 5' appearing in the contract notices published in the Official Journal of 18 February 1995 implies that it is the maximum number of candidates invited to tender for the contracts in question which was fixed at five. It follows that, on the basis of the disputed contract notices, a number of candidates below five was regarded as acceptable.

63 In those circumstances, it must be held that the Commission's complaint concerning the number of candidates selected is well founded and that the French Republic has failed to fulfil its obligations under Article 22(2) of Directive 93/37.

The complaint relating to the method known as 'award by reference to the Code des Marchés Publics'

64 The Commission points out that, in most of the contract notices published between 1993 and 1995, the contracting authorities in question had recourse, in order to indicate the award criteria, to the method known as 'award by reference to the Code des Marchés Publics', which, it claims, is contrary to Articles 29(2) of Directive 71/305 and 30(2) of Directive 93/37. By referring generally to various provisions of the French Code des Marchés Publics, the abovementioned contract notices do not satisfy the requirement as to advertising, as stated in *Beentjes*.

65 Relying on the case-law of the Court (see Case 51/83 *Commission* v *Italy* [1984] ECR 2793), the French Government contends, first, that that complaint by the Commission must be regarded as inadmissible in that it was raised for the first time in the reasoned opinion.

66 Admittedly, in its supplementary letter of formal notice of 8 May 1996, the Commission adopted a position on the criteria for the award of the contracts in question and, in this respect, drew the French authorities' attention to the fact that the contract notices must enable contractors to assess whether the proposed contracts were of interest to them. However, the French Government submits that that reference did not apply expressly to the complaint relating to the method of award by reference to the Code des Marchés Publics, but formed part of the complaint concerning the additional criterion relating to employment. Thus that reference did not enable the French Government to define the complaint as relating to the method of award by reference to the Code des Marchés Publics, a

method to which the Commission did not expressly refer until the reasoned opinion.

67 In the alternative, the French Government submits that Article 30(2) of Directive 93/37 does not require that the criteria for the award of the contract be listed in the contract notice, but permits the contracting authority to include them either in the contract notice or in the contract documents. In this case, the award criteria are expressly listed in the contract documents.

68 As regards the admissibility of this complaint of the Commission, it should be borne in mind, first, that it follows from the purpose assigned to the pre-litigation stage of the Treaty infringement procedure that the letter of formal notice is intended to define the subject-matter of the dispute and to indicate to the Member State, which is invited to submit its observations, the factors enabling it to prepare its defence (Case 274/83 *Commission* v *Italy* [1985] ECR 1077, paragraph 19).

69 Second, according to consistent case-law, the opportunity for the Member State concerned to submit its observations constitutes an essential guarantee required by the Treaty and, even if the Member State does not consider it necessary to avail itself thereof, observance of that guarantee is an essential formal requirement of the Treaty infringement procedure (see, in particular, Case 51/83, paragraph 5; and Case 274/83, paragraph 20).

70 Although it follows that the reasoned opinion provided for in Article 169 of the Treaty must contain a coherent and detailed statement of the reasons which led

the Commission to conclude that the State in question has failed to fulfil one of its obligations under the Treaty, the Court cannot impose such strict requirements as regards the letter of formal notice, which of necessity will contain only an initial brief summary of the complaints. There is nothing therefore to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in its letter of formal notice (see Case 274/83, paragraph 21).

71 In this respect, it is clear from the documents before the Court that, in the supplementary letter of formal notice of 8 May 1996, the Commission made a general criticism of the award criteria in the disputed contract notices. It drew the French authorities' attention to the fact that the contract notices must enable undertakings to determine whether the information they contain enables them to assess whether the proposed contracts are of interest to them. It also referred to the case-law of the Court according to which a general reference to a provision of national legislation cannot satisfy the requirements as to advertising in respect of contract notices.

72 It follows that the formal notice, even if its wording was not very explicit as regards the method known as 'award by reference to the Code des Marchés Publics', none the less enabled the French Government to be aware of the complaint made against it. Therefore, the criticism of the award criteria subsequently made by the Commission in its reasoned opinion is a lawful detailed specification of the complaints raised in the letter of formal notice. The Commission's complaint is therefore admissible.

73 As regards the substance of the complaint, where the authorities awarding the contract do not take the lowest price as the sole criterion for awarding the contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state these criteria in the contract notice or the contract documents. Consequently, a general reference to a provision of national legislation cannot satisfy the publicity requirement (*Beentjes*, paragraph 35).

74 The French Government does indeed contend that, in this case, the award criteria are expressly included in the contract documents. However, it did not supply the Court with any evidence which might prove that assertion.

75 It must therefore be concluded that the Commission's complaint relating to the method known as an 'award by reference to the Code des Marchés Publics' is well founded and that the French Republic has failed to fulfil its obligations under Articles 29(2) of Directive 71/305 and 30(2) of Directive 93/37.

The complaint relating to the mode of designating the lots

76 The Commission claims that many of the contract notices examined refer, under the heading 'Works. Designation of lots and qualifications', to the classifications of French professional organisations, in particular the OPQCB and Qualibat — Qualifélec. As an example, the Commission gives the qualification 'Qualibat Chauffage 5312', which corresponds to a design office of approved technical expertise in environmental engineering with at least four years' practical experience and at Level 6 in the 'Convention Collective ETAM des Bâtiment et Travaux Publics' (collective agreement for the construction and civil engineering industry).

77 Admittedly, the French authorities pointed out, in their reply to the letter of formal notice, that 'those notices do not state that the certificates which may be taken into account are exclusively certificates issued by Qualibat or Qualifélec'. The Commission claims, none the less, that the technical specifications selected by the contracting authorities in question may have the effect of giving advantage to French undertakings, which are familiar with that system of quality

certification and are accustomed to submitting documents or services in conformity with the references required in the contract notice.

78 The French Government contends that such references are purely indicative and, that being so, cannot be discriminatory. The addition of a classification number is quite superfluous since it features alongside the description of each lot in everyday language (electricity, plumbing, and so on).

79 Furthermore, the reference, under heading 3 of the contract notices, to classifications defined by professional organisations does not of itself have a discriminatory effect since it does not give to French candidates as opposed to candidates who are nationals of other Member States any additional information about the services to be provided. It is not a question of specifying, under that heading, information relating to the selection criteria or the criteria for the award of the contract, but of giving guidance about the nature of the lots which is explained in greater detail in the contract documents.

80 According to the Court's case-law the principle of equal treatment, of which Article 59 of the Treaty is a specific expression, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, to that effect, Case 3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 8).

81 In this case, although the reference to classifications of French professional organisations does not imply that the certificates which may be taken into

account are exclusively those issued by those bodies, it remains the case that the technical specifications selected are so specific and abstruse that, as a rule, only French candidates are able immediately to discern their relevance. Consequently, the use of those references to designate the lots has the effect of supplying more information to French undertakings about the nature of the lots, thereby making it easier for those undertakings to submit tenders which comply with the coded references appearing in the contract notice.

82 On the other hand, it is more difficult for tenderers from other Member States to submit tenders within the brief time-limit set since they must first find out from the contracting authorities in question the purpose and content of those references.

83 Therefore, to the extent that the designation of the lots by reference to classifications of French professional organisations is likely to have a dissuasive effect on tenderers who are not French, it thereby constitutes indirect discrimination and, therefore, a restriction on the freedom to provide services, within the meaning of Article 59 of the Treaty.

84 Consequently, the Commission's complaint relating to the mode of designating the lots is well founded and the French Republic has failed to fulfil its obligations under Article 59 of the Treaty.

The complaint relating to the minimum standards for participation

85 The Commission claims that the minimum standards for participation specified under heading 10 in a certain number of contract notices published by the

Département du Nord require from the designer proof of registration with the Ordre des Architectes (French association for architects). It states that, notwithstanding the distinction drawn by the French authorities between, on the one hand, the scheme of registration and, on the other, the scheme of permission to pursue the profession of architect in France, in the majority of cases heading 10 of the contract notices states unambiguously 'for the designer: proof of registration with the Ordre des Architectes'. Consequently, the Département du Nord has failed to fulfil its obligations under Article 59 of the Treaty by imposing restrictions on Community architects' freedom to provide services.

86 The Commission also points out that, as regards the Wingles secondary school, the minimum standards referred to in the contract notice required the provision of a 'certificate of OPQCB, Qualifélec, FNTP professional qualification'. First, Articles 23 to 28 of Directive 71/305 lay down the qualitative criteria for selection of candidate undertakings and, more specifically, Article 26 defines the means of furnishing proof of technical knowledge or ability. Second, it is clear from Case 76/81 *Transporoute* v *Ministère des Travaux Publics* [1982] ECR 417 that evidence of an undertaking's professional qualification cannot be furnished by a means of proof which falls outside the closed category of those authorised by Article 26 of Directive 71/305. Therefore, the contracting authority concerned has failed to fulfil its obligation under that provision.

87 In this respect, the Court finds, first, that the requirement of proof that the designer is registered with the Ordre des Architectes can only give advantage to the provision of services by French architects, which constitutes discrimination against Community architects and, accordingly, a restriction on their freedom to provide services.

88 Second, according to the case-law, Directive 71/305 precludes a Member State from requiring a tenderer established in another Member State to furnish proof

by any means other than those prescribed in Articles 23 to 26 of that directive, that he satisfies the criteria laid down in those provisions and relating to his qualifications (see, to that effect, *Transporoute*, paragraph 15).

89 In any event, the French Government itself recognises that those criticisms by the Commission are well founded but submits that the infringements committed are essentially the result of the inexperience of the contracting authorities in question in applying the Community rules on the award of public contracts.

90 Consequently, it must be concluded that the Commission's complaint relating to the minimum standards for participation is well founded and that the French Republic has failed in its obligations under Articles 59 of the Treaty and 26 of Directive 71/305.

The complaints relating to the procedure of information on contract awards and the failure to communicate the written reports

91 The Commission claims that, during the period from 1993 to 1995, the Nord-Pas-de-Calais Region failed to fulfil the obligation to publish information on contract awards, as provided for in Articles 12(5) of Directive 71/305 and 11(5) of Directive 93/37. The award notices seem to have been published only by the Département du Nord, which constitutes an additional failure to fulfil its obligations on the part of the Nord-Pas-de-Calais Region.

92 Furthermore, the Commission states that the French authorities did not send it the information required by its supplementary letter of formal notice of 8 May

1996, in particular the written reports on all the procedures criticised. Consequently, the French authorities have failed to fulfil their obligations under the second subparagraph of Article 8(3) of Directive 93/37.

93 The French Government admits, first, that the Nord-Pas-de-Calais Region did not publish award notices in accordance with Articles 11(5) of Directive 93/37 and 12(5) of Directive 71/305 and, second, that the written reports on the procedures in question were not sent to the Commission in accordance with Article 8(3) of Directive 93/37. It adds that that failure can only be explained by the inexperience of those contracting authorities in applying the Community rules on the award of public contracts.

94 Therefore, it must be concluded that the complaints relating to the procedure of information on contract awards and the failure to communicate the written reports are well founded and that the French Republic has failed in its obligations under Article 12(5) of Directive 71/305 and Articles 8(3) and 11(5) of Directive 93/37.

95 In the light of all the foregoing, the Court finds that, in the course of the various procedures for the award of public works contracts for the construction and maintenance of school buildings conducted by the Nord-Pas-de-Calais Region and the Département du Nord over a period of three years, the French Republic has failed to fulfil its obligations under Article 59 of the Treaty as well as under

Articles 12(5), 26 and 29(2) of Directive 71/305 and under Articles 8(3), 11(5), 22(2) and 30(2) of Directive 93/37.

Costs

96 Under Article 69(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. Since the Commission has failed on two heads and the French Republic on the others, each party must be ordered to bear its own costs.

On those grounds,

THE COURT,

hereby:

1. **Declares that, in the course of the various procedures for the award of public works contracts for the construction and maintenance of school buildings conducted by the Nord-Pas-de-Calais Region and the Département du Nord**

over a period of three years, the French Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) as well as under Articles 12(5), 26 and 29(2) of 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, and under Articles 8(3), 11(5), 22(2) and 30(2) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts;

2. Dismisses the application as to the remainder;

3. Orders the French Republic and the Commission of the European Communities to bear their own costs.

Rodríguez Iglesias	Moitinho de Almeida	Edward
Sevón	Schintgen	Puissochet
Jann	Ragnemalm	Skouris

Delivered in open court in Luxembourg on 26 September 2000.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President