

OPINION OF ADVOCATE GENERAL

JACOBS

delivered on 24 February 2005¹

1. In this action brought under Article 226 EC the Commission seeks a declaration by the Court that, by reason of the award by the public electricity company Dimosia Epicheirisi Ilektrismoy (hereinafter 'DEI') of a contract for the construction of a conveyor-belt system for the thermal-electricity generation plant of Megalopolis (hereinafter 'the Megalopolis plant') by means of a negotiated procedure without previous publication of a notice, the Hellenic Republic has failed to fulfil its obligations under Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (hereinafter 'the Utilities Sectors Directive')² and in particular Article 20 et seq. thereof.

authority, the Ministry of Environment, Planning and Public Works, a project concerning the installation of a system for the de-sulphuration, stabilisation and transport of ashes and solid waste from the Megalopolis plant for the purposes of an environmental impact assessment under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (hereinafter the 'Environmental Impact Assessment Directive').³ By decisions of 29 October 1998 and 30 December 1999, the competent national environmental authority gave its approval. That approval was subject, on the one hand, to DEI lodging a request for a final authorisation for the elimination of the resulting waste within 9 months and, on the other, to the installation within 12 months of a conveyor-belt system for the transport of the ashes between the Megalopolis plant and the mine of Thoknia, where the ashes would be treated.

The facts and background to the case

2. Towards the end of 1997 DEI submitted to the competent national environmental

3. Having been unofficially informed of the possibility of those deadlines being imposed,

1 – Original language: English.

2 – OJ 1993 L 199, p. 84.

3 – OJ 1985 L 175, p. 40.

on 27 July 1999 DEI decided to carry out a negotiated award procedure without publication of a notice and invited the firms Koch/Metka and Dosco to submit offers.

published in the Official Journal in accordance with the Utilities Sectors Directive. It requested Greece to adopt all necessary measures to comply with the reasoned opinion within two months. Not being satisfied by the reply given by Greece dated 3 April 2002, the Commission lodged the present action on 8 November 2002.

4. On 18 January 2000, Dosco declared that it was not in a position to take part and withdrew from the award procedure.

Relevant provisions of Community law

5. On 29 August 2000, after price negotiations that lasted several months, DEI awarded the contract for the construction of the conveyor-belt system to the firm Koch/Metka.

7. Article 15 of the Utilities Sectors Directive requires that 'supply and works contracts and contracts which have as their object services listed in Annex XVI A shall be awarded in accordance with the provisions of Titles III, IV and V'.

6. By letter of 3 October 2000 the Commission requested information from Greece concerning the disputed contract award. After receiving a reply from Greece by letter of 9 November 2000, the Commission sent its letter of formal notice on 17 April 2001. After giving Greece the opportunity to submit its observations, on 21 December 2001 the Commission issued a reasoned opinion in which it stated that the contract for the construction of the conveyor-belt system for the transport of ashes between the Megalopolis plant and the mine of Thoknia should have been the subject of a notice

8. Article 20(1) of the Utilities Sectors Directive, which is contained in Title IV governing procedures for the award of contracts, provides that '[c]ontracting entities may choose any of the procedures described in Article 1(7), provided that, subject to paragraph 2, a call for competition has been made in accordance with Article 21'.

9. Pursuant to paragraph 2 of the same provision:

call for competition may be made, in essence the publication of a notice in the Official Journal drawn up in accordance with the models contained in the annexes to the directive.

'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;

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

10. Article 1(7) of the Utilities Sectors Directive defines the three types of award procedures — open, restricted and negotiated — that contracting entities must follow whenever the directive applies.

11. Article 21(1) of the Utilities Sectors Directive lays down the means whereby the

Admissibility

12. Greece objects to the admissibility of the Commission's action on two grounds.

13. First, the Commission did not specify the measures that it was required to adopt in order to comply with the reasoned opinion. Since the procurement in question concerned public works which were to a large extent — around 85% — completed by the deadline set for compliance in the reasoned opinion, it was impossible to give effect to the opinion. In view of this, Greece questions the interest of the Commission in pursuing an infringement procedure.

14. Secondly, the use of the infringement procedure under Article 226 EC constitutes

an abuse of procedure. The Commission should have resorted to the procedure under Article 3 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (hereinafter the 'General Remedies Directive'),⁴ which entitles the Commission to intervene directly in a national award procedure and request action from the Member State to tackle alleged clear and manifest breaches of the general public supply, public works and public services directives.

16. The Court has further held that, where the effects of the breach subsist beyond the date for compliance laid down in the reasoned opinion, the Commission may have an interest in bringing an action. In the specific context of public procurement cases, without making a distinction between works, supply or services procurement contracts, the Court has held that the unlawful effects subsist during the entire performance of the contracts concluded in breach of the procurement directives.⁶

15. As regards Greece's first plea, it must first of all be noted that, pursuant to settled case-law, the Commission does not have to show that there is a specific interest in bringing an action when exercising its powers under Article 226 EC. Given its role as guardian of the Treaty, the Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought.⁵

17. The Court has in the past also dismissed an objection of inadmissibility based on a claim that the alleged infringement had ceased in a situation in which the award procedures had been completed before the date on which the period laid down in the reasoned opinion expired, since the contracts had not been fully performed by that date. Here again the Court does not differentiate between the different procurement contracts covered by the various directives.⁷

18. In the present case it appears from the file that at the expiry of the period prescribed for compliance with the reasoned opinion, the contract was, by the defendant's own admission, still not fully implemented. In fact, the works were only completed in May

4 — OJ 1989 L 395, p. 33.

5 — Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609, paragraphs 29 and 30 and the case-law cited therein.

6 — *Commission v Germany*, cited in footnote 5, paragraphs 33 to 39.

7 — Case C-328/96 *Commission v Austria* [1999] ECR I-7479, paragraphs 43 to 45. See also Case C-125/03 *Commission v Germany*, not published in the ECR, at paragraphs 12 and 13.

2002. It follows that the Commission's interest in bringing the action cannot be contested.

19. Greece's arguments as to the *de facto* impossibility of giving effect to the reasoned opinion, thereby rendering the Commission's action devoid of any purpose, must in my view also be dismissed.

20. First of all, as the Court has consistently held, 'even where the default has been remedied after the time-limit given in the reasoned opinion has expired, there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur, as a result of its default, towards other Member States, the Community or private parties'.⁸ I would add that the same applies whenever the default may no longer be remedied.

21. The establishment of a basis for potential liability claims may be particularly relevant in the case of breaches of public procurement rules. It is generally agreed that the setting aside of a fully implemented contract by reason of a breach of the applicable Community rules on public procurement is

not always the most sensible solution since it does not, as a general rule, satisfy either the public or private interests involved. That is especially so in the case of contracts for public works which have been for the most part executed. In those circumstances the best remedy to injured parties may lie in the award of damages. That is precisely the logic that underlies both the General Remedies Directive and Council Directive 92/13/EEC of 25 February 1992⁹ coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (hereinafter the 'Utilities Sectors Remedies Directive'). Article 2(6) of each of those directives enables Member States to provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures are to be limited to awarding damages to any person harmed by an infringement. A declaration by the Court that a breach has occurred may provide a basis for claims for damages before national courts, even where the contract has already been awarded and fully executed.

22. That is so, moreover, in the case of breaches of the Utilities Sectors Directive.

⁸ — See for example Case C-166/00 *Commission v Greece* [2001] ECR I-9835, paragraph 9 and the case-law cited therein.

⁹ — OJ 1992 L 76, p. 14.

Assuming that Greece has properly implemented its obligations under the Utilities Sectors Remedies Directive — which, as I shall discuss below, applies in the instant case — any party injured by a breach should benefit from the relatively generous damages regime established thereunder.¹⁰

23. Greece argues that, in any event, there is no third party in the instant case which could avail itself of the Court's judgment to claim damages at national level. That argument should also be rejected.

24. First, such argument is not borne out by reality. The spectrum of possible claimants is defined in very broad terms by both the Remedies directives as 'any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement'. Thus, the number of persons that could claim relief under the applicable provisions is, potentially, significant and their existence cannot, in my view, be excluded a priori. In the instant case, a second company, Dosco, took part in the preliminary stages of the award procedure but withdrew (for reasons not specified before the Court). In addition, the Commis-

sion, according to its submissions, took action following an individual complaint. Thus, contrary to the arguments put forward in the defence, the possibility cannot be excluded that there may be parties who could benefit from a declaration by the Court of a breach of the Community public procurement rules.

25. Secondly, accepting Greece's arguments would be tantamount to allowing national authorities a means to circumvent their obligations under the EC public procurement rules. In view of the length of the pre-litigation and judicial procedures under Article 226 EC, it is highly likely that by the time the Court has ruled on the substance the contract affected by the alleged infringement will be fully implemented, unless interim measures suspending the award procedure or the execution of the contract are granted. It would therefore suffice for Member States, while proceeding to the execution of the contested contract, systematically to oppose the Commission's allegations throughout the pre-litigation procedure, only to argue subsequently the inadmissibility of the Commission's action on grounds of the impossibility of implementing the reasoned opinion. Moreover, it would be unacceptable for a Member State to be in a better position where the breach is a *fait accompli* than where it can still be prevented.

¹⁰ — This regime allows, *inter alia*, injured parties to claim damages representing the costs of preparing a bid or of participating in an award procedure without the need to show a better right to the contract. See Article 2(7) of the Utilities Sectors Remedies Directive.

26. Finally, the Court has held that since the finding of failure by a Member State to fulfil its obligations is not bound up with a finding as to the damage resulting therefrom, that Member State cannot rely on the fact that no third party had suffered damage from the alleged breach of the public procurement rules committed by the national contracting authorities.¹¹

27. As regards the need to specify the measures to be adopted by the defaulting Member State, it is settled case-law that the Commission cannot be required to indicate in the reasoned opinion the measures or steps to be taken to eliminate the infringement in question.¹² That case-law, which sanctions the usual practice of the Commission under Article 226 EC, constitutes in my view an expression in the context of that provision of what may be referred to as the principle of 'institutional autonomy' which governs the relationship between the Community and its Member States.¹³ According to the system of the division of powers established by the EC Treaty, in the absence of applicable Community rules, the responsibility for the implementation, application and enforcement of Community rules falls upon the Member States in accordance with their national legal systems,¹⁴ subject, of

course, to the constraints of the principle of effectiveness as developed by the Court.

28. Greece refers however to the judgment in *Commission v Austria* in support of its plea. In that case the Court held, as an exception to its previous case-law, that 'the Commission must specifically indicate to the Member State concerned that it must adopt a certain measure if it intends to make the failure to adopt that measure the subject-matter of its infringement action'.¹⁵ The Court interpreted part of the Commission's application as seeking a declaration that the defendant State ought to have cancelled the contracts concluded by the national authorities in breach of Community law. Since such a failure had not been specified during the pre-litigation procedure, the Court declared that part of the application inadmissible as the Commission had altered the subject-matter of the proceedings, thereby violating the rights of defence of the Republic of Austria.

29. In my view the circumstances in the instant case are not comparable to those in *Commission v Austria*. In the present case the Commission has throughout the entire pre-litigation and judicial procedures maintained the same subject-matter for its action, namely the failure by Greece to fulfil its obligations under the Utilities Sectors Direc-

11 — See for example Joined Cases C-20/01 and C-28/01 *Commission v Germany*, cited in footnote 5, paragraph 42.

12 — Case C-247/89 *Commission v Portugal* [1991] ECR I-3659, paragraph 22.

13 — See further J. Rideau, 'Le rôle des Etats membres dans l'application du droit communautaire' (1972) *Annuaire français de droit international*, 864, at p. 865.

14 — See the comments of Advocate General Alber in *Commission v Austria*, cited in footnote 7, at point 47 et seq.

15 — *Commission v Austria*, cited in footnote 7, at paragraph 39.

tive by reason of the award by DEI of a contract following a negotiated procedure without previous publication of a notice. In its application, the Commission has not sought to require Greece to adopt measures other than those that it had already mentioned in its reasoned opinion. It has therefore not changed the subject-matter of its action and has not prejudiced the defendant's rights of defence.

the peculiarities of public procurement procedures in the sectors covered and to fill the gap left by the General Remedies Directive as regards breaches of the provisions of the Utilities Sectors Directive.¹⁷

30. In its second plea of inadmissibility relating to an abuse of procedure, Greece claims that the Commission should have resorted to the direct intervention procedure provided for in Article 3 of the General Remedies Directive.

31. Reference to that provision is surely an oversight by Greece since that directive cannot apply to the instant case.¹⁶ Breaches of the Utilities Sectors Directive are covered by the Utilities Sectors Remedies Directive, which was specifically designed to cater for

32. That having been said, the Utilities Sectors Remedies Directive also provides in its Article 8 for a special procedure enabling the Commission to intervene directly before the Member State when a clear and manifest breach of the Utilities Sectors Directive is detected. Apart from the different deadline that it lays down for the reply of the Member State to the notification of the Commission, the procedure is the same as that laid down by Article 3 of the General Remedies Directive. Although the Commission did not address this point in its written reply, at the hearing it noted that, despite its written submissions, the relevant procedure was that under Article 8 of the Utilities Sectors Remedies Directive. Thus, it might be inferred that Greece's plea refers to the procedure under Article 8 of the Utilities Sectors Remedies Directive rather than Article 3 of the General Remedies Directive

¹⁶ — See Articles 1(1) and 3(1) of the General Remedies Directive and Articles 1(1)(a) and 8(1)(a) of the Utilities Sectors Remedies Directive. The scope of application of the General Remedies Directive was later extended to cover breaches of public services Directive 92/50 by Article 41 of the latter directive.

¹⁷ — See the preamble to the Utilities Sectors Remedies Directive, in particular the fourth recital.

33. The Court has, in my view somewhat reluctantly,¹⁸ held that the 'special procedure under [Article 3 of the General Remedies Directive] is a preliminary measure which can neither derogate from nor replace the powers of the Commission under Article [226] of the Treaty. That article gives the Commission discretionary power to bring an action before the Court where it considers that a Member State has failed to fulfil one of its obligations under the Treaty and that the State concerned has not complied with the Commission's reasoned opinion.'¹⁹ In view of the practically identical nature of both provisions, those statements should also be taken to apply to the procedure laid down by Article 8 of the Utilities Sectors Remedies Directive.

34. Given that, owing to their particular features, breaches of public procurement rules require swift action in order to avoid a situation of *fait accompli* and that the Commission's powers under the special procedures laid down in both Remedies directives were specifically designed to avoid such situations when a clear and manifest breach is detected, one may sympathise with Greece's point of view in terms of the expediency of the choices made by the

Commission. However, the use made by the Commission of the special procedure provided for in both Remedies directives falls within the realm of its discretion when deciding its enforcement policy in this area and, even if one might disagree from a practical point of view, it cannot be condemned from a strict legal point of view.

35. It follows from the foregoing that the objections of inadmissibility raised by Greece should be dismissed.

Substance

36. The Commission claims that the contract in question falls within the scope of the Utilities Sectors Directive and should therefore have been awarded in accordance with one of the procedures involving publication of a notice as required by Article 20(1) of that directive.

18 — The Court has held that it is clear from the letter and spirit of the General Remedies Directive that it is very much to be preferred, in the interest of all the parties concerned, that the Commission use the direct intervention procedure provided for in Article 3(3) of the General Remedies Directive: see Case C-359/93 *Commission v The Netherlands* [1995] ECR I-157, at paragraph 12.

19 — *Ibid.*, paragraph 13. See also Case C-79/94 *Commission v Greece* [1995] ECR I-1071, paragraph 11.

37. Greece does not dispute the fact that the contract falls, in principle, within the scope of the Utilities Sectors Directive but claims that it was exempted from its discipline by virtue of Article 20(2)(c) and (d) thereof. As regards subparagraph (c), the technical specificity of the works in question made the chosen firm Koch/Metka the only contractor capable of performing the works. As regards subparagraph (d), the extreme urgency was brought about by the unforeseen decisions of the competent national authorities imposing tight deadlines for the completion of the environmental procedures which rendered respect for any of the procedures involving publication unviable.

39. As regards Article 20(2)(c) of the Utilities Sectors Directive, Greece claims that three types of technical reasons justified the award of the contract to Koch/Metka. First, the specific characteristics of the ashes to be transported, resulting from the fact that the fuel used in the plant is lignite rather than coal, required special technical solutions. Lignite is used as a fuel, according to the technical studies submitted by Greece, in only one other plant in the world and the technical solutions required for lignite are very rarely used by plants using coal. Secondly, the unstable nature of the sub-soil rendered difficult the building of the foundations for the conveyor belts. Finally, it was necessary to attach the new conveyor belts to the existing ones, and therefore to ensure their compatibility. In view of those technical specificities, only Koch/Metka enjoyed, in the contracting authority's view, the necessary expertise for the realisation of the works.

38. It must first be noted that as a derogation from the rules intended to ensure the effectiveness of the rights conferred by Community law in relation to public procurement, both subparagraphs mentioned by Greece must be interpreted strictly. In addition, the burden of proving the existence of exceptional circumstances justifying the derogation which they provide lies on the person seeking to rely on those circumstances.²⁰

40. I am not convinced that the arguments put forward by Greece adequately establish that Koch/Metka was the only contractor capable of performing the works. The fact that the works to be carried out were subject to exceptional technical constraints does not necessarily mean, as Greece seems to believe, that only one firm has the know-how to deal with such constraints. As the Court of Justice has held, a Member State may rely on

²⁰ — See, *inter alia*, Case 199/85 *Commission v Italy* [1987] ECR 1039, paragraph 14.

an exception such as that provided for by Article 20(2)(c) of the Utilities Sectors Directive only if it can both establish the existence of 'technical reasons' within the meaning of that provision and prove that those 'technical reasons' made it absolutely essential that the contract in question be awarded to the chosen undertaking.²¹

41. The passages of the independent technical report quoted in the written submissions of Greece do confirm the rare character and the peculiar properties of the fuel used by the Megalopolis plant and their consequences for the transport of the resulting ashes. However, nowhere in the technical report is it stated that only Koch/Metka was in a position to provide the required service. In fact, the passage cited acknowledges that the technical solutions for lignite-fuelled plants can also be used in coal-fuelled ones, even though they are very rarely used.

42. The same reasoning applies in my view as regards the constraints relating to the configuration of the sub-soil and the need to attach the new conveyor-belt system to the existing one. The geological instability of the sub-soil and the need for compatibility between the new and existing conveyor belts are indeed technical reasons which may be taken into account by the contracting authority when choosing the successful bidder, but they do not on their own prove that Koch/Metka was the only firm capable of performing the contract.

43. Greece's position is further undermined by two more facts. First, the same contracting authority has published award notices in relation to similar works carried out in Megalopolis in the past and, second, Dosco was also invited to negotiate. As the Commission points out, the Greek reply of 9 November 2000 indicates that Dosco was initially considered to be technically capable of performing the contract. The absence of other possible contractors was not as apparent as Greece claims.

21 – See, in the context of the identical wording of the derogation provided for by Article 9(b) of Directive 71/305, Case C-57/94 *Commission v Italy* [1995] ECR I-1249, paragraph 24.

44. In brief, to the extent that it tries to shift the burden of proof to the Commission on this aspect of the case, the reasoning of Greece appears to be misguided for the reasons set out in point 40 above. It must be recalled that one of the main aims of the public procurement rules is to enable contracting authorities and firms throughout the EU to benefit from the possibilities offered by the European market. By not testing the market by means of a publication of the notice, Greece has defeated such an aim.

45. In view of the foregoing, I must conclude that Greece has failed to prove that the difficulties arising from the technical constraints of the works to be carried out made it absolutely essential, pursuant to Article 20 (2)(c) of the Utilities Sectors Directive, to award the contract to Koch/Metka.

46. As regards the derogation based on reasons of extreme urgency, in order to invoke successfully that derogation under Article 20(2)(d) of the Utilities Sectors Directive three cumulative conditions must be met, namely the existence of an unforeseeable event, extreme urgency rendering the observance of time-limits laid down by other procedures impossible and a link

between the unforeseeable event and the extreme urgency resulting therefrom.

47. The unforeseeable event alleged by Greece in the instant case takes the form of the deadlines imposed by the decision of 30 December 1999 of the national authority competent for defining of the environmental conditions for the exploitation of the project. Pursuant to that decision the authorisation to dispose of the waste was to be obtained from the local authority by September 2000 and the new conveyor-belt system was to be operative by December 2000. Such short deadlines were allegedly the result of the pressures put on the competent national environmental authority by local authorities and the local population, who expressed their concerns about pollution problems resulting from the existing installations. According to Greece, failure to respect such deadlines would also have entailed serious legal consequences, principally in the form of sanctions.

48. In my opinion, any contracting authority exercising a normal standard of diligence must be aware of the compulsory authorisation procedures, environmental or otherwise, which it must respect under applicable rules at national level when planning the award of contracts falling within the scope of the public procurement directives. Contracting authorities are therefore bound to bear in

mind such procedural steps, and their possible outcome, in their planning so as not to incur any breaches of Community law. In *Commission v Germany*, where, in view of the delay in approving the public works plans by the competent national environmental authority, the contracting authority decided to abandon the open procedure and to award the contract by negotiated procedure without prior publication of a tender notice, the Court held that 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 ... something which is foreseeable in plan approval procedure'.²² I agree with the Commission that the same reasoning should apply here.

the past carried out works which had in fact respected the applicable public procurement rules. One must therefore assume that DEI was fully familiar with the rules applicable both to environmental assessment and to public procurement procedures and was aware of the politically sensitive nature of the issue of pollution at the site.

50. In those circumstances, the establishment of tight deadlines by the competent national environmental authority cannot in my view qualify as an unforeseeable event within the meaning of Article 20(2)(d) of the Utilities Sectors Directive. Indeed there were apparently no unexpected changes either in the national regulatory framework or in the pollution levels at the site such as might have required immediate countervailing action.

49. As the Commission points out, DEI had already submitted the project to which the contested contract award relates to the competent national environmental authority in the last quarter of 1997, that is, over 12 months before the deadlines were laid down in the decision of the competent national environmental authority. It also appears from the file that pollution caused by the existing solid waste transport installations at the site was a topical issue at both national and at local level. Furthermore, DEI had in

51. Moreover, what is alleged to have caused the breach of the obligations under the Utilities Sectors Directive was the decision of the Ministry of Environment, Planning and Public Works. However, it is settled case-law that the notion of State for the purposes of Community law and, in particular, for the purposes of an action under Article 226 EC, must be understood as including all public authorities. It is also

²² — Case C-318/94 *Commission v Germany* [1996] ECR I-1949, paragraph 18.

settled case-law that 'a Member State cannot rely on provisions, practices or circumstances existing in its internal legal order in order to justify its failure to comply with the obligations ... laid down in a directive'.²³ The Court has further stated that 'the Community directives governing the award of public contracts would be deprived of their effectiveness if the actions of a contracting authority were not to be imputable to the State'.²⁴

State body or agency to fail in its obligations under Community law. It is to be noted that the ultimate liability under Community law of Greece as regards the actions of the DEI is not disputed by the parties.

52. It would be not only unreasonable but also dangerous to allow a Member State to justify a failure to comply with its obligations under Community law on the basis of the action (or inaction) of one of its constitutive elements, in the instant case an integral part of the Greek Government. The obligations arising from the public procurement directives fall upon Member States and it is therefore their duty to ensure that the action or inaction of one of their constitutive elements does not cause or force another

53. The chronology of the facts also belies the argument to the effect that a situation of 'extreme urgency' was present. In this respect it suffices to note, first, that DEI presented the project for environmental approval in 1997 and that final approval, subject to conditions, did not come through until the end of 1999. Secondly, the negotiations with Koch/Metka over the price for the contracted works lasted over six months. Lastly, the works were in fact still uncompleted two years after the expiry of the 'tight' deadlines imposed by the decisions of the competent national environmental authority on grounds of environmental hazards. Whereas I fully accept that environmental or public health hazards could in certain circumstances justify a departure from the discipline of the public procurement directives, there is nothing to indicate that such extreme urgency was a consideration in the present case. In fact, as mentioned at point 5 above, price negotiations lasted for several months, which may suggest that it was the reduction in the price of the contract which took precedence.

23 — Case C-323/96 *Commission v Belgium* [1998] ECR I-5063, paragraph 42 and the case-law cited therein.

24 — *Commission v Austria*, cited in footnote 7, paragraph 75.

Conclusion

54. In view of the above, I am of the opinion that the Court should:

- (1) declare that, by reason of the award by DEI of a contract for the construction of a conveyor-belt system for the thermal-electricity generation plant of Megalopolis by means of a negotiated procedure without previous publication of a notice, the Hellenic Republic has failed to fulfil its obligations under Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and in particular Article 20 et seq. thereof;

- (2) order the Hellenic Republic to pay the costs.