

# EUROPEAN COMMUNITY: EUROPEAN COMMISSION AND DENMARK REACH SETTLEMENT OF DISPUTE OVER CONSTRUCTION CONTRACT GRANTED BY DENMARK TO SIX-PARTY CONSORTIUM IN VIOLATION OF THE PUBLIC PROCUREMENT PROVISIONS IN THE TREATY OF ROME.

## I. STATEMENT OF FACTS

Great Belt Link Ltd. (GBL), a Danish state-owned project company, opened bids in November 1988 for construction of a four-mile road and rail bridge to connect the islands of Sjælland and Funen.<sup>1</sup> The bridge is part of a broader scheme to link Denmark to the European mainland.<sup>2</sup> Upon completion of the 2.5 billion dollar project, it would be possible to drive from Copenhagen straight through to West Germany without taking a ferry.<sup>3</sup> In June of 1989, GBL decided to negotiate the 400 million dollar contract for the Great Belt West Bridge with the European Storebaelt Group (ESG),<sup>4</sup> a consortium consisting of the Dutch Ballast Nedam Group, Losinger AG of Switzerland, Taylor Woodrow Construction Ltd. of England and three Danish firms, Gojgaard and Schultz A.S., C.G. Jensen A.S., and Per Aarsleff A.S.<sup>5</sup>

Great Belt Link Ltd. granted the contract to ESG despite the protests of Bouygues, France's largest contractor and the dominant member of the Western Bridge Joint Venture Group.<sup>6</sup> As part of a losing consortium that included two other Danish companies, Bouygues initiated a complaint to the European Commission that GBL had violated the Treaty of Rome which gives companies from the

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<sup>1</sup> Barnes, *EC Commission Puts Up Roadblock on Danish Bridge*, Fin. Times, Aug. 8, 1989, at 2, col. 2 [hereinafter Barnes, *EC Commission*]; Barnes, *Danes Face Row Over Disputed Contract*, Fin. Times, Sept. 25, 1989, at 4, col. 6.

<sup>2</sup> Elsner, *Europe's Longest Car-Train Bridge Mired in Legal Row with EC*, Reuter Libr. Rep., Aug. 18, 1989, at 1 [hereinafter Elsner].

<sup>3</sup> *Id.*

<sup>4</sup> Danish bidding rules forbid shopping among bidders once negotiations have begun with the potential winner. *Great Belt Bridge Job Let Despite Protest*, Engineering News-Rec., July 6, 1989, at 9.

<sup>5</sup> *Id.*

<sup>6</sup> Whitney, *A Bridge Troubles Europe's Waters*, N.Y. Times, Sept. 8, 1989, at 7, col. 1 [hereinafter Whitney].

European Community equal opportunity to bid for public works contracts.<sup>7</sup> The winning bid by ESG was 62.5 million dollars higher than Western Bridge Joint Venture's offer.<sup>8</sup>

The European Commission asked the Danish government to postpone signing the contract for another seven days while it examined the complaints.<sup>9</sup> Denmark rejected the request and the contract was signed on June 26, 1989.<sup>10</sup> The European Commission decided to seek an injunction from the European Court of Justice to force Denmark to suspend the contract and reopen tender negotiations.<sup>11</sup> The Commission objected mainly to the tender procedures used by GBL, which specifically included requirements that Danish labor, equipment, and materials be used "to the greatest possible extent."<sup>12</sup> Denmark attempted to avoid the problem by removing the discriminatory clause from the contract hours before it was signed.<sup>13</sup>

During the European Court's first sitting to hear the case, Denmark and the European Commission reached an out-of-court settlement.<sup>14</sup> The Danish government agreed to publish a statement indicating that the "Buy Danish" clause violated the non-discrimination principles in the Treaty of Rome.<sup>15</sup> Denmark also promised not to repeat the infraction and to allow the unsuccessful tenderers to seek damages in Danish courts and to recover bidding costs.<sup>16</sup>

This marks the first time a large construction company has attempted to use European Community law to contest the granting of a major international public works contract.<sup>17</sup> The suit by the Commission highlights recent efforts by Brussels to stop national favoritism in public procurement and tests how seriously the members of the European Community value their commitment to a free common market by 1992.<sup>18</sup>

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<sup>7</sup> *Bouygues Cries Foul on Great Belt Award*, Engineering News-Rec., June 15, 1989, at 23 [hereinafter *Bouygues Cries Foul*].

<sup>8</sup> Whitney, *supra* note 6, at 7, col. 2.

<sup>9</sup> Barnes, *Danes Sign Bridge Deal in Face of EC Protest*, Fin. Times, June 27, 1989, at 6.

<sup>10</sup> *Id.*

<sup>11</sup> Whitney, *supra* note 6, at 7, col. 1.

<sup>12</sup> *Id.*

<sup>13</sup> Barnes, *EC Commission*, *supra* note 1, at 2.

<sup>14</sup> Barnes, *Danes Face Row Over Disputed Contract*, Fin. Times, Sept. 25, 1989, at 4, col. 6.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at col. 7.

<sup>17</sup> Dawkins, *Danes Near Clash Over Bridge Deal*, Fin. Times, June 30, 1989, at 8, col. 8 [hereinafter Dawkins].

<sup>18</sup> For further reference see *Bridge Held Up*, Engineering News-Rec., June 22,

## II. LEGAL BACKGROUND

The Treaty of Rome (EEC Treaty), which came into force on January 1, 1958,<sup>19</sup> provides the guidelines governing Community wide competition in the public procurement sector. Articles 30, 52, 59 and 90 of the EEC Treaty each contain relevant provisions addressing public works contracts.<sup>20</sup> Article 30 prohibits quantitative restrictions on importation, or measures of equivalent effect,<sup>21</sup> and provides for the free movement of goods.<sup>22</sup> Article 52 requires that any restrictions on the freedom of establishment be abolished.<sup>23</sup> Article 53 supplements Article 52 by prohibiting Member States from introducing any restrictions on the establishment of nationals from other Member States.<sup>24</sup> The removal of restrictions on the free supply of services within the Community is required under Article 59.<sup>25</sup> Article 90 of the EEC

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1989, at 27; *Danes In Court*, Daily Telegraph, July 28, 1989, at 19; *Taylor Woodrow in 300M Pound Danish Western Bridge Joint Venture*, Origin Universal News Services, June 26, 1989, at 13.

<sup>19</sup> Treaty Establishing the European Economic Community, *opened for signature* Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. The EEC Treaty was signed by the following countries, listed in order of ratification: Italy, France, Federal Republic of Germany, Belgium, Luxembourg and the Netherlands.

<sup>20</sup> *Id.* at arts. 30, 52, 59 and 90. "Public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority which have as their object either the execution, or both the execution and design, of works, or the execution by whatever means of a work corresponding to the requirements specified by the contracting authority. A "work" is the outcome of building or civil engineering works, for example, taken as a whole that is sufficient to fulfill an economic or technical function. Council Directive of July 18, 1989, 32 O.J. EUR. COMM. (No. L 210) art. 1(a)(c), at 3 (1989) [hereinafter Directive 89/440].

<sup>21</sup> Under this provision, "measures of equivalent effect" includes any method used by public authorities to discriminate against imported goods where public contracts are concerned. Wooldridge, *Public Procurement in the European Community*, 1987 J. BUS. LAW 505, 506 n.5 [hereinafter Wooldridge].

<sup>22</sup> EEC Treaty, *supra* note 19, art. 30. The free movement of goods is recognized in the EEC Treaty as a fundamental principle in the organization of the Community. *Id.* at art. 3(a)(c).

<sup>23</sup> EEC Treaty, *supra* note 19, art. 52. "Freedom of establishment" includes the establishment of nationals of a Member State in the territory of another Member State, the right to manage enterprises, and the right to manage companies under the conditions laid down by the law of the country of establishment for its own nationals.

<sup>24</sup> *Id.* at art. 53.

<sup>25</sup> *Id.* at arts. 59-60. In Article 60, the meaning of "services" within the context of the EEC Treaty is clarified. "Services" is defined as services normally supplied for remuneration. These services include activities of an industrial and commercial nature and activities of craftsmen and professionals.

Treaty forbids the enactment of any measure contrary to the rules of the Treaty.<sup>26</sup> The European Court of Justice has held Articles 30, 52 and 59 to have direct effects<sup>27</sup> concerning instances of discrimination based on nationality.<sup>28</sup>

In 1971, the European Council supplemented the provisions of the EEC Treaty concerning public works with the first of three directives<sup>29</sup> dealing with government procurement.<sup>30</sup> Council Directive 71/305 (Public Works Directive) is applicable to public works contracts that are worth at least 1 million ECU<sup>31</sup> and awarded by state, regional or local authorities.<sup>32</sup>

The Public Works Directive addresses the procedural aspect of public works contracts in several articles. Article 12 requires that a public authority must advertise its intention to award a public works contract by publishing a notice in the Official Journal of the European Community.<sup>33</sup> The Directive also draws a distinction between open procedures, restricted procedures and negotiated procedures.<sup>34</sup>

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<sup>26</sup> *Id.* at art. 90.

<sup>27</sup> Within the European Economic Community, several types of Community acts may have "direct effect" on the domestic law of the Member States. The European Council may enact regulations which have direct effect on all Member States. Under certain conditions, other Community acts may have direct effect. Directives by the European Council and decisions by the Court of Justice which are addressed to Member States may have direct effect in the individual Member States so long as the requirements established are clear, precise, unconditional and enforceable without any new action by an EEC institution or State. Thys and Henry, *Government Procurement Regulations of the European Economic Community*, 20 GEO. WASH. J. INT'L LAW & ECON. 445, 446 (1986-87) [hereinafter Thys and Henry].

<sup>28</sup> Wooldridge, *supra* note 21, at 506 n.8.

<sup>29</sup> A majority of the legislation required to achieve the completion of the internal market takes the form of directives. These consist of legislative measures addressed to Member States requiring them to take such steps as are necessary to bring their laws into conformity with Community laws. Member States are usually given a time limit within which to implement directives. CHANCE, 1992: AN INTRODUCTORY GUIDE (1988).

<sup>30</sup> Council Directive of July 26, 1971, 14 O.J. EUR. COMM. (No. L 185), art. 7(1), at \_\_\_\_ (1971) [hereinafter Council Directive 71/305].

<sup>31</sup> The ECU is a monetary unit based on a collection of Community national currencies and is used for Community financial transactions. As of September 30, 1989, one ECU was equal to \$1.10. *Fin. Times*, Sept. 30, 1989, at 13.

<sup>32</sup> Council Directive 71/305, *supra* note 30, art. 7(1).

<sup>33</sup> *Id.* at art. 12.

<sup>34</sup> *Id.* at arts. 5, 9 and 10. The rules regarding open procedures apply in cases where any contractor may tender. The rules for restricted procedures apply where contractors may tender only if invited to do so by the party awarding the contract. The rules for negotiated procedures apply in cases where contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them. Wooldridge, *supra* note 21, at 507.

The Public Works Directive requires Member States to abolish any provisions concerning the award of public works contracts which favor local contractors over those from other Member States.<sup>35</sup> Article 10(1) of the Public Works Directive indicates that technical standards may be expressed in terms of the appropriate national standard only where the public authority is unable to give a description of the subject of the contract using precise specifications.<sup>36</sup> Public works contracts must not include technical specifications which mention products of a particular make or source.<sup>37</sup>

The Public Works Directive also provides a three-step procedure for the award of a public works contract. The first step involves excluding tenderers who are "non-admitted."<sup>38</sup> The second step entails a review of the tenderer's technical ability and financial standing.<sup>39</sup> The final step requires the selection of a contractor based on pre-defined criteria.<sup>40</sup> The criteria for the award of the contract must be either the lowest price or the most advantageous economic offer.<sup>41</sup> If the public authority opts for the latter, it must state in the notice of acceptance of tender to the Official Journal of the European Community the criteria intended to be applied in awarding the contract.<sup>42</sup>

Since the Public Works Directive was adopted, two additional Council Directives have been enacted in the area of government

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<sup>35</sup> Thys and Henry, *supra* note 27, at 448.

<sup>36</sup> Council Directive 71/305, *supra* note 30, art. 10(1). Article 10(1) states: unless such specifications are justified by the subject matter of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention products of a specific make or source or of a particular process and which therefore favour or eliminate certain undertakings. In particular, the indication of trademarks, patents, types, or of a specific origin or production shall be prohibited. However, if such indication is accompanied by the words 'or equivalent,' it shall be authorized in cases where the authorities awarding contracts are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned.

<sup>37</sup> *Id.* at art. 10(2).

<sup>38</sup> *Id.* at art. 24. A non-admitted tenderer is a tenderer who has not enrolled in the necessary professional or trade register of his home country. Thys and Henry, *supra* note 27, at 450 n.37.

<sup>39</sup> Council Directive 71/305, *supra* note 30, art. 26. The criteria used to evaluate a contractor's technical capacity includes the contractor's educational and professional qualifications, past work experience and equipment used.

<sup>40</sup> Thys and Henry, *supra* note 27, at 450-51.

<sup>41</sup> Council Directive 71/305, *supra* note 30, art. 29.

<sup>42</sup> *Id.* See *infra* note 33.

procurement. Directive 77/62 was implemented to extend the procedures of the Public Works Directive to public supply contracts.<sup>43</sup> Council Directive 77/62 was amended by Council Directive 80/67 to recognize the establishment of the Government Procurement Code following the Tokyo Round of multi-lateral trade negotiations under the General Agreement on Tariffs and Trade (GATT).<sup>44</sup>

The Government Procurement Code has limited applicability to public service contracts. The Code does not apply to pure service contracts such as those involving architectural and engineering services.<sup>45</sup> A government contract is subject to the Code only if it is primarily a supply contract and not a service contract.

On July 18, 1989, Council Directive 89/440 was enacted to amend the Public Works Directive. Several significant changes were made involving the coordination of procedures for the award of public contracts.<sup>46</sup> Article 12 details more stringent requirements for pre-publication of future works projects by contracting authorities.<sup>47</sup> These new requirements include publishing notice of the essential characteristics of the works contract, establishing the procedure (open, restricted, or negotiated) to be used in awarding the contract, and publishing notice of the actual awarding of the contract.<sup>48</sup>

The recent directive also increases the minimum time limits for the receipt of tenders following published notice by the contracting authority. Article 12 provides for a time limit of not less than 52 days where the open procedure is used to award the contract.<sup>49</sup> If the restricted or negotiated procedure is used, Article 12 allows a minimum of 37 days for the receipt of requests to participate.<sup>50</sup>

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<sup>43</sup> Council Directive of December 21, 1976, 20 O.J. EUR. COMM. (No. L 13) 1 (1976).

<sup>44</sup> Council Directive of July 22, 1980, 23 O.J. EUR. COMM. (No. L 215) 1 (1980). The Agreement on Government Procurement (Government Procurement Code) represents the first set of internationally accepted rules regulating government procurement practices. GATT Agreement on Government Procurement, *opened for signature* Apr. 12, 1979, T.I.A.S. No. 10403, 1235 U.N.T.S. 258 [hereinafter Government Procurement Code].

<sup>45</sup> Jarik, *A U.S. Perspective on the GATT Agreement on Government Procurement*, 20 GEO. WASH. J. INT'L LAW & ECON. 494 (1986-87).

<sup>46</sup> Council Directive of July 18, 1989, 32 O.J. EUR. COMM. (No. L 210), at 1 (1989) [hereinafter Council Directive 89/440].

<sup>47</sup> *Id.* at art. 12.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* In comparison, Council Directive 71/305, *supra* note 30, art. 13, allows for a 36 day time limit to be enforced by the contracting authority.

<sup>50</sup> Council Directive 89/440, *supra* note 46, art. 12. Council Directive 71/305 allows only a 21 day limit for negotiations involving the restricted and negotiated procedure. Council Directive 71/305, *supra* note 30, art. 14.

Directive 89/440 also establishes requirements regarding the awarding of a contract. Article 8 provides that for each contract awarded, the contracting authority must prepare a written report giving the names of those tenders admitted and the reason for such selection, the names of those tenderers rejected and the reasons for such rejection, and the name of the successful tenderer and the reason for its selection.<sup>51</sup>

Member States were notified of the enactment of Directive 89/440 on July 19, 1989.<sup>52</sup> The Member States have until July 19, 1990, to enact into law the necessary steps to implement this directive.<sup>53</sup> The Hellenic Republic, Spain and Portugal will have until March 1, 1992, to comply with the Directive.<sup>54</sup>

The Court of Justice of the European Communities has addressed the issue of discrimination by a public authority in awarding public works contracts in two recent cases. In the first case, the Italian Government was accused of failing to fulfill its obligation under the Public Works Directive to award the contract to the party who either tenders at the lowest price or offers the most economically advantageous tender.<sup>55</sup> Italy had enacted legislation requiring that the bid closest to the average tender be accepted.<sup>56</sup> The court held that such a rule was too mechanical to comply with the requirements of the Public Works Directive.<sup>57</sup> Thus, the defendant had failed to fulfill its obligation under Article 29 of the directive concerning the selection of a contractor.<sup>58</sup>

The European Court of Justice also has heard proceedings filed by the European Commission against a Member State concerning specifications within an advertisement for tenders.<sup>59</sup> Dundalk Urban District Council, an Irish municipality, solicited tenders with the specification that a particular standard of pipe be used in a water augmentation scheme.<sup>60</sup> However, only a company located in Ireland

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<sup>51</sup> Council Directive 89/440, *supra* note 46, art. 8.

<sup>52</sup> *Id.* at art. 24 n.1.

<sup>53</sup> *Id.* at art. 24.

<sup>54</sup> *Id.*

<sup>55</sup> *Re Public Works Contracts: E.C. Commission v. Italy*, 48 COMMON MKT. L.R. 345 (1987). See *supra* note 42.

<sup>56</sup> *Re Public Works Contracts: E.C. Commission v. Italy*, 48 COMMON MKT. L.R. at 352.

<sup>57</sup> *Id.* at 346.

<sup>58</sup> *Id.* at 355.

<sup>59</sup> *Re the Dundalk Water Scheme (No. 2): E.C. Commission v. Ireland*, 49 COMMON MKT. L.R. 563 (1985).

<sup>60</sup> *Id.* at 566.

manufactured the pipe at the required standard.<sup>61</sup> Although the court refused to delay the awarding of the contract on other grounds,<sup>62</sup> the court emphasized that if the awarding of the contract had not been necessary to prevent health and safety risks to the public, such specifications would violate the Public Works Directive.<sup>63</sup>

### III. ANALYSIS

The European Commission commenced its action against Denmark following a request from Buoygues of France, which claimed that the awarding of the contract violated European Community rules on the free movement of goods, services, and workers by requiring the use of largely Danish labor, equipment, and materials.<sup>64</sup> Following Article 30 of the EEC Treaty, which protects the free movement of goods, and Article 59, which protects the free supply of services, the European Council passed the Public Works Directive to promulgate liberal purchasing practices where public works contracts are involved. As a state-owned project company, Great Belt Link, Ltd., is subject to the Public Works Directive.<sup>65</sup>

The Public Works Directive prohibits a contract from containing any provisions which favor local contractors over those from other Member States.<sup>66</sup> The GBL contract, however, included requirements that Danish labor, equipment and materials be used "to the greatest possible extent."<sup>67</sup> Since the use of Danish labor, equipment, and materials clearly favors Danish contractors, the effect of the phrase "to the greatest possible extent" must be examined. The phrase may

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 568-71. The Court found that Article 3(5) of Council Directive 71/305, which states that "the provision of this Directive shall not apply to public works contracts awarded by the production, distribution, transmission or transportation services for water and energy," left this particular claim out of the realm of the Directive since it was a water augmentation scheme. The court was concerned that a delay in awarding the water contract would result in risks to public health and safety.

<sup>63</sup> *Id.* at 571.

<sup>64</sup> Dawkins, *supra* note 17, at 8.

<sup>65</sup> The disputed contract is worth approximately \$400 million (the equivalent of approximately 364 million ECU), which satisfies the monetary requirement of Directive 71/305. Council Directive 71/305, *supra* note 30, art. 7(1). The monetary requirement for public works contracts is ECU 1 million. *See supra* note 31. Directive 71/305 also requires that the contract be awarded by a public authority. Council Directive 71/305, *supra* note 30, art. 7(1).

<sup>66</sup> Thys and Henry, *supra* note 27, at 448.

<sup>67</sup> Whitney, *supra* note 6, at 7, col. 1.



be somewhat ambiguous, for example, Denmark could argue that if a French company were awarded the contract then the use of Danish labor, equipment, and materials would not be possible to a great extent. However, it is unlikely that a mere trace of uncertainty would reduce the effect of the provision which favors local contractors since the local contractors can most easily obtain employees, equipment, and materials from their own country.

The Public Works Directive also prohibits requirements concerning technical specifications which refer to products of a specific make or source.<sup>68</sup> The provision that materials and equipment from Denmark be used in the construction process clearly introduces specifications of a particular source.

Technical standards may be expressed in terms of the appropriate national standard only where necessary to provide an accurate description of the subject of the contract.<sup>69</sup> This is not the case with the contract awarded by GBL. The "Buy Danish" clause was included as more than a descriptive device, and the standards established by the clause are far from clear. A reference to "Danish labor, equipment, and materials" appears to exclude those tenders based on the use of labor, equipment and materials not from Denmark, an exclusion which violates EEC law.

The European Court of Justice has previously ruled on a contract containing technical specifications referring to products of a specific make or source.<sup>70</sup> Although the Court upheld the awarding of the contract for policy reasons,<sup>71</sup> it recognized that this judgment could be entirely different where a public works contract not involving health and safety risks to the public was involved.<sup>72</sup> The Danish service contract contains no pressing health or safety risks to the public. Following the reasoning of the Court, the specifications referring to Danish labor, materials and equipment violate the public procurement laws of the Community.

The issue is complicated by the deletion of the word "Danish" from the contract hours before the final signing.<sup>73</sup> Thus, technically no specification of a particular source exists. However, the "Buy

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<sup>68</sup> Council Directive 71/305, *supra* note 30, art. 10(2).

<sup>69</sup> Council Directive 71/305, *supra* note 30, art. 10(1).

<sup>70</sup> E.C. Commission v. Ireland, 49 COMMON MKT. L.R. at 563.

<sup>71</sup> See *supra* note 62.

<sup>72</sup> E.C. Commission v. Ireland, 49 Common Mkt. L.R. at 571.

<sup>73</sup> Barnes, *EC Commission Puts Up Roadblock on Danish Bridge*, Fin. Times, Aug. 8, 1989, at 2, col. 2.

Danish" requirement was included in the request for tenders, during the tendering process, during the decision-making process by GBL concerning possible contractors, and during all but the last few hours of negotiations. Due to its inclusion throughout the awarding process, the deletion has little curative effect.

Under the three-step method provided by the Public Works Directive for awarding a contract, only the final step involving the criteria used to award the contract is at issue.<sup>74</sup> The Public Works Directive requires that the contract be awarded to the lowest bidder or to the bidder who makes the most economically advantageous offer.<sup>75</sup> The Bouygues consortium offered the lowest bid but was not awarded the contract.<sup>76</sup> Danish authorities contend, however, that the offer by GBL was clearly the most economically advantageous even though not the lowest.<sup>77</sup>

In this type of situation, Directive 89/440 will obviously have a positive effect on the awarding of public works contracts. By requiring a contracting authority to prepare a written report containing the name of the tenderers accepted and rejected and justifications for both, Directive 89/440 will provide a more level playing field for all parties. The justifications for selection and rejection will be available for all interested parties to see, including governments of other Member States and the European Court of Justice. Contracting authorities may no longer award public contracts based merely on nationalistic sentiment.

In addition, Directive 89/440 will equalize the awarding of contracts by requiring more detailed notices of the acceptance of application for tenders and by extending the time limit for the receipt of tenders following published notice. These amendments to the Public Works Directive will allow contractors from around the Community to receive an objective evaluation of their tenders in all public works contracts.

The European Court of Justice has strictly interpreted the provisions of the Public Works Directive concerning the two criteria for awarding a public works contract. In *EC Commission v. Italy*, the Court held that a rule requiring that the bid closest to the average tender be

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<sup>74</sup> Council Directive 71/305, *supra* note 30, art. 29. The first step in the awarding of a public works contract is to exclude non-admitted tenderers. The second step is to review the tenderer's technical and financial capacities. *See supra* notes 24-25.

<sup>75</sup> Council Directive 71/305, *supra* note 30, art. 29.

<sup>76</sup> *Bouygues Cries Foul*, *supra* note 7, at 23.

<sup>77</sup> *Elsner*, *supra* note 2, at 1.

accepted was not in compliance with the directive.<sup>78</sup> Article 29(1) was interpreted narrowly and literally by the Court.<sup>79</sup>

From a policy standpoint, the effects of extending the public procurement laws to cover substantial international construction contracts are compelling. Presently, the government procurement market within the European Community is open on a very small scale to contractors from all Member States.<sup>80</sup> An analysis of the effect of EEC laws governing public procurement indicates that the harmony sought through the Treaty of Rome and the Public Works Directive has not been reached in this area.<sup>81</sup> The free movement of persons, services and capital is a fundamental principle of the EEC Treaty<sup>82</sup> and is vital to insure the effective development of economic activities within the Community. In a report to the Council of Ministers addressing the effectiveness of the three Council Directives concerning public procurement, the Commission estimated that the present system of awarding public contracts to national contractors wastes approximately 40 billion ECU per year.<sup>83</sup> This indicates the need for integration in the EEC's internal government contracts market. Presently, a large number of highways and bridges in Western Europe are becoming dilapidated and are desperately in need of repair. Contractors from Member States do not want to be limited to bidding only in the country where they happen to be based.<sup>84</sup>

The public procurement side-agreement to GATT and the subsequent Council Directive 80/67, amending Council Directive 77/62, do not apply to service contracts *per se*.<sup>85</sup> Although incidental services are not exempt from the Procurement Code,<sup>86</sup> pure service contracts such as those involving architectural or engineering services are not

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<sup>78</sup> E.C. Commission v. Italy, 49 COMMON MKT. L.R. at 346.

<sup>79</sup> See *supra* note 30.

<sup>80</sup> Wooldridge, *supra* note 21, at 505.

<sup>81</sup> *Id.* at 508.

<sup>82</sup> EEC Treaty, *supra* note 19, art. 1.

<sup>83</sup> Wooldridge, *supra* note 21, at 505.

<sup>84</sup> Whitney, *supra* note 6, at 7, col. 2.

<sup>85</sup> Government Procurement Code, T.I.A.S. No. 10403, 1235 U.N.T.S. 258, art. I, para. 1. The Agreement applies to "any law, regulation, procedure and practice regarding the procurement of products by the entities subject to this Agreement. This includes services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not service contracts *per se*."

<sup>86</sup> *Id.* Incidental services are, for example, where a contract requires a contractor to perform follow-up maintenance work. See also Thys and Henry, *supra* note 27, at 494.

covered.<sup>87</sup> The public works service contract between Denmark's GBL and ESG therefore is not subject to the provisions of the GATT side-agreement and Council Directive 80/67.

#### IV. CONCLUSION

Although Denmark avoided sanctions from the Court of Justice by reaching a last minute settlement with the European Commission, the message from the governing bodies of the European Community seems clear. No longer can the Member States rely on the Commission to close its eyes to traditional discriminatory favoritism involving public works contracts. The Commission's adamant pursuit of Denmark brought the parties to within several days of possibly having the Court of Justice suspend the present contract with GBL, which would have cost the Danish government an estimated 200 million dollars and delayed the project for a year and a half, before Denmark admitted guilt and agreed to make amends to the remaining tenderers.

The opening up of a Community-wide market in the public procurement sector will benefit industry and commerce throughout the Community. These benefits clearly outweigh the criticisms that the powerful bureaucracy in Brussels is taking too much control. The Community's governing bodies must be allowed to exercise some form of authority over the Member States in order to promote economic and social progress. The mandate from Brussels to abolish discrimination in the awarding of public contracts should not be viewed as a dictatorial show of strength, but as a necessary step towards the unification of the Community. Attempts by public authorities, such as Denmark, to maintain long-practiced limitations on bidding have no place in the transition to a European Community free of trade and competition barriers.

*G. Brian Raley*

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<sup>87</sup> Thys and Henry, *supra* note 27, at 494 n.29. During the negotiations of the Government Procurement Code, the United States sought a more expansive coverage, specifically requesting to include service contracts. This was not agreed to.