JUDGMENT OF THE COURT (Fifth Chamber)
24 June 1986 *

In Case 267/82

Développement SA, a company incorporated under French law, whose registered office is at 9 place de la Madeleine, Paris,

and

Clemessy, whose registered office is at 18 rue de Thann, Mulhouse, both represented by Jean Yves Le Mazou, Avocat at the Cour d'appel de Paris, of 52 rue du Faubourg-Saint-Honoré, Paris, and by André Elvinger, avocat-avoué, of Luxembourg, with an address for service at the latter's Chambers,

applicants,

v

Commission of the European Communities, represented by its Legal Adviser, Peter Gilsdorf, acting as Agent, assisted by Daniel Jacob, of the Brussels Bar, 93 avenue Brillat-Savarin, 1050 Brussels, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION under Article 178 and the second paragraph of Article 215 of the EEC Treaty for an order requiring the European Economic Community to pay the applicants the sum of FF 1 202 754 by way of compensation for the damage allegedly suffered by them on account of the conduct of the Commission of the European Communities in the course of the tendering procedure for the construction of the Somali Pharmaceutical Institute financed by the European Development Fund,

* Language of the Case: French.

THE COURT (Fifth Chamber)

composed of: U. Everling, President of Chamber, R. Joliet, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: G. F. Mancini
Registrar: D. Louterman, Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 4 February 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application lodged at the Court Registry on 29 September 1982, two French undertakings, Développement SA, having its registered office in Paris, and Clemessy, having its registered office in Mulhouse, brought an action under Article 178 and the second paragraph of Article 215 of the EEC Treaty claiming that the Community should be ordered to pay them the sum of FF 1 202 754 by way of compensation for damage allegedly caused by the Commission's conduct as a result of which the contract for the construction of the Somali Pharmaceutical Institute, financed by the European Development Fund (hereinafter referred to as 'the Fund'), was not awarded to them.

2 Under a Convention concluded between the European Economic Community and the African, Caribbean and Pacific States ('the ACP States'), signed on 28 February 1975 at Lomé (hereinafter referred to as 'the First Lomé Convention'), the Community decided to make a contribution out of the Fund's resources to the financing of a project submitted by the Somali Democratic Republic for the 'turn-key' construction of a pharmaceutical institute. With that end in view, on 6 June 1979 a financing agreement was concluded between the European Economic Community and the Somali Democratic Republic.

3 The facts, according to the applicants, are as set out below.

4 As a result of an invitation to tender organized by the Somali Ministry of Public Works, in which the closing date was fixed at 1 June 1980, five undertakings including the first applicant, Développement SA (which at the time was called Sopha Développement), in association with the second applicant, Clemessy, submitted tenders. The tenders were received and, on 2 June 1980, examined by a committee of the Somali Ministry of Public Works which set up a Technical Committee from amongst its own members to assess the tenders. On 28 June 1980 the Technical Committee reached the conclusion that Développement SA's tender was the most advantageous and should be accepted. On 22 July 1980 the President of the Somali Democratic Republic wrote to the Ministries of Planning, Health, Public Works and Industry instructing them to 'finalize' the proposal in question.

5 However, the contract was not awarded to Développement SA which, at the request of the Fund, which pointed to a certain lack of precision in the tender, on 13 October 1980, submitted further details of those tenders. Since those additional details were in turn considered insufficient, Développement SA was informed by a telex message from the Commission of 24 November 1980, that a fresh tendering procedure would be opened for which an expert designated by the Somali Government was to be appointed from a list put forward by the Commission. On 20 February 1981 the expert submitted a report containing an assessment of the offers submitted by the three lowest tenderers (Développement SA, Dravo Costruttori and Montitalia) and proposed a list of recommendations addressed to those undertakings for adapting their projects in accordance with the revised programme laid down by him and a new timetable.

6 On 15 March 1981 the Somali Government decided to annul the invitation to tender and to open direct negotiations with the three lowest tenderers pursuant to Articles 10 and 53 of the General Conditions relating to public works and supply contracts financed by the European Development Fund (Official Journal 1972, L 39, p. 1) (hereinafter referred to as 'the General Conditions'). The detailed rules governing the new procedure were laid down in April 1981. On 30 April 1981, Développement SA, in association with Clemessy, submitted fresh tenders amounting to FF 54.6 million, before the closing date, together with a letter to the

Somali Government offering to reduce the amount to FF 47 million by excluding certain non-essential services. Dravo Costruttori also submitted fresh tenders.

7 The tenders were opened on 9 May 1981 and negotiations were subsequently conducted in Mogadishu between the tenderers, the expert and the Somali Technical Committee. On 14 May 1981 the members of the Somali Technical Committee unanimously came to the conclusion that the contract should be awarded to Développement SA, and requested the latter to confirm in writing the matters which had been agreed during the negotiations.

8 On 19 May 1981 the Commission's representative asked the Somali Vice-Minister of National Planning to delay the adoption of the decision awarding the contract to Développement SA until the expert had drafted a new report.

9 In a letter of 9 June 1981 to the Somali authorities, the expert pointed out that the Somali Technical Committee's report of 14 May 1981 contained a number of inaccuracies and errors of assessment.

10 Développement SA was notified of the expert's letter on 17 June 1981 and a further round of negotiations followed. It was finally informed orally on 10 August 1981 that the contract had been awarded to the company Dravo Costruttori.

11 The applicants explain that, following the decision to award the contract to Dravo Costruttori, they brought this action claiming compensation for that part of the damage suffered which consists of mission expenses incurred in travel to Somalia and within the European Community and of various disbursements resulting from their participation in the tendering procedures. They maintain that the damage suffered was attributable to constant interference by the Commission, which prevented the contract from being awarded to them in spite of the fact that at the end of the first stage the Somali Technical Committee and the President of the Somali Republic had decided in their favour and that following the second stage the Technical Committee had again decided the matter in their favour.

12 In their application, which is based on the second paragraph of Article 215 of the EEC Treaty, the applicants rely in the first place on the Community's non-contractual liability for unlawful conduct, and secondly on the principle of strict non-contractual liability.

13 The Commission contends that the application should be dismissed as inadmissible and in any event as unfounded.

Admissibility

Jurisdiction of the Court

14 The Commission raises an objection of inadmissibility, arguing that the Court has no jurisdiction in this case because the action for damages brought by the applicants cannot be directed against the Commission. It emphasizes that, under the procedure for negotiating, concluding and performing public works contracts financed by the Fund, responsibility for adopting the necessary decisions rests, according to Article 55 of the First Lomé Convention, with the national authorities of the ACP State which is the beneficiary of financing, as they alone deal directly with tenderers. The Commission has no dealings with the tenderers and its role is confined to cooperating with the competent national authorities. Accordingly, any disputes arising from the negotiation, conclusion and performance of such contracts can concern only the national authorities of the relevant ACP State and are to be settled by arbitration, as provided for by Article 55 of the General Conditions, once the administrative remedies available under the national legislation of the ACP State concerned have been exhausted.

15 In reply, the applicants state that their application does not seek to challenge the validity of the decisions adopted by the Somali authorities or to establish their liability, and that it is based not on the provisions of the General Conditions but on the second paragraph of Article 215 of the EEC Treaty in invoking the Commission's liability for its conduct.

16 As the Court pointed out in its judgment of 10 July 1985 in Case 118/83 (*CMC Cooperativa muratori e cementisti and Others* v *Commission* [1985] ECR 2325),

although the authorities of the ACP State concerned, which alone has dealings with the tenderers, are responsible for preparing, negotiating and concluding contracts relating to a project financed by the Fund, it 'would be wrong to dismiss the possibility that acts or conduct of the Commission or its officials and agents in connexion with projects financed by the European Development Fund might cause damage to third parties. Any person who claims to have been injured by such acts or conduct must therefore have the possibility of bringing an action, if he is able to establish liability, that is, the existence of damage caused by an illegal act or by illegal conduct on the part of the Community'.

17 In this case, the applicants are seeking precisely to establish that the Commission is liable by challenging the actions of its agents and by relying on the second paragraph of Article 215 of the EEC Treaty. The objection of inadmissibility must therefore be rejected.

Failure of the application to specify how the damages sought are to be apportioned between the applicants

18 The Commission also maintains that the application is inadmissible inasmuch as it fails to specify how the damages sought are to be apportioned between the two applicants.

19 As the applicants rightly point out, the manner in which the damages are to be apportioned between them does not affect any obligation which the Commission may have to compensate them jointly, nor can it affect the admissibility of the application.

20 Accordingly, this objection of inadmissibility must also be rejected.

Substance

Liability for wrongful conduct

21 The applicants' main complaint is, in substance, that although on more than one occasion the Somali authorities considered the applicants' tender to be economically the most advantageous, the Commission systematically sided against them

by repeatedly and unforeseeably intervening in the tendering procedure without stating any reasons for its attitude. In addition, the applicants rely as a secondary matter on the following specific complaints concerning the course of the procedure: the timetable prepared by the expert who was designated by the Commission was discriminatory inasmuch as it was drawn up unilaterally in order to exclude them; the Commission refused to notify them of the timetable for the procedure, as set out in Chapter II of the expert's report, and denied them access to the correspondence exchanged between the Somali authorities and the Commission; and finally the Commission did not provide them with essential information which they needed in order to take part in the procedure.

22 The applicants consider that the Commission's conduct referred to above constitutes an infringement of (a) Protocol No 2 to the First Lomé Convention, which makes it obligatory to choose the tender that is economically the most advantageous, namely in this case that of the applicants, (b) the principle of non-discrimination, (c) the principle of the protection of legitimate expectation, and (d) certain procedural rules.

23 The Commission replies essentially that the measures which were taken by the Somali authorities and on which the applicants rely were merely opinions and that those authorities never adopted a definitive decision in the applicants' favour. It emphasizes that it had direct dealings only with the Somali authorities and not with the tenderers, and that its representations to those authorities were intended to help ensure that the most advantageous tender was chosen. That being so, the Commission is not under a duty to give reasons for its attitude and, in any event, an action based on the second paragraph of Article 215 of the EEC Treaty cannot be founded on the absence of a statement of reasons. The Commission adds that the expert was chosen by the Somali authorities from a list of three experts put forward by it and that the only information of any interest to the tenderers in Chapter II of the expert's report, namely the closing date for the submission of revised tenders, was notified to them in due time, whilst the rest of the report was confidential.

24 It should be noted with regard to the applicants' specific complaints concerning the discriminatory nature of the timetable drawn up by the expert and the refusal to give them access to Chapter II of that report or to provide them with information enabling them to take part in the procedure that the conduct complained of is that of the Somali Government or the expert designated by it. Accordingly, the Commission cannot be held responsible for their conduct and it has not incurred any liability.

25 As to the specific complaint that the Commission refused to give the applicants access to the correspondence exchanged between itself and the Somali Government, it must be borne in mind, as the Court pointed out in its judgment of 10 July 1984 in Case 126/83 (*STS* v *Commission* [1984] ECR 2769), that, 'the measures adopted by the Commission's representatives during that procedure, whether approvals or refusals to approve, endorsements or refusals to endorse, are solely intended to establish whether or not the conditions for Community financing are met. They are not intended to interfere with the principle that the contracts in question remain national contracts which the ACP States alone are responsible for preparing, negotiating and concluding, and they cannot have that effect'. Furthermore, 'for their part, undertakings which submit tenders for or are awarded the contracts in question remain outside the exclusive dealings conducted on this matter between the Commission and the ACP States'. It follows that the correspondence exchanged between the Commission and the Somali Government was concerned solely with the exclusive dealings which are conducted in this area between those authorities, and the Commission was not under a duty to give third parties access to it.

26 With regard to the first of the applicants' complaints of a general nature to the effect that, by interfering in the tendering procedure, the Commission reversed the outcome of a decision adopted by the Somali authorities awarding the contract to the applicants, it should be noted that the latter, as the Commission rightly maintains, were at no time recognized as successful tenderers by a decision emanating from the competent national authorities, in accordance with Article 30 (2) and (3) of Protocol No 2 to the First Lomé Convention, or notified in the manner provided for by the General Conditions. The opinions of the Technical Committee and other documents relied upon by the applicants never went beyond the stage of the internal procedure and did not culminate in the adoption of a measure that was firmly binding on the competent national authorities. Hence the applicants' complaint that, by interfering in the procedure, the Commission reversed the outcome of a decision adopted by the Somali authorities, is misconceived.

27 With regard to the second general complaint to the effect that, through the actions of its agents, the Commission prevented the contract from being awarded to the applicants by decision of the Somali authorities, it should be noted that the Commission has not only the right but also the duty, as part of the responsibilities conferred upon it for the proper management of the resources of the fund, to ensure that the appropriate procedural rules are complied with and that the tender selected is economically the most advantageous, taking into account in particular

the qualifications of and the guarantees offered by the tenderers, the nature and conditions of execution of the works and the price, utilization costs and technical value of those works.

28 It is clear from the documents before the Court that, in this case, the intervention complained of was intended and served only to determine which tender was economically the most advantageous by dispelling any doubts in that regard. Consequently the action taken by the Commission's representatives cannot be described as unlawful.

29 It follows from the foregoing considerations that the first condition which is necessary in order to render the Community liable has not been fulfilled. It is therefore unnecessary to consider whether there is a causal connection between the Commission's conduct and the damage allegedly sustained, or to assess such damage.

Strict liability

30 The applicants maintain that even if the Commission's intervention was lawful inasmuch as it was justified by policy considerations or in the public interest, none the less from an objective standpoint it caused them damage which should be made good, in accordance with the principle of strict liability which forms part of the general principles of law common to the Member States.

31 According to the applicants, that principle should in this case be interpreted as meaning that there is nothing in the wording of the Treaties, the general principles of law or the circumstances of the case to justify making the applicants bear a financial burden which was incurred in the public interest and which should be borne by the Community as a whole.

32 The Commission maintains that the principles on which the applicants rely have not been recognized by the Court and that, in any event, the conditions for their application are not fulfilled in this case, particularly because no decision was adopted awarding the contract to the applicants.

33 It should be noted that the principle of strict liability, as described by the applicants, implies that an individual has to bear, in the public interest, a financial burden which would not normally fall upon him. In this case, the damage allegedly sustained by the applicants is merely the result of the ordinary risk taken by any tenderer taking part in a tendering procedure. Accordingly, without there being any need to consider whether such a principle of strict liability exists in the Community's legal system, this submission must be rejected.

34 In the light of all the foregoing considerations, the application must be dismissed.

Costs

35 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. As the applicants have been unsuccessful in their submissions, they are jointly and severally liable to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) Dismisses the application.

(2) Declares that the applicants are jointly and severally liable to pay the costs.

Everling Joliet

Due Galmot Kakouris

Delivered in open court in Luxembourg on 24 June 1986.

P. Heim U. Everling

Registrar President of the Fifth Chamber