JUDGMENT OF THE COURT (Second Chamber)

11 October 2007 *

In Case C-237/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 30 May 2005,

Commission of the European Communities, represented by M. Patakia and X. Lewis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by G. Kanellopoulos and S. Charitaki, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Greek.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, G. Arestis, L. Bay Larsen, R. Schintgen and P. Kūris, Judges,

Advocate General: P. Mengozzi,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 September 2006,

after hearing the Opinion of the Advocate General at the sitting on 15 February 2007,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court of Justice to declare that, by reason of the practice of the competent authority with regard to the completion and collation of applications and declarations by cereal producers and others under the integrated administration and control system for the year 2001, the Hellenic Republic has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for

the award of public service contracts (OJ 1992 L 209, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1, 'Directive 92/50'), particularly Articles 3(2), 7, 11(1) and 15(2) thereof, and the general principle of transparency.

Legal context

Directive 92/50

2 Under Article 1(a) of Directive 92/50, '"*public service contracts*" shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority', to the exclusion of the contracts listed in that same provision under (i) to (ix).

3 Article 3(1) and (2) of that directive provides:

'1. In awarding public service contracts or in organising design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive.

2. Contracting authorities shall ensure that there is no discrimination between different service providers.'

4 Under Article 7(1)(a) of Directive 92/50:

'1. (a) This Directive shall apply to:

— ... public service contracts concerning the services referred to in Annex I B, ... awarded by the contracting authorities referred to in Article 1(b), where the estimated net value of value added tax (VAT) is not less than ECU 200 000,

— public service contracts concerning the services referred to in Annex I A ...:

(i) awarded by the contracting authorities listed in Annex I to Directive 93/36/EEC where the estimated value net of VAT is not less than the equivalent in ecus of 130 000 special drawing rights (SDRs);

(ii) awarded by the contracting authorities listed in Article 1(b) other than those referred to in Annex I to Directive 93/36/EEC and where the estimated value net of VAT is not less than the equivalent in ecus of 200 000 SDRs.'

5 Under Article 8 of Directive 92/50, '[c]ontracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI'.

6 Article 9 of the directive states:

'Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.'

7 Article 11(1) of the same directive provides that, in awarding public service contracts, contracting authorities are to apply the open, restricted and negotiated procedures defined in Article 1(d), (e) and (f), of that directive.

8 Under Article 15(2) of Directive 92/50:

'Contracting authorities who wish to award a public service contract by open, restricted or, under the conditions laid down in Article 11, negotiated procedure, shall make known their intention by means of a notice.'

Regulation (EEC) No 3508/92

9 It is clear from the third and fourth recitals of the preamble to Council Regulation (EEC) No 3508/92 of 27 November 1992 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355, p. 1), as amended by Council Regulation (EC) No 1593/2000 of 17 July 2000 (OJ 2000 L 182, p. 4,'Regulation No 3508/92'), that, as part of the reform of the common agricultural policy and in order to adapt the administration and control mechanisms to the new

situation and improve their effectiveness and usefulness, it is necessary to set up a new integrated administration and control system covering the aid schemes for arable crops, beef and veal, sheepmeat and goatmeat ('IACS').

10 Article 2 of Regulation No 3508/92 provides:

'The [IACS] shall comprise the following elements:

(a) a computerised database;

(b) an identification system for agricultural parcels;

(c) a system for the identification and registration of animals;

(d) aid applications;

(e) an integrated control system.'

11 Under Article 3(1) of the regulation:

'The computerised database shall record, for each agricultural holding, the data obtained from the aid applications. This database shall in particular allow direct and

immediate consultation, through the competent authority of the Member State, of the data relating at least to the previous three consecutive calendar and/or marketing years.'

12 Article 4 of the same regulation provides:

'An identification system for agricultural parcels shall be established on the basis of maps or land registry documents or other cartographic references. Use shall be made of computerised geographical information system techniques including preferably aerial or spatial orthoimagery, with an homogenous standard guaranteeing accuracy at least equivalent to cartography at a scale of 1:10 000.'

13 Under Article 6(1) of Regulation No 3508/92:

'In order to be eligible under one or more Community schemes governed by this Regulation, each farmer shall submit, for each year, an "area" aid application indicating:

— agricultural parcels, including areas under forage crops, and agricultural parcels covered by a set-aside measure for arable land and those laid fallow,

— where applicable, any other necessary information provided for either by the Regulations relating to the Community schemes, or by the Member State concerned.'

14 Article 7 of the regulation is worded as follows:

'The [IACS] shall cover all aid applications submitted, in particular as regards administrative checks, on-the-spot checks and, if appropriate, verification by aerial or satellite remote sensing.'

The facts giving rise to the dispute and the pre-litigation procedure

15 A complaint was made to the Commission concerning the alleged unlawfulness, in the light of Directive 92/50, of a framework agreement and the implementing agreements thereof concerning the provision of certain services in the context of the implementation of the IACS in Greece for the year 2001.

16 The framework agreement was concluded on 20 February 2001 between the Greek Ministry of the Interior, the Civil Service and Decentralisation, the Greek Ministry of Agriculture, the Greek Union of Prefectoral Authorities and the Pan-Hellenic Association of Unions of Agricultural Cooperatives ('the framework agreement').

17 The framework agreement concerned coordination by that association of the following services supplied by its members, namely the unions of agricultural cooperatives ('the UACs'):

— informing farmers about the adoption of new forms for applications and for declarations relating to agricultural holdings and crops, which will supply data to be added to the new IACS database;

— providing assistance with a view to ensuring that data provided by farmers are entered correctly and in good time using the relevant forms. That service includes, in particular, technical assistance for the identification of cultivated areas on orthophotographs, aerial photographs or topographical maps;

— collecting the forms and sending them in hard copy or electronic format to the competent prefectoral authority.

18 To that effect, the framework agreement provides for the conclusion of implementing agreements between the prefectoral authorities and the UACs at the level of each prefecture. Subsequently, such contracts were actually awarded (the 'contracts at issue').

19 By letter of 18 December 2002, the Commission gave the Hellenic Republic formal notice to submit its observations on the plea in law alleging that, by awarding the service contracts to the UACs directly and without prior advertising, it had failed to comply with the provisions of Directive 92/50, in particular Article 3(2) thereof, and the principle of non-discrimination.

20 On 19 December 2003, the Commission, taking the view that the observations submitted in response to its letter by the Hellenic Republic were inadequate, issued a reasoned opinion inviting that Member State to take the measures necessary to comply with the opinion within a period of two months from the date of its notification.

21 The Commission was not convinced by the Hellenic Republic's responses to the reasoned opinion and decided to bring the present proceedings.

Admissibility

22 The Hellenic Republic raises a plea of inadmissibility against the Commission's action, alleging that it does not have a legal interest in bringing the proceedings and that the action is devoid of purpose.

23 In that connection, the Member State claims, first, that it took the necessary measures to bring the alleged failure to fulfil obligations to an end and that it was no longer in existence by the expiry of the period prescribed by the reasoned opinion for compliance, since:

— over the course of 2003, there were no direct awards of contracts for the services at issue and the right to tender was extended to entities other than the UACs;

— by Official Declaration No 5767 of the Secretary-General of the Ministry of Agriculture of 6 November 2003, the Greek authorities undertook 'to use, if necessary, competitive tendering procedures for the award of the service contracts at issue, provided always that those services fall, wholly or in part, under Annex I A of Directive 92/50'.

24 Secondly, the Hellenic Republic submits that, by the expiry of the period prescribed for it to comply with the reasoned opinion, the alleged failure to fulfil obligations, which concerned the year 2001 only, was no longer in existence and had ceased to have any effects.

25 The Commission contends that a finding of failure to fulfil obligations is necessary because there is no guarantee that Directive 92/50 will be applied effectively and correctly, either in the present dispute concerning the year 2001, or in the future.

26 First, not only is Declaration No 5767 inadequate because it is not legally binding but it is also vague owing to the use of the expression 'if necessary'.

27 Secondly, the continuing disagreement between the Hellenic Republic and the Commission regarding the unique nature of the contracts at issue, and also as to whether the services concerned are included in Annex I A of Directive 92/50, is far from being theoretical and entails a risk that the Member State will reoffend.

28 Finally, there is no guarantee that Directive 92/50 will be correctly applied in the future since, during the years following 2001, the service contracts in question have also been awarded directly to the UAC.

29 In that regard, it is important to note that, as regards the award of public procurement contracts, the Court has held that an action for failure to fulfil obligations is inadmissible if, when the period prescribed in the reasoned opinion expired, the contract in question had already been completely performed (see Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraphs 11 and 13, and Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraph 18).

30 Accordingly, it is necessary to verify whether, when the period prescribed by the reasoned opinion expired, that is to say, on 19 February 2004, the contracts at issue were, at least partly, still being performed or whether, on the contrary, the assistance work for which they were concluded was at that date already fully completed, so that they had been completely performed.

31 In the present case, the failure to fulfil obligations alleged by the Commission, described expressly in the claims in the application initiating proceedings, concerns the assistance provided by the UACs in the context of the implementation of the

IACS solely for the year 2001, as those services are detailed in the contracts at issue concluded, in respect of that same year, for the performance of the framework agreement. At the hearing, the Commission confirmed that its action was limited to the year 2001 alone.

32 The assistance work provided for by the contracts at issue concerns the preparation of aid applications submitted by farmers for the purpose of recording the data they contain on the IACS database in accordance with Article 3(1) of Regulation No 3508/92. Those applications must be submitted annually to enable payments for the year in question to be paid. Therefore, these are, in essence, services related to an annual exercise concluded by the payment of the aid granted.

33 In that connection, it is necessary to state that Article 5(1) of the framework agreement — a provision which also appears in the contracts at issue — provides that they are to enter into force on the day they are signed and expire when all the financial aid has been paid to the farmers who applied for it.

34 The Commission was not able to refute the Hellenic Republic's argument, put forward by its representative at the hearing, that the payment of aid for the year 2001 was made in full in the course of the following year, in other words well before the expiry of the period prescribed by the reasoned opinion.

35 In the absence of indications from the Commission to the contrary, it must accordingly be found that, by the date that the period prescribed by the reasoned opinion expired, the framework agreement and the contracts at issue concerning the performance of that agreement for the year 2001 had already exhausted all their effects.

36 At the hearing, the Commission maintained that, unlike the infringement at issue in *Commission* v *Italy*, the failure to fulfil obligations which is the subject of the present action, namely awarding the services of assistance to the UAC directly and without advertising, was repeated in the years following 2001, in other words before the present case was brought.

37 In that connection, it must be observed that the Commission has not succeeded in refuting the Hellenic Republic's submissions that, in those years, those services of assistance were provided under a procedure which was radically different from that followed for the year 2001.

38 In particular, the Commission has not succeeded in calling into question the statement made by the representative of the Hellenic Republic at the hearing on the basis of supporting documents submitted by the Greek Government, in response to a question asked in that regard by the Court, to the effect that, for the years following 2001, the Greek State budget made no provision for payment in consideration of the services of assistance provided by the UACs, since from that point onwards the UACs received a payment from each farmer for the services they provided to him.

39 It follows that, having regard to the evidence presented to the Court, the Commission has not succeeded in demonstrating to the requisite legal standard that the failure to fulfil obligations alleged by the Commission against the Hellenic Republic in respect of the year 2001 recurred in subsequent years.

40 Finally, concerning the Commission's argument to the effect that its action is admissible by virtue of the continuing dispute between it and the Hellenic Republic concerning the interpretation of Directive 92/50 in the light of the specific characteristics of the public contracts at issue, it is sufficient to note that that circumstance alone is not enough to make the action admissible.

41 It follows from all the foregoing that the Commission's application must be dismissed as inadmissible.

Costs

42 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Hellenic Republic has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the action as inadmissible;

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

[Signatures]