OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 4 February 1986 *

Mr President,
Members of the Court,

1. In an application lodged at the Court Registry on 29 September 1982, two French construction undertakings, Développement SA and Société Clemessy, charge the Commission of the European Communities with acting in such a way as to deprive them of the award of the contract for the construction of the building for the Somali Pharmaceutical Institute. They consequently seek an order from the Court pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty requiring the Commission to pay them the sum of FF 1 202 754 by way of compensation for the damage which they have allegedly suffered.

The facts of the case may be summarized as follows: In the context of its financial cooperation with the ACP States under the First Lomé Convention, signed on 28 February 1975 (Official Journal 1976, L 25, p. 1), the European Economic Community undertook to finance out of the European Development Fund (hereinafter referred to as 'the Fund') a project for the construction of the aforesaid Institute. On the basis of the agreement concluded on the matter, the Somali Minister for Public Works organized an invitation to tender on 12 December 1979 in which five undertakings took part: Montitalia, Dravo Costruttori, General Impiant, Astaie and — jointly with Société Clemessy — Développement SA which at the time was called Sopha Développement. On 19 August 1981, following a somewhat involved procedure lasting over a year, the national authorizing officer, namely the Somali Minister for Planning, officially notified the Community's representative in Mogadishu of the decision to award the contract to Dravo Costruttori.

In their application, the applicants contend that during the tendering procedure the Commission exerted pressure on the Somali authorities to persuade them to change their initial decision to award the project to Sopha Développement in favour of Dravo Costruttori.

In particular, the applicants maintain that (a) after formally accepting Sopha Développement's tender on 28 June 1980, the Somali authorities decided on 15 March 1981 to annul the tendering procedure and to commence direct negotiations with Sopha Développement, Drave Costruttori and Montitalia, the three lowest tenderers; (b) that step was taken in accordance with instructions received from the Community and on the basis of a technical report submitted by Professor Lhoest, a Belgian expert entrusted by the national authorizing officer with the assessment of the tenders submitted by the five undertakings concerned; (c) on 14 May 1981 the contract was again awarded to Sopha Développement, this time on the basis of a tender submitted in conformity with the criteria specified by the expert; and (d) five days later the Community's representative wrote to the Minister concerned asking him to suspend the measure awarding the contract pending the submission of a second report by Professor Lhoest. Three months later the project was finally awarded to Dravo Costruttori.

* Translated from the Italian.

2. In the light of those facts, the applicants maintain that the Commission is liable for depriving them on two occasions of a contract for which they had tendered successfully and claim compensation for all the costs incurred by them in Europe and in Somalia throughout the tendering procedure.

In a document which was received at the Court Registry on 6 December 1982, however, the Commission objected that the application was inadmissible and asked the Court, pursuant to Article 91 (1) of the Rules of Procedure, to give a decision on its objection without considering the substance of the case. In the Commission's view, the Court has no jurisdiction to hear the case, having regard both to the rules which, in a tendering procedure, govern legal relations between the Commission, the ACP States and the undertakings concerned, and to the provisions for resolving any disputes which may arise in the matter. The defendant also points out that an action brought under Articles 178 and 215 is subsidiary to the means of redress available under national law. In other words, Société Clemessy and Développement SA should have instituted proceedings in the national courts first.

After considering the applicants' reply, the Court resolved, by order of 18 May 1983, to decide on the objection in its final judgment. The Commission's argument is, in any event, devoid of substance. Some months ago, in considering an objection which was in every respect identical to the objection raised in this case, the Court held with regard to the procedures for implementing projects financed by the Fund that it 'would be wrong to dismiss the possibility that acts or conduct of the Commission ... might cause damage to third parties. Any person who claims to have been injured by such acts ... must therefore have the possibility of bringing an action, if he is able to establish liability ... on the part of the Community'. The Court came to the conclusion that 'the objection of inadmissibility raised by the Commission must be rejected in so far as it refers to the action for damages brought pursuant to Article 178 and the second paragraph of Article 215 of the Treaty' (judgment of 10 July 1985 in Case 118/83 *Muratori and Others* v *Commission* [1985] ECR 2325). The same conclusion applies in this case.

3. I now turn to the substance of the case. According to the applicants, the Commission is liable by virtue of its wrongful acts and, in the alternative, it is strictly liable. They rely on four submissions in support of their primary contentions, namely that the Commission has:

(1) contravened the principle of non-discrimination laid down by Article 215 of the Second Lomé Convention (Article 56 of the *First* Lomé Convention is meant) which provides that participation in tendering procedures and in other procedures for the award of contracts financed by the Fund is to be open on equal terms to all natural and legal persons of the Member States and ACP States;

(2) acted in such a way as to frustrate the applicants' legitimate expectations;

(3) been responsible for a number of irregularities invalidating the procedure which culminated in the award of the contract to Dravo Costruttori; and

(4) infringed Article 25 (Article 21 is meant) of Protocol No 2 to the First Lomé Convention, according to which the contract must be awarded to the economically most advantageous tender.

For the sake of convenience, I will consider the second and third submissions first. In those submissions the applicants charge the defendant with failing to provide them with sufficiently detailed information concerning the procedure, failing to state the reasons for the decisions appointing the expert and annuling the invitation to tender, denying them access to the correspondence

exchanged between the Commission and the Somali authorities and withholding from them the reasons why Professor Lhoest fixed a timetable for direct negotiations in his first report.

How are those arguments to be assessed? It seems to me that far from establishing the existence of unlawful conduct on the part of the Commission, those arguments call in question the legality of the procedure for the award of the contract and the validity of the measure adopted in connection therewith. If that is so, however, they are not matters within the jurisdiction of the Court of Justice. In the *Muratori* judgment the Court held that 'in this case there is no measure [of the Commission] capable of being the subject of proceedings under Article 173 of the Treaty' and the reason for that is obvious. The measures adopted by representatives of the Community in connection with tendering procedures for the award of public works contracts financed by the Fund are solely intended to establish whether or not the conditions for payment of the sums in question are fulfilled. In other words, they are not intended to 'interfere with the principle that [the procedures and] the contracts in question remain national [procedures and] contracts which the ACP States alone are responsible for preparing, negotiating and concluding . . . [with the result that] undertakings which submit tenders . . . remain outside the . . . dealings conducted . . . between the Commission and the ACP States' (judgment of 10 July 1984 in Case 126/83 *STS* v *Commission* [1984] ECR 2769).

Even in the context of non-contractual liability, it is in any event quite clear that, whether or not they are unfounded, the applicants' charges — namely, failure to state the grounds on which certain measures were based and failure to give the applicants an opportunity to acquaint themselves with certain aspects of the tendering procedure — cannot be directed against the Community's representatives. The documents before the Court show in the first place that Professor Lhoest was appointed on 3 December 1980 by the national authorizing officer, that is to say the Somali Minister for Planning, from a list of experts submitted to him by the Commission at his request. The same applies to the decisions to annul the tendering procedure and to open negotiations with the three undertakings that had submitted the lowest tenders, which were also adopted, 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. 3) (hereinafter referred to as 'the General Conditions') by the Minister for Planning in his letter of 15 March 1981 which was duly sent to all the undertakings concerned. Those undertakings were also requested to reply to the questions raised in the expert's report and to submit new tenders not later than 30 April 1981.

Hence the measures for which the applicants hold the Commission responsible stem from the Somali authorities alone and, moreover, stated in full the reasons on which they were based, although Article 45 (4) of the aforesaid General Conditions expressly provides that the administration is not required to state the reasons for a measure annulling an invitation to tender. Moreover, I consider that there is no provision on which the applicants can found their contention that they should be given access to the correspondence exchanged between the Commission and the authorities awarding the contract. In any event, it is difficult to discern any causal connection between the defendants' alleged omission in that regard and the failure to award the contract to the applicants.

Finally, with regard to the allegedly inadequate information concerning the detailed rules governing the tendering procedure, I would recall that, according to Article 30 (2) of Protocol No 2 to the First Lomé Convention, the national authorizing officer and not the Commission is responsible for issuing invitations to tender and supervising the preparation, submission and appraisal of projects. Accordingly, the second and third submissions must be rejected.

4. That brings me to the first and fourth submissions which are based essentially on the premise that on two occasions, namely 28 June 1980 and 14 May 1981, the awarding authorities declared Sopha Développement the successful tenderer. By systematically criticizing the suitability and the quality of the tender submitted by Sopha Développement, without however making public the reasons for its criticisms, the Commission induced those authorities to reverse their decision and thus favoured the competing undertaking which finally secured the contract. Such conduct is contrary to Article 56 (1) of the First Lomé Convention, which lays down the principle that participation in tendering procedures for projects financed by the Fund is open to all undertakings on equal terms, and to Article 21 of Protocol No 2 to the First Lomé Convention, which provides that the tender selected must be economically the most advantageous.

In my view, the premise of that argument is incorrect: it is not true to say that Sopha Développement was recognized as the successful tenderer. The documents on which the applicants have based their assumption to the contrary do not constitute the formal proposal for placing the contract — which, pursuant to Article 30 (2) and (3) of Protocol No 2 to the First Lomé Convention, may be made only by the national authorizing officer — but are merely *opinions* delivered by the Somali Technical Committee, an advisory body attached to the local Ministry of Public Works. Furthermore, on neither of the two occasions in question was Sopha Développement sent the letter whereby the administration informs an undertaking that its tender has been selected (second subparagraph of Article 45 (2) of the General Conditions).

With regard to the Commission, I would refer to Articles 18 and 21 of Protocol No 2 to the First Lomé Convention, according to which, and in the interest of the proper management of Community resources, the Commission has not only the right, but also the *duty* to ensure that national tendering procedures are conducted in such a way as to culminate in the selection of the tender which 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 or supplies, and the price, utilization costs and technical value of those works or supplies'. According to the documents before the Court, that duty has been properly discharged. Far from harming or favouring one or other of the competing undertakings, the measures taken by the Community's officials helped to eliminate the many inaccuracies and omissions in the first projects submitted to the Somali authorities, enabling the latter to select the lowest tender on the basis of the expert's final report (which is not open to criticism in that respect).

As I said earlier, the applicants are asking the Court in the alternative to declare that the defendant is stricty liable, and in that regard they rely on the protection of property rights, of the kind afforded by German law, and on protection against

lawful though harmful acts of the public administration, in accordance with the criteria developed by the French courts. The question which would then arise is whether those principles form part of the common legal heritage of the Member States, but I do not believe there is any need to answer it. In order to refute the applicants' argument, it is sufficient to observe that none of the measures taken by the Somali authorities or by the Commission formally recognized Sopha Développement as the successful tenderer. Moreover, the fact that, in participating in the invitation to tender, Sopha Développement has incurred certain costs which it has had to bear itself does not infringe either its property rights or its legal status. Clearly it in no way follows from the mere fact that an undertaking has the right to take part in a tendering procedure that its tender will be accepted.

Having established that the Commission's conduct cannot be regarded as unlawful, I consider it superfluous to examine the parts of the application dealing with the amount of damages claimed since the application is unfounded.

5. On the basis of the foregoing considerations, I suggest that the Court should declare that the application submitted on 29 September 1982 by Développement SA and Société Clemessy is admissible but should dismiss it as unfounded. Pursuant to Article 69 (2) of the Rules of Procedure, the applicants should be ordered to pay the costs.