APPLICATION N° 20907/92

S A. ONDERNEMINGEN Jan DE NUL v/Belgium

DECISION of 2 March 1994 on the admissibility of the application

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Article 6, paragraph 1 of the Convention : *Not applicable to proceedings to obtain recognition of a "right" which has no legal basis in the State in question (Limits to the autonomy of the concept of "civil rights and obligations".)*

In concluding that in this case the applicant did not have a "right" recognised in domestic law, the Commission notes that under the relevant legislation an undertaking had neither the right to have a public contract awarded under a particular procedure nor the right to tender, and, furthermore, that the applicant company has not established that it satisfied the conditions for the award of the contract

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THE FACTS

1. *Particular circumstances of the case*

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant is a joint stock company whose registered office is at Hofstade-Aalst. Before the Commission it is represented by Mr. M Denys, a lawyer practising in Brussels.

1 On 22 December 1966 the Belgian State concluded an agreement with the Greater Antwerp Passenger Transport Authority (MIVA) with a view to constructing an infrastructure network for the improvement of municipal transport in the Antwerp area The decision was taken to build a hybrid transport system combining surface tram routes with underground sections ("the metro") MIVA was given the task of general supervision of the planning and works The State retained only the power to endorse or veto the results of any procedure for the awarding of contracts

On 9 September 1976 MIVA put out to tender a contract for the construction of part of the Antwerp metro The contract was won by the *ad hoc* consortium M , composed of two Belgian companies and a German company

In connection with the construction of a second section of the metro, which involved excavating a tunnel under or near houses, and required the use of a special technique, MIVA advised the Minister of Transport, pursuant to Article 17 para 2 sub para 4 of the Law of 14 July 1976, to award the contract for this work to the *ad hoc* consortium M by negotiated agreement

The Minister of Transport followed this advice, further considering that this was justified given that, for safety reasons, the work needed to be carried out by experienced technicians using tried and tested technology and equipment, and that the M consortium was the only undertaking which had sufficient knowledge of the geology of the Antwerp area, and had the requisite skills and equipment For these specific reasons, the Minister considered that the procedure followed, particularly the award of the contract by negotiated agreement, was not in breach of any of the applicable legislation

After receiving the approval of the Minister of Transport, on 31 October 1980, MIVA awarded the contract to the M consortium by negotiated agreement

On 18 December 1980 the applicant lodged an application requesting the Conseil d'Etat to set aside three administrative decisions relating to the award of the contract by negotiated agreement These were the Minister of Transport's decision to choose the negotiated procedure for the award of the contract for the work on the second section of the metro, his decision to award that contract to the *ad hoc* consortium M and the budget committee's decision to approve the above-mentioned decisions The applicant company alleged that it had suffered damage because, in the absence of any competitive tendering or invitation to tender procedure, it had been unable to make a bid and had no chance of obtaining the contract

On 28 May 1982 the M consortium applied for leave to join the proceedings as a third party Leave was granted on 11 June 1982

The report of the legal assistant preparing the case for trial was communicated to the parties on 14 July 1988. After final written submissions had been exchanged the case was set down for 22 October 1991. A judgment rejecting the application was given on 5 November 1991 and communicated to the parties on 4 March 1992.

The applicant company contested, *inter alia*, the applicability of Article 17, para. 2, sub-para. 4, of the Law of 14 July 1976 It maintained that the invitation to tender for the work on the first section and the completion of that work showed that it was not necessary to award the contract for the work on the second section to a specific highly specialised and experienced company. In the alternative, it requested the appointment of an expert in order to verify whether, by acquiring and using the equipment required to carry out the work in issue, it would have been able to do that work, and could thus have won the contract. In setting out its reasons for dismissing the applicant company's arguments, the Conseil d'Etat referred to the grounds given by the Minister of Transport for his decision on the way the contract was to be awarded. It also held that in its technical criticisms the applicant company had cast almost no doubt, if any, on the unique experience acquired by the M consortium, or on the specific nature of its equipment.

2. On 25 October 1982 MIVA proposed that the contract for the construction of a third section of the metro be awarded to the M. consortium by negotiated agreement. On 19 December 1983 the Minister of Transport agreed to this proposal. The decision was based partly on the arguments already put forward in relation to the award of the contract for the second section of the metro and partly on the fact that the M. consortium already had a site where work was in progress at the place where the work envisaged for the new section was due to begin.

On 20 April 1984 the applicant company lodged an application to set aside three administrative decisions relating to the award of the contract for this work by negotiated agreement. These were the Minister of Transport's decision to choose the negotiated procedure for the award of the contract for the work on the third section of the metro, his decision to award that contract to the *ad hoc* consortium M. and the decision of the Ministerial Committee on Economic and Social Co-ordination to approve the above-mentioned decisions.

The report of the legal assistant preparing the case for trial was communicated to the parties on 20 June 1988.

After final written submissions had been exchanged the case was set down for 22 October 1991. A judgment rejecting the application was given on 5 November 1991 and communicated to the parties on 4 March 1992. The Conseil d'Etat, considering that in substance the case was identical with the previous case tried on 5 November 1991 and that the applicant's arguments were the same, gave the same reasons in rejecting the application as those given in the previous judgment.

II *Relevant legislation and case-law*

A Article 9 para 1 of the Law of 14 July 1976 on contracts for public works, supplies and services provides as follows

"In awarding contracts the competent authority shall, at its own discretion, either give notice that it will accept the most competitive tender or issue an invitation to tender without binding itself Contracts may not be awarded by negotiated agreement save in the cases set forth in Article 17 of this Law "

Under Article 11 and Article 13 para 2 of the same law, the competitive tendering and invitation to tender procedures may be either open or restricted In the latter case the authority is free to choose the undertakings to be consulted

Article 17, para 2, sub-para 4, reads as follows

"Contracts may be awarded by negotiated agreement ( )

4 For civil engineering projects or artistic or precision work or articles whose execution can be entrusted only to artists or technicians of proven experience,

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Under Article 12 para 1, in the event of the competitive tendering procedure being followed, "where the competent authority decides to award the contract, this must go to the tenderer who has submitted the lowest bid meeting the criteria, the authority being otherwise liable to pay damages amounting to ten per cent of the value of that bid"

B Case law of the Conseil d'Etat on its jurisdiction to deal with disputes relating to public contracts

With regard to its jurisdiction to deal with disputes relating to public contracts concluded by administrative authorities, the Conseil d'Etat has drawn a distinction between disputes concerning rights and obligations arising from the contract concluded and those concerning the unilateral administrative decisions taken by the administrative authority Although decisions of this type precede formation of the contract and are a prerequisite for it, they are capable of being separated from it (the separable decision principle)

The Conseil d'Etat, an administrative court, restricts its scrutiny to applications to set aside separable decisions Any dispute relating to rights and obligations arising from a contract concluded by an administrative authority (e g concerning its validity, interpretation or performance) falls outside its jurisdiction and within that of the civil courts alone

On the question of public contracts the Conseil d'Etat considers, in accordance with the separable-decision principle, that the following decisions are attackable before it a decision by the competent authority to close the award procedure by awarding the contract to a particular undertaking, a preliminary decision concerning the choice of award procedure, a decision to recommence an award procedure and a decision by the supervisory authority endorsing, refusing to endorse or setting aside the decision awarding the contract

When a decision awarding a contract is set aside, this does not affect the validity of the contract concluded by the administrative authority, which each party must discharge by complete performance

In no case can the Conseil d'Etat award damages Nevertheless, where an administrative decision is set aside, redress for any prejudice caused can be obtained through an action for damages in the civil courts The onus is then on the plaintiff to prove the existence of fault, of prejudice and of a causal relationship between fault and prejudice

COMPLAINTS

The applicant company complains, having regard to the length of the proceedings concerning its two applications to the Conseil d'Etat, of a violation of Article 6 para 1 of the Convention, under which everyone is entitled, in the determination of his civil rights and obligations, to a hearing within a reasonable time by a tribunal The two sets of proceedings in question lasted 11 years in the first case and 7 years in the other

THE LAW

Relying on Article 6 para 1 of the Convention, the applicant company complains that the Conseil d'Etat did not hear its two applications to set aside decisions awarding public contracts by negotiated agreement within a reasonable time The two sets of proceedings lasted 11 years in the first case and 7 years in the other

Article 6 para 1 of the Convention reads as follows

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law "

The Commission recalls the established case-law of the European Court of Human Rights confirming the autonomy of the expression 'disputes (contestations) over civil rights" (see, for example, Eur Court H R , Konig judgment of 28 June 1978, Series A no 27, p 29, para 88) It also notes that Article 6 para 1 of the Convention is not aimed at creating new substantive rights which have no legal basis in the State concerned, but at giving procedural protection to rights which are recognised in

domestic law. In its judgment in the case of W. v. United Kingdom (8 July 1987, Series A no. 121, pp. 32-33, para. 73) the Court emphasised that Article 6 para. 1 extended only to " 'contestations' (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law" and did not in itself "guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States".

The Commission notes that in the public works context no one can assert a "right" to have a particular infrastructure project carried out by the public authorities. It is within the discretionary power of the public authorities to take such a decision.

Article 9 para. 1 of the Law of 14 July 1976 on contracts for public works, supplies and services provides as follows: "In awarding contracts the competent authority shall, at its own discretion, either give notice that it will accept the most competitive tender or issue an invitation to tender without binding itself. Contracts may not be awarded by negotiated agreement save in the cases set forth in Article 17 of this Law." The Commission notes that, pursuant to this provision, no undertaking can assert a "right" to have a contract awarded in accordance with a particular procedure.

Under Article 11 and Article 13 para. 2 of the above-mentioned law, the competitive tendering and invitation to tender procedures may be either open or restricted. In the latter case the authority is free to choose the undertakings to be consulted. The Commission accordingly infers that the applicant company cannot claim a "right" to tender either.

The Commission notes that the contract in issue was awarded under the negotiated procedure, under Article 17, para. 2, sub-para. 4, of the above-mentioned law, which reads as follows:

> "Contracts may be awarded by negotiated agreement: (...)
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> 4. For civil engineering projects or artistic or precision work or articles whose execution can be entrusted only to artists or technicians of proven experience;
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> ..."

The Commission considers that the applicant company cannot claim a right to be awarded the contract in issue by negotiated agreement under the above provision unless it is able to establish that it fulfilled the conditions laid down therein. However, a reading of the Conseil d'Etat's two judgments shows that the applicant company did not establish that it had already carried out work similar to that required for the contract in issue, nor that it had the necessary equipment and appropriate skills to carry out the work.

Consequently, the Commission concludes that at no time could the applicant company plausibly claim any particular right

It follows that the application is incompatible with the Convention *ratione materiae* and must be rejected, pursuant to Article 27 para 2 of the Convention

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE