

Case T-160/03

AFCon Management Consultants and Others

v

Commission of the European Communities

(Takis Programme — Invitation to tender — Irregularities in the tendering procedure — Action for damages)

Judgment of the Court of First Instance (Fifth Chamber), 17 March 2005 . . . II - 984

Summary of the Judgment

1. *Non-contractual liability — Conditions — Unlawfulness — Damage — Causal link (Art. 288, second para., EC)*
2. *European Communities' public procurement — Award of a contract as a result of an invitation to tender — Authority of the institutions with respect to the conduct of the tendering procedure — Conflict of interests between a tenderer and a member of the*

committee for the evaluation of the tenders — Commission's discretion — Limits — Infringement of the principles of sound administration and equal treatment — Incurring of Community liability

(Art. 288 EC)

3. *European Communities' public procurement — Tendering procedure — Expenses incurred by a tenderer — Right to compensation — None — Exception — Infringement of Community law*

1. Community law recognises a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties.

is required to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers.

(see para. 31)

2. In accordance with the principles of sound administration and equal treatment, the Commission must, as far as concerns public procurement, after the discovery of a conflict of interests between a member of the evaluation committee and one of the tenderers, act with due diligence and on the basis of all the relevant information when formulating and adopting its decision on the outcome of the procedure for the award of the tender at issue. The Commission

In that regard, it has some discretion as regards the measures to be taken in respect of the conduct of the procedure. However, where it does not investigate whether there is any collusion between one of the tenderers and a member of the evaluation committee, the Commission exceeds that discretion and manifestly and gravely disregards the limits on that discretion. Therefore, it commits an unlawful act which is liable to cause the Community to incur liability.

(see paras 75, 77, 79, 93)

3. Economic operators must bear the economic risks inherent in their activities which, as regards a tendering procedure, include, in particular, the costs relating to preparation of the tender. The expenses thus incurred therefore remain the responsibility of the undertaking which chose to take part in the procedure, since the opportunity to compete for a contract does not involve any certainty as to the outcome of the procedure. It follows that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute damage which is capable of being remedied by an award of damages.

Phare/Tacis Funds cannot, without potentially undermining the principles of legal certainty and of protection of legitimate expectations, apply in cases where an infringement of Community law in the conduct of the tendering procedure has affected a tenderer's chances of being awarded the contract. Where the tenderer's chances have been prejudiced, he must be compensated for the loss relating to the costs incurred in participating in the procedure.

However, Article 24 of the General Regulations for Tenders and the Award of Service Contracts financed from

(see paras 98, 102)