

ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

13 June 1997 \*

In Case T-13/96,

**TEAM Srl**, a company incorporated under Italian law, whose registered office is in Rome,

**Centralne Biuro Projektowo-Badawcze Budownictwa Kolejowego (Kolprojekt)**, a company incorporated under Polish law, whose registered office is in Warsaw,

represented by Antonio Tizzano and Gian Michele Roberti, of the Naples Bar, 36 Place du Grand Sablon, Brussels,

applicants,

v

**Commission of the European Communities**, represented by Marie-José Jonczy, Legal Adviser, and Lucio Gussetti, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

\* Language of the case: Italian.

APPLICATION for annulment of the Commission decision, contained in a letter of 16 November 1995 from the Head of Unit 2 ('Poland and the Baltic States') of Directorate B ('Relations with Central Europe') in Directorate-General IA (External Relations: Europe and the new independent States, common foreign and security policy and external missions), annulling the tendering procedure for a feasibility study for the modernization of a railway junction in Warsaw on the E-20 line, and of an invitation to tender of 4 December 1995 for a feasibility study for the modernization of the Warsaw Railway node on the E-20 TEN line, together with damages in respect of the harm suffered by the applicants as a result of the Commission's action,

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: K. Lenaerts, President, P. Lindh and J. D. Cooke, Judges,

Registrar: H. Jung,

makes the following

**Order**

**Background to the dispute**

- 1 The applicants, TEAM Srl and Centralne Biuro Projektowo-Badawcze Budownictwa Kolejowego (Kolprojekt) are, respectively, an engineering consultancy company incorporated under Italian law specializing in the construction, management

and maintenance of civil engineering, industrial and infrastructure projects, and a Polish public-owned company providing railway engineering consultancy services.

- 2 The PHARE Programme, based on Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic (OJ 1989 L 375, p. 11), as amended by Council Regulations (EEC) No 2698/90 of 17 September 1990 (OJ 1990 L 257, p. 1), No 3800/91 of 23 December 1991 (OJ 1991 L 357, p. 10), No 2334/92 of 7 August 1992 (OJ 1992 L 227, p. 1), No 1764/93 of 30 June 1993 (OJ 1993 L 162, p. 1) and No 1366/95 of 12 June 1995 (OJ 1995 L 133, p. 1), and designed to extend economic aid to other countries of Central and Eastern Europe, is the framework within which the European Community channels economic aid to the countries of Central and Eastern Europe in order to implement measures intended to support the process of economic and social reform under way in those countries.
- 3 On 13 June 1995, the Commission issued a restricted invitation to tender for a feasibility study for the modernization of a railway junction in Warsaw on the E-20 line. That invitation to tender was sent to the applicants, among others. They formed a consortium to take part jointly in the procedure and submitted their tender.
- 4 By fax of 16 November 1995 from the Head of Unit 2 ('Poland and the Baltic States') of Directorate B ('Relations with Central Europe') in Directorate-General IA (External Relations: Europe and the new independent States, common foreign and security policy and external missions ('Unit IA. B.2')), the Commission informed the tenderers that the invitation to tender had been cancelled ('the contested decision').

- 5 On 4 December 1995, the Commission issued, 'on behalf of the Government of Poland', a new restricted invitation to tender for a feasibility study for the modernization of the Warsaw Railway node on the E-20 TEN line ('the contested invitation to tender').
  
- 6 By fax of 21 December 1995, the Head of Unit IA. B.2 announced that, in response to questions and remarks from several tenderers pointing to a lack of clarity in the terms of reference, the Commission would clarify the matter with the Polish authorities with a view to issuing more precise terms of reference in the course of January, together with a new deadline for the submission of offers. The fax stated that the submission of offers was, in the meantime, deferred and the deadline postponed.

#### **Forms of order sought and procedure**

- 7 By application lodged at the Registry of the Court of First Instance on 26 January 1996, the applicants brought the present action, claiming that the Court should:
  - annul the Commission decision contained in the letter of 16 November 1995 from the Head of Unit IA. B.2 and the new invitation to tender of 4 December 1995;
  
  - award the applicants damages in respect of the harm suffered;
  
  - order the Commission to pay the costs.

- 8 By fax of 28 May 1996, the Ministry of Transport and Maritime Economy of the Republic of Poland asked the Commission to withdraw the Warsaw railway junction study from the PHARE PL 9406 Programme and replace it with other urgent railway projects. It pointed out that the tender had been suspended for several months and that the study could not be undertaken. The ministry also mentioned external factors relating to the planned modernization of the junction, in particular the improvement of the Warsaw-Terespol section of the E-20 railway line and new priority pre-investment activities for the E-65 line (Warsaw-Gdynia section, Crete Corridor VI).
- 9 By letter of 3 June 1996, the Deputy Director General of DG IA informed the Polish ministry that the Commission had acceded to its request. He further explained that, since there was no longer any reason to proceed with the invitation to tender concerning the study, the Commission had decided to annul the whole procedure on the basis of Article 23(2)(d) of the 'General Regulations for Tenders and the Award of Service Contracts' ('the General Regulations').
- 10 Also by letter of 3 June 1996, the Director of Directorate B of DG IA ('Directorate IA. B') informed the applicants of the Polish ministry's request and the Commission's consequent decision to annul the whole tendering procedure on the basis of Article 23(2)(d) of the General Regulations.
- 11 By document received at the Court Registry on 10 June 1996 ('the submission of 10 June 1996'), the Commission raised a procedural issue, claiming that the Court should:

— rule that the action for annulment should not proceed to judgment;

- declare the action for damages inadmissible or, in the alternative, dismiss it as unfounded;
  
- order the applicants to pay the costs of the action for damages.

12 In their observations on the application not to proceed to judgment and the plea of inadmissibility, the applicants claim that the Court should:

- dismiss the application for a decision not to proceed to judgment or, in the alternative, reserve a decision on that application for the final judgment;
  
- in the event that the application for a decision not to proceed to judgment is allowed, order the Commission to pay the costs of the action for annulment;
  
- declare the action for damages admissible.

13 On 5 May 1997, as a measure of organization of procedure, the Court requested the Commission to produce the letter of 28 May 1996 from the Ministry of Transport and Maritime Economy of the Republic of Poland and the letter of 3 June 1996 from the Deputy Director General of DG IA, and the applicants to submit the letter of 3 June 1996 from the Director of Directorate IA. B. The parties submitted the letters requested on 14 and 12 May 1997 respectively.

**Law**

- 14 The applicants make the general point that the submission of 10 June 1996 is irregular, since it contains both a preliminary plea not to proceed to judgment under Article 114 of the Rules of Procedure, which relates exclusively to the application for annulment, and a defence, which relates only to the claim for damages. Basing their argument on Articles 46 and 114 of the Rules of Procedure, the applicants claim that a party may not divide up its defence by submitting, in the same document, both an application for a declaration of inadmissibility or a finding that there is no need to proceed to judgment with regard to some of the heads of claim and a standard defence with regard to the others.
- 15 That argument cannot be upheld. Although the submission of 10 June 1996 is entitled 'Application for a decision not to proceed to judgment in accordance with Article 114 of the Rules of Procedure and Defence' and although it claims, in the alternative, that the action for damages should be dismissed as unfounded, it is apparent on reading the document that it must be construed as requesting the Court, without going into the substance of the case, to rule on the application for a decision not to proceed to judgment as regards the application for annulment and on the plea of inadmissibility raised in the submission as regards the claim for compensation, in accordance with Article 114 of the Rules of Procedure.
- 16 Pursuant to Article 114(3) of the Rules of Procedure, where the defendant submits a preliminary plea, the remainder of the proceedings are to be oral, unless the Court decides otherwise. In the present case, the Court considers that it has been sufficiently informed by its examination of the documents before it. It is not therefore necessary to open the oral procedure.

*The application for a decision not to proceed to judgment on the action for annulment*

Arguments of the parties

- 17 The Commission contends that, following the letter of 28 May 1996 from the Ministry of Transport and Maritime Economy of the Republic of Poland requesting that the study for which the contested invitation to tender was issued be withdrawn, it took account of that request in accordance with Article 3(2) of Regulation No 3906/89 and annulled the tendering procedure on the basis of Article 23(2)(d) of the General Regulations.
- 18 The Commission points out that the action is seeking to restore the administrative situation that existed prior to the contested decision, thereby enabling the applicants to remain eligible to be awarded the contract to carry out the study. However, since the whole tendering procedure has been annulled, the action has, in the meantime, become devoid of purpose. Even were the applicants to obtain satisfaction, such a decision would be without practical impact for them, as its effect would be to reinstate decisions on a tendering procedure that had been definitively annulled and would not, therefore, proceed. No contract could therefore be entered into by the contracting authority.
- 19 Consequently, the applicants no longer have any interest in bringing proceedings, and the Court should therefore declare it unnecessary to proceed to judgment on the application for annulment, in accordance with Article 114 of the Rules of Procedure.
- 20 The applicants claim that the Court should dismiss the application for a decision not to proceed to judgment or, in the alternative, reserve its decision for the final judgment.

- 21 They point out that almost a year elapsed between the first invitation to tender of 13 June 1995 and the Polish ministry's letter of 28 May 1996. However, the committee evaluating the tenders completed work at the end of July 1995. Instead of then proceeding to award the contract, in accordance with Article 22(7)(b) of the General Regulations, the Commission proceeded to act in a completely arbitrary and unjustified manner, amounting to negligence, in order to avoid awarding the contract.
- 22 According to the applicants, it is plain from the application for a decision not to proceed to judgment that it was those delays that led the Polish ministry to withdraw the feasibility study in issue from the projects under the PHARE Programme. Thus, as a result of the Commission's own conduct, the applicants have lost all hope of seeing the Commission itself remedy the irregularities and negligence it has shown in administering the tendering procedure and have no alternative but to rely on the Court to defend their interests.

### *Findings of the Court*

- 23 The Community channels its economic aid for measures intended to support the process of economic and social reform under way in the countries of Central and Eastern Europe through the PHARE Programme, based on Regulation No 3906/89.
- 24 Article 3(2) of that regulation provides:

'Account shall be taken, *inter alia*, of the preferences and wishes expressed by the recipient countries concerned in the choice of measures to be financed pursuant to this Regulation'.

25 It is clear, moreover, from Article 8 of that regulation that the Commission is to administer the aid.

26 Those provisions governed the two invitations to tender of 13 June and 4 December 1995 and the decisions to annul them.

27 After this action had been brought, the Polish authorities requested, by fax of 28 May 1996, that the feasibility study for which those two invitations to tender were issued be withdrawn from the PHARE PL 9406 Programme and replaced by other urgent railway projects. As the file shows, the Commission acceded to that request, in accordance with Article 3(2) of Regulation No 3906/89 and, subsequently, annulled the whole tendering procedure on the basis of Article 23(2)(d) of the General Regulations, under which a tendering procedure may be annulled where exceptional circumstances render normal performance of that procedure impossible.

28 Without there being any need to examine the factual situation prior to the application for a decision not to proceed to judgment, it is thus apparent that the study for which the two invitations to tender in question were issued will no longer be carried out in the context of the PHARE PL 9406 Programme. Consequently, there is no longer a contract to be awarded. Any judgment of the Court annulling the contested decision and the contested invitation to tender could not, therefore, give rise to the requirement to comply referred to in Article 176 of the EC Treaty. The applicants thus no longer have any interest in obtaining their annulment.

29 Consequently, there is no longer any need to give a decision on the application for annulment.

*The plea of inadmissibility as regards the claim for damages*

30 The Commission points out that the claim for damages does not even approximately indicate the amount of the alleged damage. It does not therefore meet the requirements of Article 44 of the Rules of Procedure or allow the Commission to present its defence. Consequently, the claim should be declared inadmissible.

31 Pursuant to Article 114(4) of its Rules of Procedure, the Court may either decide on the plea of inadmissibility or reserve its decision for the final judgment.

32 In the circumstances of this case, it is necessary to continue the proceedings on the substance of the case before deciding on the plea of inadmissibility as regards the claim for damages.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

**1. There is no need to give a decision on the application for annulment.**

**2. A decision on the plea that the claim for damages is inadmissible is reserved for the final judgment.**

**3. Costs are reserved.**

Luxembourg, 13 June 1997.

H. Jung

Registrar

K. Lenaerts

President