CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 36308/97
by Marti AG, Cellere AG, Gebr. Brun AG and Stuag AG
against Switzerland

The European Court of Human Rights (Fourth Section), sitting on 11 July 2000 as a Chamber composed of

Mr G. Ress, *President*,
Mr L. Wildhaber,
Mr A. Pastor Ridruejo,
Mr L. Caflisch,
Mr J. Makarczyk,
Mr J. Hedigan,
Mrs S. Botoucharova, *judges*,
and Mr V. Berger, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 22 May 1997 and registered on 2 June 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having deliberated, decides as follows:

THE FACTS

The applicants are four companies involved in building and construction works and registered in Switzerland. Before the Court they are represented by Mr E. Rüegg, a layer practising in Baden (Switzerland).

A. The circumstances of the case

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

The Official Journal (*Kantonsblatt*) of the Canton of Lucerne published on 24 February 1996 an invitation for tenders by the Building Department (*Baudepartement*) of the Canton of Lucerne in respect of "preparatory work on the N2/6 [motorway] extension constructions for the north feeder". In the same issue, a further invitation for tenders was published by the Kriens municipality in respect of "canalisation and water construction works to be constructed in connection with the N2 extension works for the north feeder". The date for submitting the tenders was fixed for 25 March 1996. Offers had to state any construction works to be outsourced to other companies.

The applicants submitted three tenders, *i.e.* for the construction of the north feeder, the canalisation and the water construction works.

On 27 March 1996 the tenders were examined by the authorities. The applicants were not awarded any construction works. According to notes prepared by representatives of the applicants present upon the occasion, the tenders had been as follows:

- in respect of the north feeder: of the three tenders made, A. AG had offered a lower and L. AG a higher price than the applicants;
- in respect of the canalisation and water construction works: of the two tenders made, A. AG had offered a lower price than the applicants.

Shortly afterwards a meeting was held between the administration and the applicants at which it apparently transpired that A. AG was not in fact in a position to undertake the entire construction works itself and that L. AG eventually rose to the second position of bidders in view of an alleged calculation error of 400,000 Swiss Francs in their tender.

As a result, the applicants, pursuant to Section 6 of the Tenders Act (*Submissionsgesetz*, see below, Relevant domestic law) filed a complaint with the Government (*Regierungsrat*) of the Canton of Lucerne. They maintained that there had been procedural defects and breaches of the Tenders Act, *inter alia*, in that A. AG, in its tender, had omitted to specify which constructions would be outsourced to other companies; and that the tender of L. AG contained elements of unfair competition.

The Government of the Canton of Lucerne dismissed the complaint on 14 June 1996, pointing out that the award had found that A. AG would be in a position to undertake substantial parts of the construction works itself, and that the tender of L. AG had contained an error in that one particular price had been multiplied by 100.

The applicants filed an administrative law appeal (*Verwaltungsgerichtsbeschwerde*) with the Administrative Court (*Verwaltungsgericht*) of the Canton of Lucerne in which they complained that they had not had access to a court within the meaning of Article 6 § 1 of the Convention. They further complained that they had not been able to consult the case-file and that the law had been incorrectly applied.

On 16 July 1996 the Court found that it had no jurisdiction to entertain the appeal. In particular, Article 6 of the Convention was inapplicable as the applicants had not demonstrated the existence of a "right" within the meaning of that Article.

The applicants' further administrative law appeal was dismissed by the Federal Court (*Bundesgericht*) on 12 November 1996, the decision being served on 22 November.

In its decision, that court found that the applicants had no standing in view of its constant case-law according to which decisions on tenders did not concern legally protected rights, as would be required when filing an administrative law appeal. In respect of the applicants' complaint about lack of access to a court within the meaning of Article 6 § 1 of the Convention, the court considered that this provision did not itself grant new substantive rights but was applicable only if a "right" arose under domestic law. No such right existed if it could not be claimed before a court. The court then referred to Sections 18 and 19 of the Ordinance (*Verordnung*) completing the Tenders Act (see below, Relevant domestic law). These provisions envisaged, in principle, that tenders with lower prices would prevail, though, according to Section 18 § 2 of the Ordinance, the lowest offer is not always the cheapest. As a result, domestic law did not grant a "right" to be awarded a particular offer upon tender, for which reason Article 6 § 1 of the Convention was not applicable.

B. Relevant domestic law

The 1973 Tenders Act (*Submissionsgesetz*) of the Canton of Lucerne deals with invitations for tenders and with the award of construction works by the Canton of Lucerne and its municipalities. Section 3 determines that construction works shall as a rule be awarded following a competitive invitation for tenders. Section 6 provides for an appeal to the Government (*Regierungsrat*) for those applicants whose personal interests worthy of protection are at issue (*in ihren persönlichen schützenswerten Interessen beeinträchtigt*).

The Ordinance (*Verordnung*) completing the Tenders Act provides, insofar as relevant:

> "Section 18 *Principles governing award. (a) General*
>
> 1. Construction works and supplies are to be awarded, based on the principle of economy, to the candidate who has made the cheapest offer (*günstigstes Angebot*).

2. The cheapest offer will be the one with the lowest price (*tiefster Preis*) as long as the implementation of the construction works or supplies corresponds to the substantive requirements and the time-limit. The lowest tender (*niedrigstes Angebot*) will not, therefore, always be the cheapest.

Section 19 *(b) In case of equal or similar tenders*

1. In case of equal or similar tenders, the following criteria shall be considered:

(a) proof of good performance;
(b) variety among the candidates;
(c) degree of employment when implementing the construction works;
(d) tax domicile in the Canton of Lucerne or in the municipality concerned;
(e) payment of taxes in the Canton of Lucerne or in the municipality concerned;
(f) use of local construction materials and products;
(g) professional qualifications of the head of enterprise (e.g. master craftsman) and of the employees;
(h) training of apprentices;
(i) securing and maintaining employment in the Canton of Lucerne or the municipalities concerned.

2. The order of relevance when employing the criteria mentioned in § 1 shall be determined by the awarding authority individually and according to the situation concerned, in particular in the light of the economic situation."

According to Section 22 of the Ordinance, the authority concerned is not obliged to give reasons to candidates whose tender has not been considered.

Meanwhile, Section 9 of the Federal Act on a Common Market (*Binnenmarktgesetz*) provides for an appeal to a court in case of alleged restricted access to the common market, but this provision entered into force only on 1 July 1998.

COMPLAINTS

The applicants complain that they did not have access to a court as required by Article 6 § 1 of the Convention. This would have been all the more necessary as, throughout the proceedings, they complained of serious irregularities of tender. A confirmation herefor can be seen in the fact that in the proceedings before the Government of the Canton of Lucerne, they were prevented from consulting the case-file. If, as the Federal Court argued, there is no right to be awarded a particular offer upon tender, this would lead to arbitrariness, and the competition envisaged by the law would become a farce.

The applicants submit that there is a right under Swiss law to be awarded a particular offer. Thus, the Tenders Act provides for an appeal to the Government of the Canton of Lucerne. The Ordinance completing the Tenders Act furthermore envisages awarding the contract to the lowest bidder. Section 19 § 1 of the Ordinance only lists criteria for the award of contracts if there are equal or similar offers. In the present case, the other candidates had not complied with the regulations and had not, therefore, made the lowest tender.

THE LAW

The applicants complain that in the proceedings complained of they had no access to a court, as required by Article 6 § 1 of the Convention.

Article 6 § 1 of the Convention provides, insofar as relevant:

> "In the determination of his civil rights and obligations ... , everyone is entitled to a ... tribunal established by law."…

The Court recalls that Article 6 § 1 of the Convention secures to everyone the right to have any claims relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect (see the Philis v. Greece (no. 1) judgment of 27 August 1991, Series A no. 209, p. 20, § 59).

In the present case, the issue which arises is whether Article 6 of the Convention applies to the proceedings at issue.

The Court must ascertain in particular whether there has been a dispute (*contestation*) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law (see the Zander v. Sweden judgment of 25 November 1993, Series A no. 279-B, p. 38, § 22). In this respect, the Court recalls that Article 6 § 1 of the Convention does not itself guarantee any particular content of "civil rights and obligations" and is not meant to create new substantive rights which have no legal basis in the State concerned. Rather, the provision aims at giving procedural protection to rights which can be said, at least on arguable grounds, to be recognised under domestic law (see the W. v. the United Kingdom judgment of 8 July 1987, Series A no. 121, p. 32 *et seq*., § 73).

In the present case, Section 3 of the Tenders Act of the Canton of Lucerne determines that construction works and supplies shall as a rule be awarded following a competitive invitation for tenders. The Ordinance completing the Tenders Act provides in its Section 18 that the award shall fall to the cheapest offer, though it is also stated that, given the substantive requirements and the time-limits involved, the lowest tender will not always be the cheapest. Section 19 lists further criteria to be considered in case of equal or similarly favourable offers. Section 22 provides that no reasons need be given to candidates whose offers have not been considered.

It is true, in the Court's view, that these provisions set up a competitive scheme for the award of contracts concerning public works. But it is also true that they afford the public authorities considerable discretion when taking their decision. No right emerges from these provisions for any candidate to have any particular project carried out by the public authorities.

This view is confirmed by the decisions of the Administrative Court of the Canton of Lucerne of 16 July 1996, and of the Federal Court of 12 November 1996, both of which concluded that domestic law did not grant the applicants a "right" to be awarded a particular offer upon tender.

The Court concludes that at no time could the applicants plausibly claim any particular right under domestic law. The case thus falls to be distinguished from that of Tinelly & Sons Ltd and others and McElduff and others v. the United Kingdom concerning a "right" arising from alleged discrimination of the candidates (see the judgment of 10 July 1998, Reports of Judgments and Decisions 1998-IV, p. *1655 et seq*.). No specific claim of discrimination has been made in the present case.

It follows that Article 6 of the Convention is not applicable to the proceedings at issue. The application is, therefore, incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention and must be rejected, pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Vincent Berger
Registrar

Georg Ress
President