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. 2629/06
by I.T.C. LTD
against Malta

The European Court of Human Rights (Fourth Section), sitting on 11 December 2007 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr G. BONELLO,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having regard to the above application lodged on 12 January 2006,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together.

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The case originated in an application (no. 2629/06) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Maltese company, International Trading Corporation Limited ("the applicant company"), on 31 October 2006. The applicant company was represented by Mr I. Refalo and Mr M. Refalo, lawyers practising in Valletta, Malta. The Maltese Government ("the Government") were represented by their Agent, Mr S. Camilleri, Attorney General.

A. The circumstances of the case

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

1. Background of the case

On 28 December 2003 the Ministry for Youth and the Arts issued a call for tenders for the design, organisation and management of a quality national event, on the occasion of the celebration of Malta's accession to the European Union.

The deadline for submitting bids was January 2004.

Three participants (the applicant company, Welcomeurope Consortium and Synergix Limited) paid the relevant fees and guarantees and submitted their bids.

On 3 February 2004 the tender was awarded by the Adjudication Board to Welcomeurope Consortium.

2. Proceedings before the Public Contracts Appeals Board

On 5 February 2004 the applicant company objected to this decision. On 19 February 2004 a hearing took place before the Public Contracts Appeals Board (the "PCAB").

The applicant company alleged that the bid made by Welcomeurope had not met the formal requirements of the tender. In particular, its components had been presented collectively and not individually and it had not been submitted in an itemised format. Moreover, the bid in question had been based on incorrect and misleading information. It had made reference to "laser cannons" which, according to the applicant, did not exist, and to a TV transmission deal with the European Broadcasting Union (the "EBU"), which was not dependent on the involvement of Welcomeurope. In the applicant's view, as the EBU would have broadcast all the major shows

from the ten acceding countries, this matter should not have been taken into consideration during adjudication. The applicant company further stated that its bid was better value for money.

Welcomeurope challenged the applicant company's arguments. It contended that "cannon lights" would be used in the show. Furthermore, the EBU had informed them that, due to the presence of an artist who had signed a contract with Welcomeurope for the exclusive right to use his services, Malta would have been allotted a longer transmission period.

Representatives from the Adjudication Board gave oral evidence, stating that both bids had satisfied the formal requirements of the tender and that the final choice in favour of Welcomeurope had been based on the price and on the satisfactory standard reached.

The applicant company requested the production of a number of documents, namely the Adjudication Board's report, minutes of meetings regarding the bids, letters from Welcomeurope relating to TV coverage, Welcomeurope's detailed list of equipment and its certificate of insurance cover. It alleged that these documents were indispensable for allowing it to substantiate its objections.

Welcomeurope objected to this request, noting that some of the documents contained commercial information of a highly confidential nature.

The PCAB observed that it could authorise the production of documents only in so far as they were relevant to the objections raised and strictly necessary for giving a ruling on their merits. As a consequence, only a small extract from the Adjudication Board's report was produced. The chairman of the Adjudication Board had in fact noted that other parts of the report might have contained commercial and other information of a confidential nature.

In a decision of 27 February 2004, the PCAB rejected the applicant company's claim. It held that the invalidity of Welcomeurope's bid had not been proved and that there had been no reason to doubt the method used by the Adjudication Board to assess the bids, which had been based on an overall assessment and had not been dependent on the amount or type of lasers used.

3. Proceedings before the Civil Court

On 24 February 2004 the applicant company lodged an application with the Civil Court (First Hall) in its constitutional jurisdiction. It alleged that the rejection of its request for the production of documents had infringed its right to a fair hearing.

By a judgment of 16 December 2004, the Civil Court dismissed the applicant company's claim on the ground that Article 6 of the Convention was not applicable to the proceedings before the PCAB.

It recalled that this provision only applied to disputes concerning civil rights and obligations. These rights belonged to private and not to public law and existed only if they arose from a "clearly defined statutory right". Thus, although a company was entitled not to be discriminated against in the adjudication procedure, it did not have a civil right to be awarded the tender. The fact that it carried out commercial activities aimed at earning profit was not in itself sufficient to bring Article 6 into play.

Moreover, it could not be said that the PCAB was a "tribunal" within the meaning of this provision. It was not independent since essential features of its constitution and of the exercise of its functions depended on the Prime Minister. Furthermore, its decisions took the form of specific recommendations, which were final as regards the award of the contract. They were binding on the Director of Contracts who could not be considered a body having judicial powers. According to domestic case-law, a recommendation did not have the same authority as a judgment of a competent court determining the existence of civil rights and obligations.

4. Proceedings before the Constitutional Court

On 28 December 2004 the applicant company appealed to the Constitutional Court.

It claimed that according to the case-law of the European Court of Human Rights, the word "tribunal" in Article 6 of the Convention had to be given a wider interpretation, not based on the distinction between quasi-judicial and purely administrative bodies. All judicial authorities that determined a person's complaints affecting his or her rights should be considered a "tribunal". In particular, the dispute submitted to the PCAB concerned civil rights and obligations. Indeed, the participation in the tender involved substantial financial and logistical efforts and the award of the contract would have entailed significant financial benefits for the applicant. By its very nature, the whole process gave rise to rights and obligations in respect of any person entering into negotiations to obtain such an award.

The applicant further argued that, having regard to the manner of appointment of its members and to its procedures, the PCAB resembled more a court or judicial tribunal than an administrative body.

By a judgment of 12 July 2005, the Constitutional Court rejected the applicant company's appeal.

It held that Maltese law applicable at the time (the Public Service (Procurement) Regulations 1996) did not grant any rights in the context of a public call for tenders. The mere act of submitting a tender did not give the applicant company the right to have its tender accepted. It was true that the amount of work involved in submitting a tender and the financial expenses attached to it carried with it an obligation to act in good faith and with the diligence of a *bonus pater familias* throughout the negotiations. However,

these obligations only had a pre-contractual nature; they could give rise to a claim for damages, but not to any right to demand specific performance.

In the present case, the applicant did not request damages but a reconsideration of the decision. The fact that the result of the proceedings before the PCAB had economic consequences for the applicant was not sufficient to conclude that the dispute concerned the determination of a civil right. The Constitutional Court distinguished the applicant company's case from the case of *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* (see judgment of 10 July 1998, *Reports of Judgments and Decisions* 1998-IV). Although that case had dealt with tenders, the right at issue was the right not to be discriminated against in the job market.

In view of the above, the Constitutional Court concluded that the proceedings before the PCAB did not involve a determination of civil rights and obligations. It was therefore irrelevant to establish whether the PCAB was a "tribunal" within the meaning of Article 6 of the Convention.

B. Relevant domestic law and practice

1. Judicial Review

Article 469 A (1) of the Code of Organisation and Civil Procedure (the "COCP"), reads as follows:

> **"**Save as is otherwise provided by law, the courts of justice of civil jurisdiction may enquire into the validity of any administrative act or declare such act null, invalid or without effect only in the following cases:
>
> (*a*) where the administrative act is in violation of the Constitution;
>
> (*b*) when the administrative act is *ultra vires* on any of the following grounds:
>
> (i) when such act emanates from a public authority that is not authorised to perform it; or
>
> (ii) when a public authority has failed to observe the principles of natural justice or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon; or
>
> iii) when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations; or
>
> iv) when the administrative act is otherwise contrary to law."

2. The Public Service (Procurement) Regulations

Regulation 4.2 of the Public Service (Procurement) Regulations 1996 read as follows:

> "These regulations do not confer any right on any tenderer, supplier or contractor beyond those pertaining under civil law."

Regulation 2 of the sixth schedule to the 1996 Regulations required Contract Committees to:

"evaluate tenders submitted as well as reports and recommendations made thereon by the respective departments and public organisations and make definite recommendations for the award of tenders ensuring that the best value for money at the lowest possible cost is attained. In this regard, due consideration shall be given to

i. the final cost including financing costs to Government or to the public organisation, and

ii. the impact of each offer on the recurrent expenditure of Government or the public organisation;"

The 1996 Regulations were amended by Legal Notice 387 of 2003, (the "2003 Regulations"). In so far as relevant the 2003 Regulations read as follows:

Regulation 4

"(1) Contracting authorities shall ensure that there is no discrimination between undertakings, and that all undertakings are treated equally in all calls for tenders whatever their estimated value.

...

(4) Contracting authorities shall respect fully the confidential nature of any information furnished by candidates and tenderers.

(5) In the context of provision of technical specifications to interested candidates and tenderers, the qualifications of candidates and selection of tenderers and the award of contracts, contracting authorities may impose requirements with a view to protecting the confidential nature of information which they may wish to make available."

Regulation 103

"(1) Any tenderer who feels aggrieved by a proposed award of a contract and any person having or having had an interest in obtaining a particular ... contract and who has been or risks being harmed by an alleged infringement may ... file a notice of objection with the Department of Contracts or the contracting authority involved as the case may be."

The functions of the PCAB have not been subject to any relevant changes in the past amendments and the Ninth Schedule to the 1996 Regulations in so far as relevant read as follows:

"(l0) The sessions of the Board during which the complaint is heard shall be held in public and both the complainant and the interested party shall have the right to attend and to be accompanied by any person, professional or otherwise, whom they consider suitable to defend their interests.

(11) The Chairman shall ensure that during the public hearing all interested parties are given the opportunity to state their cases.

...

(17) All decisions taken by the Board shall be submitted in writing and shall contain the full facts and reasons on which the Board's final decision is taken. All decisions shall be concluded with definite recommendations which shall be binding on the Director of Contracts.

(18) Any bidder submitting a complaint who is not satisfied with the final decision taken by the Board shall have final legal rights to refer the matter to a Court of Law and to seek any redress or compensation which he considers due to him as a result of the decision with which he may disagree. Such recourse by any bidder to a Court of Law shall not deter the Director of Contracts from implementing the Board's final decision."

COMPLAINT

The applicant complained under Article 6 of the Convention that it had not been accorded a fair hearing before the PCAB.

THE LAW

The applicant company complained that as a result of the refusal of its request for the production of a number of documents, the proceedings before the PCAB had been unfair, contrary to Article 6 § 1 of the Convention, which reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

A. The parties' submissions

1. The Government

The Government objected that the applicant had not exhausted the domestic remedies available to it. The applicant company had lodged its application with the Civil Court on 24 February 2004, therefore after the public hearing before the PCAB of 19 February 2004 but before the PCAB's final decision of 27 February 2004 rejecting its appeal. Thus the constitutional judgments referred solely to the PCAB's interlocutory decision refusing the applicant company's request for the production of the relevant documents. The Government further submitted that the fact that the Constitutional Court had ruled against the applicant company on its Convention claims did not exclude its right to contest the final award of the contract by judicial review proceedings and to seek the payment of damages in tort for the alleged illegality of the award.

However, even if it were considered that the applicant company had exhausted domestic remedies, the Government submitted that Article 6 was not applicable as by law the PCAB had not been called upon to determine any civil right or obligation. The decision of the Director of Contracts to conclude a contract with a particular bidder was an administrative act and

the right to appeal such a decision to the PCAB was an internal remedy provided within the administration.

The issuance of a call for tenders did not give any tenderer any enforceable civil right against the issuer. This was clear from the Public Service (Procurement) Regulations in force at the relevant time. The law did not vest any person with the right to have a tender accepted for the sole reason that it complied with the required conditions. Moreover, the Adjudication Board was not bound to ensure that someone was in fact awarded the contract. It was only required to make recommendations it deemed appropriate in the exercise of its discretion. The Director could then proceed with the award of the contract although he was not obliged to do so. However, if he decided to do so, he was bound to follow the recommendations of the PCAB. Consequently, even such recommendations did not vest the complainant with an enforceable civil right. Such a right would only arise from the contract once it had been concluded and not during the evaluation stage. This was also the conclusion upheld by both the Civil Court and the Constitutional Court in the domestic proceedings (see above).

According to domestic case-law (*Roberto Zamboni et Vs Director of Contracts et, judgment of the Court of Appeal, 31 May 2002*) a decision to award a government contract is an administrative act in terms of Article 469 A of the COCP. Moreover, the extent to which pre-contractual liability can arise under Maltese law is still doubtful, as confirmed in *Alfred Attard et Vs Paolo Xuereb et,* (*judgment of the Civil Court (First Hall), 13 October 2003*). The same court later concluded that to claim damages resulting from pre-contractual liability a plaintiff must prove that the termination or cessation of negotiations was not justified and that the conduct of the party who brought the negotiations to an end must be equivalent to *dolus*. In those circumstances the damages to be paid should be limited to expenses actually incurred in the course of or in connection with negotiations and should not cover loss of profit. Thus, according to the Government, even if it were to be conceded that pre-contractual liability arose from the tendering process and that this constituted a civil right, in the present case no such claim was put forward or could be put forward or determined by the PCAB.

Finally, the Government, referring to the Court's case law maintained that the present case differed from that of *Benthem v. Netherlands* (judgment of 23 October 1995, Series A no. 97). In the latter case the Royal Decree at issue was not susceptible to review by a judicial body as required by Article 6 § 1. In the present case, the final decision to award a public contract was indeed subject to judicial review, an action which the applicant did not file.

2. The applicant

The applicant company submitted that it had exhausted domestic remedies since the Constitutional Court was the only appropriate remedy. In fact, the Civil Court, by its rejection of the defendant's plea of non-exhaustion of ordinary remedies, had confirmed this.

In respect of the applicability of Article 6, the applicant company submitted that although the Public Service (Procurement) Regulations did not provide for any specific rights, they did give a tenderer the right to object to an award of a public contract and have the objections considered at a public hearing. These Regulations also obliged the Government to accept the most economically advantageous tender, which is not necessarily the lowest. Failure to accept such a tender would, at the very least, leave the Government liable to be sued for damages. It further submitted that the subsequent and more detailed 2003 Regulations (which were in turn replaced), amending the 1996 Regulations were also indicative of the scope of the rights granted to tenderers.

According to the applicant company, the argument that a body determining an appeal made in a public tender procedure was a tribunal determining civil rights and obligations was supported by a number of considerations: *inter alia*, the fact that a tenderer incurred a submission fee and various substantial costs in order to make a bid which had to be determined in good faith, as also noted in the 2003 Regulations; the fact that an objection was also subject to a fee, which was paid on the understanding that the hearing would guarantee respect for all rights concerned; and the fact that a tenderer who disagreed with a decision of the body could refer the matter to a court of law and seek redress or compensation if the authority had acted unfairly.

In the present case the applicant requested the examination of the Adjudication Board's report in order to determine the occurrence of unfairness; consequently, any available remedy could only arise as a result of this determination. Moreover, it was an accepted principle that pre-contractual damages arose in cases where one of the parties behaved unfairly during the process of contracting.

B. The Court's assessment

The Court considers that it is not necessary to examine whether the applicant company has exhausted domestic remedies in respect of its complaint under Article 6 of the Convention, or whether its subsequent actions related solely to the PCAB's interlocutory decree, as the complaint that it did not have a fair trial before the PCAB, must in any event be declared inadmissible for the following reason.

The Court reiterates that for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("*contestation*" in the French text) over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question *(*see *Pudas v. Sweden*, judgment of 27 October 1987, Series A no. 125-A, p. 14, § 31). The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence (see *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, p. 39, § 94). Moreover, it is not sufficient to bring a dispute within the scope of Article 6 to show that it is "pecuniary" in nature.

Article 6 § 1 of the Convention is not aimed at creating new substantive rights without a legal basis in the Contracting State, but at providing procedural protection of rights already recognised in domestic law (see *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121-A, p. 32-33, § 73 and *Roche v. the United Kingdom,* [GC], no. 32555/96, § 117, ECHR 2005-...). In this connection, in deciding whether a right, civil or otherwise, could arguably be said to be recognised under Maltese law, the Court must have regard to the wording of the relevant legal provisions and to the way those provisions are interpreted by the domestic courts (see *Masson and van Zon v. the Netherlands*, judgment of 28 September 1995, Series A no. 327, p. 19, § 49 and *Roche,* cited above, § 120). This Court would need strong reasons to differ from the conclusions reached by the national superior courts on a question of interpretation of domestic law and by finding, contrary to their view, that there was arguably a right recognised by domestic law (*ibid*).

In respect of the wording of the relevant law, the Court notes that the Public Service (Procurement) Regulations, particularly regulation 4.2 stated that "*these regulations did not confer any right on any tenderer, supplier or contractor beyond those pertaining under civil law*" and clause 4.11 of the call for tenders stated that "*the Government was not obliged to accept the lowest or any other tender submitted and was not obliged to give reasons for so doing*". Although these regulations obliged the contracting committee to recommend tenders which ensured the best value for money at the lowest possible cost, this did not mean that the least expensive had to be chosen (as was not disputed by the applicant company in its observations). Thus, the mere fact that a legal person submitted a bid or made an offer could not give rise to an expectation, even less so a right, to be awarded the tender, or to have it determined by any particular method (see, *mutatis mutandis*, *Jan De Nul (S.A.) Ondernemingen v. Belgium* (dec.), no. 20907/92, 2 March 1994).

As to the way in which those provisions were interpreted by the domestic courts, the Court notes that according to the case-law referred to by the Government, a decision to award a government contract has been held to be an administrative act. It further notes that in the present case both the Civil Court and the Constitutional Court concluded that the relevant legal provisions did not grant any civil rights in the context of a public call for tenders.

Thus, upon analysis of the relevant provisions and their interpretation, the Court is of the view that during the evaluation stage of the tender in question, the applicant company could not at any point expect to be a holder of a civil right.

The fact that, as claimed by the applicant company, a tenderer had the right to object to an award and to have the objections considered at a public hearing, did not amount to a civil right, but merely to a right of a public nature. Indeed a right to object to an award does not suffice to make Article 6 applicable to proceedings determining the award of a tender, in view of the Adjudication Board's discretion to decide who should be granted the tender (see, *mutatis mutandis*, *Skyradio and others v. Switzerland*, (dec.) no. 46841/99, 31 August 2004). The present case is different from *Araç v. Turkey*, (no. 69037/01, 21 September 2006) in which the exclusion of the applicant from the tendering process had been due to his political opinions and where the decision excluded him not only from the tender at issue but from any future tendering processes. The decision thus entailed very significant economic consequences for him. The fact that in the present case the applicant company had already incurred financial expenses in order to take part in the bid and that the decision could have had some economic consequences for it, did not suffice to create a civil right. Indeed proceedings do not become "civil" merely because they also raise an economic issue (see, *mutatis mutandis*, *Pierre-Bloch v. France,* judgment of 21 October 1997, *Reports* 1997-VI, p. 2206, at p. 2225, § 51). Moreover, the Court points out that, as confirmed by the remedies it chose to pursue, the applicant company's action was directed at demanding specific performance and not to obtaining compensation. The fact that the contested decision could have possibly given rise to damages resulting from pre-contractual liability does not alter the above finding.

Consequently, in the absence of a civil right, Article 6 is not applicable to the present tendering process and the determination made by the PCAB.

In view of this conclusion it is not necessary for the Court to determine whether the PCAB is a tribunal in terms of Article 6 of the Convention.

For the above reasons the Court finds that this complaint is incompatible *ratione materiae* with the provisions of the Convention and must be rejected under Article 35 §§ 3 and 4 of the Convention.

In view of the above, it is appropriate to discontinue the application of Article 29 § 3 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

T.L. EARLY
Registrar

Nicolas BRATZA
President