JUDGMENT OF THE COURT OF FIRST INSTANCE (Eighth Chamber)

8 October 2008 *

In Case T-411/06,

Sogelma — Societá generale lavori manutenzioni appalti Srl, established in Scandicci (Italy), represented by E. Cappelli, P. De Caterini, A. Bandini and A. Gironi, lawyers,

applicant,

v

European Agency for Reconstruction (EAR), represented initially by O. Kalha, subsequently by M. Dischendorfer and then by R. Lundgren, acting as Agents, and by S. Bariatti and F. Scanzano, lawyers,

defendant,

* Language of the case: Italian.

supported by

Commission of the European Communities, represented by P. van Nuffel and L. Prete, acting as Agents,

intervener,

APPLICATION for annulment of decisions of the EAR relating to cancellation of the tender procedure for the public works contract reference EuropeAid/120694/D/W/YU and organisation of a new tender procedure, and an application for compensation for loss allegedly suffered,

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

composed of M.E. Martins Ribeiro, President, S. Papasavvas and A. Dittrich (Rapporteur), Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 June 2008,

gives the following

Judgment

Legal context

1 The European Agency for Reconstruction (EAR) was established by Council Regulation (EC) No 2454/1999 of 15 November 1999 amending Regulation (EC) No 1628/96 relating to aid for Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia, in particular by the setting up of a European Agency for Reconstruction (OJ 1999 L 299, p. 1).

2 Council Regulation (EC) No 1628/96 of 25 July 1996 (OJ 1996 L 204, p. 1), was repealed by Article 14(1) of Council Regulation (EC) No 2666/2000 of 5 December 2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, repealing Regulation (EC) No 1628/96 and amending Regulations (EEC) No 3906/89 and (EEC) No 1360/90 and Decisions 97/256/EC and 1999/311/EC (OJ 2000 L 306, p. 1). The provisions of Regulation (EC) No 1628/96, as amended by Regulation No 2454/1999, governing the establishment and operation of the EAR were amended by and incorporated in Council Regulation (EC) No 2667/2000 of 5 December 2000 on the European Agency for Reconstruction (OJ 2000 L 306, p. 7).

3 Under Article 1 of Regulation No 2667/2000, the Commission may delegate to the EAR implementation of the Community assistance provided for in Article 1

of Regulation No 2666/2000 to Serbia and Montenegro. Under Article 2(1)(c) of Regulation No 2667/2000, the Commission may make the EAR responsible for all operations required to implement programmes for the reconstruction of Serbia and Montenegro, including preparing and evaluating invitations to tender and awarding contracts. In addition, under Article 3 of that regulation, the EAR is to have legal personality.

Background to the dispute

4 On 7 September 2005 the EAR published in the Supplement to the *Official Journal of the European Union* (OJ 2005 S 172) an open procedure procurement notice, reference EuropeAid/120694/D/W/YU, relating to the award of the public works contract 'Restoring of Unhindered Navigation (removal of unexploded ordnance) in the Inland Waterway Transport system, Republic of Serbia, Serbia and Montenegro' ('the Procurement Notice').

5 The Procurement Notice and point 2 of the instructions to tenderers to be found in the tender dossier [the 'Instructions to tenderers'] stated that the project concerned was to be financed by the EAR, and that the contracting authority for it was to be the Serbian Ministry of Capital Investments.

6 Point 16(x) of the Procurement Notice and point 4.2(x) of the Instructions to tenderers specified, among the 'minimum selection criteria' to be met by the successful candidate, that all the key personnel had to have at least 10 years appropriate professional experience.

7 Point 37 of the Instructions to tenderers reads as follows:

'Appeals

(1) Tenderers believing that they have been harmed by an error or irregularity during the award process may petition the [EAR] directly and inform the Commission. The [EAR] must reply within 90 days of receipt of the complaint.

(2) Where informed of such a complaint, the Commission must communicate its opinion to the [EAR] and do all it can to facilitate an amicable solution between the complainant (tenderer) and the [EAR].

(3) If the above procedure fails, the tenderer may have recourse to procedures established by the European Commission.'

8 Before the deadline for the submission of tenders, the EAR received three tenders, submitted respectively by a consortium formed by the applicant, Sogelma — Societá generale lavori manutenzioni appalti Srl, and the Croatian company DOK ING RAZMINIRANJE d.o.o. ('DOK ING'), and by two other consortia.

9 On 10 March 2006 the EAR publicly opened the tender envelopes. The price in the applicant's tender was lower than that proposed by its competitors.

10 On 14 and 22 March 2006 the EAR sent requests for clarification to the tenderers. The second request concerned in particular the CVs of the proposed key personnel. All the tenderers replied to the requests for clarification within the periods set by the EAR.

11 By letter dated 9 October 2006 the EAR informed the applicant that the tender procedure in question had been cancelled due to the fact that none of the offers received was technically compliant. As regards the applicant's offer, the EAR stated that one of the key personnel proposed, the 'Superintendent Survey Team' did not satisfy the requirements laid down in point 16(x) of the Procurement Notice and in point 4.2(x) of the Instructions to tenderers.

12 By letter of 19 October 2006 (mistakenly dated 19 September 2006) the applicant asked for a copy of the decision to cancel the tender procedure and the respective minutes. In addition, it refers in that letter to the possibility of using the negotiated procedure under Article 30 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

13 By letter of 13 November 2006 the applicant repeated that request and asked the EAR to take a reasoned decision on whether or not to proceed with a negotiated procedure.

14 By letter of 1 December 2006 the applicant asked the EAR to provide it with copies of all the minutes of the evaluation committee which examined the tenders submitted in response to the Procurement Notice, of the minutes of the public opening of the

tender envelopes, and of the decision to cancel the tender procedure and the related minutes, on the basis of Article 6 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

15 By letter of 14 December 2006 the EAR advised the applicant that it had exercised its right to cancel the tender procedure and to initiate a new invitation to tender due to the fact that the technical requirements 'ha[d] been considerably changed'. Furthermore, the EAR stated that, apart from the finding that no technically compliant tenders had been received, the evaluation committee made no other remarks. Annexed to that letter, the EAR sent the minutes relating to the public opening of tender envelopes.

Procedure and forms of order sought

16 By application lodged at the Registry of the Court of First Instance on 22 December 2006 the applicant brought this action and stated that it was bringing proceedings on its own behalf and as the agent of the company DOK ING.

17 By order of the President of the Second Chamber of 4 June 2007 the Commission was given leave to intervene in support of the forms of order sought by the EAR.

18 The Commission lodged a statement in intervention. The applicant submitted observations on that statement within the period allowed.

19 After a partial renewal of the membership of the Court of First Instance, the case was allocated to a new Judge Rapporteur. That judge was then assigned to the Eighth Chamber, and this case was consequently allocated to that chamber.

20 After hearing the report of the Judge Rapporteur the Court (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for in Article 64 of the Court's Rules of Procedure, asked the parties to reply in writing to a number of questions. The parties complied with that request within the period allowed.

21 The parties presented oral argument and replied to the questions put by the Court at the hearing of 18 June 2008.

22 The applicant claims that the Court should:

— annul the decisions of the EAR relating to:

  — cancellation of the tender procedure;

  — organisation of a fresh tender procedure;

— order the EAR to pay it compensation for the loss suffered, as stated in the application;

— order the EAR to pay the costs.

23 The EAR contends that the Court should:

— declare the action to be inadmissible, or, alternatively, dismiss the action as unfounded;

— order the applicant to pay the costs.

24 The Commission contends that the Court should:

— declare the action for annulment to be inadmissible, or, alternatively, dismiss the action as unfounded;

— dismiss the action for compensation for damage as unfounded;

— order the applicant to pay the costs.

25 Further, the applicant requests that, pursuant to Article 65(b) of the Rules of Procedure, the Court order the EAR to produce all the documents relating to the award procedure in question. The EAR and the Commission oppose that request.

26 In the application, the applicant also claimed that the Court should annul 'all other preliminary, connected or associated measures, including the decision to exclude the applicant'. At the hearing, the applicant stated that this claim should no longer be considered by Court of First Instance, which has been duly recorded.

Admissibility

27 The EAR relies on several pleas of inadmissibility. It is necessary to examine, first, the plea that the Court of First Instance has no jurisdiction to rule on an action for annulment brought on the basis of the fourth paragraph of Article 230 EC against an act of the EAR and, secondly, the plea that the applicant did not lodge an administrative complaint prior to bringing the present action. The Court must examine, thirdly, in relation to the application for annulment of the decision to cancel the tender procedure, whether the time-limit for bringing proceedings laid down in the fifth paragraph of Article 230 EC was respected. Fourthly, it is necessary to examine the admissibility of the action in so far as it seeks annulment of the EAR's decision to organise a new tender procedure. Lastly, it is necessary to examine the admissibility of the action in so far as the applicant asserts the rights of DOK ING.

A — *The jurisdiction of the Court of First Instance to rule on an action for annulment brought on the basis of the fourth paragraph of Article 230 EC against an act of the EAR*

1. *Arguments of the parties*

28 The EAR claims that the decision to cancel the tender procedure is not an act the legality of which can be reviewed by the Court under Article 230 EC. It submits

that, in terms of that article, review by the Community judicature is limited to acts adopted jointly by the European Parliament and the Council, acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and to acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

29 Article 13a of Regulation No 2667/2000, as amended by Council Regulation (EC) No 1646/2003 of 18 June 2003 (OJ 2003 L 245, p. 16), is irrelevant in that regard, since it refers only to actions against decisions of the EAR taken pursuant to Article 8 of Regulation No 1049/2001.

30 Equally, Article 13(2) of Regulation No 2667/2000 does no more than provide that the Community judicature has jurisdiction to hear disputes relating to compensation in the case of the EAR's non-contractual liability.

31 Tenderers are not, according to the EAR, without any protection. Their rights are protected by the procedure laid down in point 37 of the Instructions to tenderers (quoted in paragraph 7 above). The EAR submits that, in terms of that point, a tenderer may, if the procedure provided for in that point fails, have recourse to procedures established by the Commission, whose acts are actionable under Article 230 EC. The EAR also raises the possibility of bringing an action before the domestic courts.

32 The applicant and the Commission do not accept that plea of inadmissibility.

2. *Findings of the Court*

33 First, it is clear that agencies such as the EAR established on the basis of secondary legislation are not among the Community institutions listed in the first paragraph of Article 230 EC.

34 Furthermore, Regulation No 2667/2000, as amended, which states only, in Articles 13 and 13a, that the Court has jurisdiction in disputes relating to compensation in the case of the EAR's non-contractual liability and to EAR decisions relating to access to documents taken pursuant to Article 8 of Regulation No 1049/2001, does not provide that the Court has jurisdiction to hear actions for annulment against other decisions taken by the EAR.

35 None the less, those considerations do not preclude review by the Court of First Instance, under Article 230 EC, of the legality of EAR acts which are not referred to in Articles 13 and 13a of Regulation No 2667/2000.

36 The Court of Justice has held, in paragraph 23 of the *Les Verts* case (Case 294/83 *'Les Verts'* v *Parliament* [1986] ECR 1339), that the European Community is a community based on the rule of law, and that the Treaty has established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. The general scheme of the Treaty is to make a direct action available against all measures adopted by the institutions which are intended to have legal effects (see *Les Verts*, paragraph 24, and case-law cited). The Court of Justice concluded in that case that an action for annulment could be brought against measures of the European Parliament intended to have legal effects vis-à-vis third parties, even though Article 173 of the EC Treaty

(now, after amendment, Article 230 EC), in the version applicable at the material time, referred only to acts of the Council and the Commission. The Court stated that an interpretation of that article which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in Article 164 of the EC Treaty (now Article 220 EC) and to its system (*Les Verts*, paragraph 25).

37 The general principle to be elicited from that judgment is that any act of a Community body intended to produce legal effects vis-à-vis third parties must be open to judicial review. It is true that *Les Verts*, paragraph 24, refers only to Community institutions and the EAR is not one of the institutions listed in Article 7 EC. None the less, the situation of Community bodies endowed with the power to take measures intended to produce legal effects vis-à-vis third parties is identical to the situation which led to the *Les Verts* judgment: it cannot be acceptable, in a community based on the rule of law, that such acts escape judicial review.

38 It must be noted that the cancellation of a tender procedure is an act which, as a general rule, may be the subject of an action under Article 230 EC (see, to that effect, order of the Court of 19 October 2007 in Case T-69/05 *Evropaïki Dinamiki* v *EFSA*, not published in the ECR, paragraph 53). It is an act which adversely affects the applicant and brings about a distinct change in his legal position, since the result is that the applicant can no longer expect to be awarded the contract for which he has submitted a tender.

39 It must also be borne in mind that, under Articles 1 and 2 of Regulation No 2667/2000, as amended, the Commission may delegate to the EAR implementation of the Community assistance provided for in Article 1 of Regulation No 2666/2000 to Serbia and Montenegro, and, in particular, make the EAR responsible for preparing and evaluating invitations to tender and awarding contracts. As is stated by the Commission, the EAR therefore takes decisions which the Commission itself would have taken if it had not delegated those powers to the EAR.

40 Decisions which the Commission would have taken cannot cease to be acts open to challenge solely because the Commission has delegated powers to the EAR, otherwise there would be a legal vacuum.

41 The Court must reject the EAR's argument that the rights of tenderers are protected by the procedure laid down in point 37 of the Instructions to tenderers on the ground that they could have recourse to procedures established by the Commission, whose acts are open to challenge under Article 230 EC. It is clear that point 37 of the Instructions to tenderers does not provide for the Commission to adopt, in the course of the procedure, a decision which is open to judicial review. It must further be observed that the Commission stated, in reply to a written question put by the Court, that it had not set up any specific procedure to deal with any complaints which did not reach an amicable settlement under point 37 of the Instructions to tenderers.

42 Lastly, the Court must reject the EAR's argument that an action against its acts could be brought before a domestic court. While it is true, in the present case, that, according to the Procurement Notice and point 2 of the Instructions to tenderers, the contracting authority is the Serbian Ministry of Capital Investments, it remains the case that it is the EAR, and not a domestic authority, which took the decision to cancel the tender procedure. It is clear that no domestic court has jurisdiction to assess the legality of that decision.

43 It follows that decisions taken by the EAR in the context of public procurement procedures and intended to produce legal effects vis-à-vis third parties are acts open to challenge before the Community judicature.

44 No doubt is cast on that conclusion by the case-law referred to by the EAR in support of its defence.

45 As regards Case C-160/03 *Spain* v *Eurojust* [2005] ECR I-2077, it is true that the Court of Justice there held that the acts contested were not included in the list of acts the legality of which the Court may review under Article 230 EC (paragraph 37). However, in the following paragraph of that judgment, the Court of Justice also held that Article 41 EU did not provide for the application of Article 230 EC to the provisions on police and judicial cooperation in criminal matters in Title VI of the Treaty on European Union, the jurisdiction of the Court in such matters being defined in Article 35 EU, to which Article 46(b) EU refers. The Court of Justice also held, in paragraphs 41 and 42 of that judgment, that the acts contested in that case were not exempt from judicial review.

46 Similarly, in the order in Case T-148/97 *Keeling* v *OHIM* [1998] ECR II-2217, the Court of First Instance did not confine itself to stating, in paragraph 32, that the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) was not one of the institutions of the Community listed in Article 4 of the EC Treaty (now Article 7 EC) and was not mentioned in the first paragraph of Article 173 of the EC Treaty, but also observed, in paragraph 33, that other remedies were potentially available against the contested decision of the President of OHIM, mentioning, inter alia, Article 179 of the EC Treaty (now Article 236 EC). That order therefore does not preclude an action lying under Article 230 EC against a decision of a Community body not mentioned in that article.

47 As regards the order of 1 March 2007 in Joined Cases T-311/06 R I, T-311/06 R II, T-312/06 R and T-313/06 R *FMC Chemical and Others* v *EFSA,* not published in the ECR, it must be pointed out that that order relates to an action brought against an opinion of the European Food Safety Authority which did not produce binding legal effects. It cannot be concluded from that order that an action brought against an act of a Community body not mentioned by Article 230 EC is inadmissible.

48 Consequently, the case-law relied on by the EAR does not affect the finding that an act emanating from a Community body intended to produce legal effects vis-à-vis third parties cannot escape judicial review by the Community judicature.

49 It must moreover be observed that, as a general rule, actions must be directed against the body which enacted the contested measure, in other words, the Community institution or body from which the decision emanated.

50 In that context, it must be pointed out that the EAR is a Community body endowed with legal personality and established by a regulation with the aim of implementing Community assistance inter alia to Serbia and Montenegro (see Articles 1 and 3 of Regulation No 2667/2000). For that purpose, Articles 1 and 2 of Regulation No 2667/2000 expressly permit the Commission to delegate to the EAR the implementation of that assistance, including preparing and evaluating invitations to tender and awarding contracts. The EAR therefore itself has the power, conferred on it by the Commission, to implement programmes of Community assistance.

51 In the present case, it is the EAR which took the decision to cancel the tender procedure, by virtue of the powers delegated by the Commission in accordance with Regulation No 2667/2000. The Commission played no part in the decision-making process. Accordingly, it is clear that the EAR is the body which enacted the contested measure. Consequently, the applicant may institute proceedings before the Court of First Instance against the EAR in that capacity.

52 Furthermore, it must be pointed out that it is clear from Article 13(2) and from Article 13a(3) of Regulation No 2667/2000 that it is for the EAR to defend itself in a court of law in disputes relating to whether it has incurred non-contractual liability and in disputes relating to decisions which it has taken pursuant to Article 8 of Regulation No 1049/2001.

53 In those circumstances, it cannot be considered that other decisions taken by the EAR ought not also to be defended in a court of law by the EAR.

54 It is true that, in certain cases, the Community judicature has held that acts adopted pursuant to delegated powers were to be imputed to the delegating institution, which was obliged to defend in a court of law the act in question. However, in those cases, the circumstances were not comparable to those of the present case.

55 As regards the order of 5 December 2007 in Case T-133/03 *Schering-Plough* v *Commission and EMEA* (not published in the ECR), relating to an action for annulment directed against an act of the European Agency for the Evaluation of Medicinal Products (EMEA), the Court there stated that Council Regulation (EEC) No 2309/93 of 22 July 1993 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products (OJ 1993 L 214, p. 1) provided for only advisory powers for the EMEA. The Court thereby concluded that the refusal by the EMEA of an application for variation of a marketing authorisation had to be deemed to emanate from the Commission itself and therefore that any action had to be directed against the Commission (order in *Schering-Plough* v *Commission and EMEA*, paragraphs 22 and 23). In the present case, it is clear that the powers of the EAR are not advisory, since it has the responsibility, delegated to it by the Commission, of preparing and evaluating invitations to tender and awarding contracts.

56 As regards Joined Cases T-369/94 and T-85/95 *DIR International Film and Others* v *Commission* [1998] ECR II-357, relating to an action for annulment directed against acts of the European Film Distribution Office (EFDO), it must be noted that the Court stated that, under Article 7(1) of Decision 90/685/EEC concerning the implementation of an action programme to promote the development of the European audiovisual industry (MEDIA) (1991 to 1995) (OJ 1990 L 380, p. 37), the Commission

was responsible for the implementation of the MEDIA programme. The Court then pointed out that the relevant agreement between the Commission and the EFDO on the financial implementation of the MEDIA programme made any decision in that area subject in practice to the prior agreement of the Commission's representatives, and that decisions taken by the EFDO on funding applications made under the MEDIA programme were accordingly imputable to the Commission, which was therefore responsible for their content and could be called upon to defend them in court (paragraphs 52 and 53 of that judgment). In the present case, it is clear that decisions taken by the EAR in relation to procurement are not subject to the prior approval of the Commission.

57 It follows from all of the foregoing that the Court of First Instance has jurisdiction to hear the present action and that the applicant has properly directed that action against the EAR.

B — *The necessity of a prior administrative complaint*

1. *Arguments of the parties*

58 The EAR contends that point 37 of the Instructions to tenderers (quoted in paragraph 7 above) establishes a system for preliminary monitoring of the legality of its acts. The action brought before the Court of First Instance is claimed to be inadmissible because the applicant did not comply with the procedure laid down in that article.

59 The applicant and the Commission do not accept that plea of inadmissibility.

2. *Findings of the Court*

60 It is clear, first, that the wording of point 37.1 of the Instructions to tenderers does not specify that an administrative complaint is obligatory. It must further be observed that the fact that point 37 of the Instructions to tenderers does not lay down any time-limit for bringing an administrative complaint militates against an interpretation of that point as being designed to introduce the requirement of a prior administrative complaint.

61 Moreover, point 37.2 of the Instructions to tenderers provides only that the Commission is to facilitate an amicable solution between the complainant (tenderer) and the EAR, not that it must in that context adopt a decision which may be open to judicial review.

62 It must further be pointed out that Article 37.3 also does not provide that completion of the procedure concerned is a prerequisite of bringing an action before the Community judicature. That point states that '[i]f the above procedure fails, the tenderer may have recourse to procedures established by the European Commission'. In that context, it must be borne in mind that the Commission has not established any specific procedure for dealing with any complaints which have not given rise to an amicable settlement under point 37 of the Instructions to tenderers (see paragraph 41 above). There is therefore no 'procedure established by the Commission' completion of which could be considered a prerequisite of bringing an action before the Community judicature.

63 The EAR claims that use of the word 'may' in point 37.1 of the Instructions to tenderers cannot be interpreted to mean that that procedure is optional. In that regard, it is true that that word is also used in regulations which provide that a prior administrative procedure is a prerequisite of bringing an action before the Community judicature. That applies, for example, to Article 68 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1), to which the EAR refers, and which states '[a]ny natural or legal person may appeal' against relevant decisions of the Community Plant Variety Office. It must, however, be noted that that regulation expressly lays down, in Article 69, a time-limit for filing a notice of appeal against a decision of the Community Plant Variety Office. In addition, it expressly provides, in Article 73(1) that an appeal lies from decisions of the Board of Appeal of that Office to the Community judicature and lays down a time-limit for lodging such an appeal. Similarly, while Article 90(2) of the Staff Regulations of Officials of the European Economic Community provides that any person to whom those Regulations apply 'may' submit to the appointing authority a complaint against an act adversely affecting him, it also establishes a time-limit for doing so. Furthermore, Article 91(2) of those Regulations expressly provides that an appeal to the Community judicature is to lie only if the appointing authority has previously had a complaint submitted to it.

64 By contrast, point 37 of the Instructions to tenderers cannot subject the admissibility of an action to an obligatory prior administrative complaint, since the wording is not sufficiently clear.

65 For the sake of completeness, it must be stated that the EAR cannot, without any basis in law, introduce a condition governing admissibility which goes beyond those laid down in Article 230 EC.

66 In this context, the Court must reject the EAR's argument that point 2.4.16 of the 'Practical Guide to contract procedures for EC external actions' represents such a

legal basis. It need merely be pointed out that such a Practical Guide is a working tool which explains the procedures applying in a particular area and which cannot, as such, constitute a basis in law for the introduction of an obligatory prior administrative complaint.

67 The Court must also reject the EAR's argument that such a legal basis is provided by Article 56(1)(b) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1, the 'Financial Regulation'), under which decisions entrusting executive tasks to the agencies referred to in Article 54(2) of that regulation, must comprise an effective internal control system for management operations. On that point, it must be observed that that provision relates to budgetary matters and manifestly does not apply to the legal remedies available to tenderers. It cannot therefore constitute a basis in law for the introduction of a condition governing the admissibility of appeals by tenderers, namely an obligatory prior administrative complaint.

68 It follows from the foregoing that the plea of inadmissibility on the ground that no prior administrative complaint was submitted by the applicant must be rejected.

C — *Compliance with the time-limit for bringing proceedings*

1. *Arguments of the parties*

69 The EAR considers that the action is inadmissible in so far as it relates to the annulment of the decision to cancel the tender procedure, because the time-limit for bringing proceedings laid down by the fifth paragraph of Article 230 EC was not complied with.

70 In that regard, it contends that it sent the letter of 9 October 2006, informing the applicant of the cancellation of the tender procedure in question as an annex to an e-mail of the same day. Since it did not receive any 'not received' message from the electronic messaging system of the applicant, the EAR considers that it can reasonably take the view that the e-mail sent on 9 October 2006 actually reached the applicant on the same day. The period for bringing an action against that decision therefore expired on 19 December 2006.

71 In its rejoinder the EAR states that, following enquiry, it established that the original version of the letter in question was never sent to the applicant. Contrary to what was stated in its statement in defence, the letter was not sent to the applicant by e-mail and by post, but solely by e-mail. The applicant therefore obtained the information that the tender procedure had been cancelled from the document sent as an annex to the e-mail of 9 October 2006.

72 The applicant claims that it never received the e-mail of 9 October 2006. The letter of 9 October 2006 reached it by post on 12 October 2006.

2. *Findings of the Court*

73 First, it should be noted that the decision to cancel the tender procedure is not a decision which had to be formally notified to the applicant in accordance with Article 254(3) EC. The applicant is not an addressee of the decision to cancel the tender procedure (see, to that effect, order of 14 May 2008 in Case T-383/06 *Icuna.Com* v *Parliament* [2008] ECR II-727, paragraph 43). The decision to cancel related

to the entire tender procedure, and the fact that it was subsequently communicated to the applicant does not mean that it was addressed to the applicant.

74 The period for instituting proceedings laid down in the fifth paragraph of Article 230 EC therefore started to run from the time when the applicant had knowledge of the decision.

75 According to the Court's case-law, if the date of notification of a decision cannot be established with certainty, the applicant is accorded the benefit of the doubt which results and his application is regarded as having been lodged within the prescribed period if, in the light of the facts, it does not appear absolutely impossible that the letter notifying the decision arrived so late that the time-limit was complied with (Joined Cases 32/58 and 33/58 *SNUPAT.* v *High Authority* [1959] ECR 127, paragraph 136).

76 Similarly, the applicant is accorded the benefit of the doubt if it is not a matter of determining the date of notification, but the date on which the applicant became aware of the act. It is for the party pleading that the action is out of time to provide evidence of the date on which the event causing time to begin to run occurred (see Case T-347/03 *Branco* v *Commission* [2005] ECR II-2555, paragraph 54, and case-law cited).

77 It is clear that sending an e-mail does not guarantee that it is actually received by the person to whom it is addressed. An e-mail may not reach him for technical reasons. Even if, in the present case, the EAR did not receive a 'not received' message, that does not necessarily mean that the e-mail did actually reach the person to whom it was addressed. Furthermore, even where an e-mail actually reaches the person to whom it is addressed, it may not be received on the day on which it was sent.

78 In that context, it must be observed that the EAR could have chosen a means of communication which enabled it to establish accurately the date on which the letter reached the tenderer. It is true that the EAR asked the applicant, in its e-mail of 9 October 2006, to confirm by e-mail receipt of the message. However, it did not receive such confirmation. It is clear that, if the sender of an e-mail who does not receive any confirmation of receipt takes no further action, he is normally not able to prove that that e-mail was received and, when necessary, on which date.

79 As regards the EAR's argument, put forward in the rejoinder, that the letter in question was not sent to the applicant by e-mail and by post, but solely by e-mail, contrary to what was stated in the statement in defence, the EAR offers no evidence in that connection. The 'fiche détail' [record sheet] produced as an annex to the rejoinder which refers to the sending of the letter in question on 9 October 2006 certainly cannot exclude the possibility that the letter was also sent by post. It should be noted that the EAR conceded, moreover, at the hearing, that that document did not demonstrate that the communication was not sent by post.

80 The EAR has therefore not demonstrated that the applicant had knowledge of the decision to cancel the tender procedure before 12 October 2006, the date on which the applicant acknowledges having received the letter of 9 October 2006. The period of two months laid down in the fifth paragraph of Article 230 EC, extended, under Article 102(2) of the Court's Rules of Procedure, by a period of 10 days on account of distance, therefore expired on 22 December 2006, the date on which the application was lodged at the Registry of the Court of First Instance.

81 It follows from the foregoing that the present action cannot be regarded as out of time in so far as it relates to annulment of the decision to cancel the tender procedure.

D — *Admissibility of the action in so far as it relates to annulment of the decision to organise a new tender procedure*

1. *Arguments of the parties*

82 The EAR and the Commission contend that the application for the annulment of the EAR's decision to organise a new tender procedure is inadmissible. As regards this head of claim the application does not comply with the essential procedural requirements laid down in Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, since the pleas put forward in the application relate only to the decision to cancel the tender procedure.

83 Furthermore, the decision to organise a tender procedure, whether it is a new invitation to tender or follows cancellation of another invitation to tender, is not of direct and individual concern to economic operators, even if they have submitted a tender in a previous procedure, which was then cancelled.

84 The applicant claims that the decision to publish a new invitation to tender resulted from the fact that — according to the EAR — the first tender procedure had no positive outcome. Were the decision to cancel the first tender procedure to be held unlawful, the subsequent decision to organise a new tender procedure would be the direct consequence of the EAR's unlawful conduct. The applicant claims that, should its action be upheld, that would reopen the first procedure and render the second devoid of purpose.

2. *Findings of the Court*

85 The Court has consistently held that only a measure whose legal effects are binding on the applicant and are capable of affecting his interests by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under Article 230 EC (see order in Case C-164/02 *Netherlands* v *Commission* [2004] ECR I-1177, paragraph 18, and case-law cited).

86 As a general rule, a decision to organise a tender procedure has no adverse effects, since it does no more than give to interested parties the possibility of taking part in the procedure and submitting a tender. The applicant has not put forward any arguments capable of showing that, in the present case, the decision to organise a new invitation to tender could none the less be regarded as adversely affecting it.

87 Accordingly, the applicant's argument that, should its action be upheld, that would reopen the first procedure and render the second devoid of purpose, is not capable of establishing that the decision to organise a new tender procedure adversely affects it. Equally, its argument that, were the decision to cancel the first tender procedure to be held unlawful, the subsequent decision to organise a new tender procedure would be the direct consequence of the EAR's unlawful conduct, is not capable of demonstrating that the latter decision adversely affects it. The mere fact that there is a link between one decision which adversely affects the applicant, namely the cancellation of the first tender procedure, and a second decision, namely the decision to organise a new tender procedure, does not mean that the second decision also adversely affects it.

88 Furthermore, it is clear that the decision to organise a new tender procedure for the same work as that covered by a procurement procedure which has been previously cancelled does not in itself mean that, if the Court annuls the decision to cancel the first procurement procedure, the contracting authority is no longer in a position to continue the first procedure. The decision to organise a new tender procedure does not necessarily involve the award of a contract covering the same work to another tenderer.

89 In light of the foregoing, it must be held that the applicant has not brought forward evidence to establish that the decision to organise a new tender procedure has legal effects which are binding on it and are capable of affecting its interests by bringing about a distinct change in its legal position.

90 It follows that the action must be dismissed as inadmissible in so far as the applicant seeks annulment of the decision to organise a new tender procedure, and it is unnecessary to examine whether the application meets the requirements of Article 44(1)(c) of the Rules of Procedure.

E — *Admissibility of the action to the extent that the applicant asserts the rights of DOK ING*

1. *Preliminary observations*

91 It must be borne in mind that the applicant states, in the application, that it is bringing the action on its own behalf and as agent of the company DOK ING. That

relates, first, to the requests for annulment. Secondly, the applicant quantifies, in the application, both the damage which it claims to have suffered and the damage allegedly suffered by DOK ING, and asks the Court to order the EAR to pay to it the full amount of the sum in question.

92 The Court asked the applicant, by way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, to supply details of the 'instructions' which it received from the company DOK ING, to lodge in the Court file any relevant documentation and to express a view on the admissibility of the manner in which it had chosen to proceed in order to defend the rights of the company DOK ING.

2. *Arguments of the parties*

93 The applicant claims, in reply to the question put by the Court, that it brought the present action in order to obtain suitable protection of its own rights and those of DOK ING, on the basis of existing agreements, as undertakings which had taken part in the tender procedure. It submits that the three documents which it has produced, at the request of the Court, show that it has authority to do so.

94 The EAR and the Commission consider that the present action is not admissible to the extent that the applicant asserts the rights of the company DOK ING.

3. *Findings of the Court*

95 It is, first of all, clear that Sogelma is the only applicant in the present case. In particular, neither DOK ING nor the consortium formed by the applicant and DOK ING are parties to these proceedings. Moreover, it must be noted that the applicant does not claim that DOK ING has assigned its rights to the applicant.

96 It is necessary therefore to examine whether the three documents which the applicant has produced, at the request of the Court, enable it to assert the rights of DOK ING in the context of the present proceedings.

97 As regards the document titled 'Joint Venture Agreement', dated 27 September 2005, Article 4 thereof provides that the applicant, as Group Leader, has authority in particular to assume obligations on behalf of DOK ING and that it may sign, on behalf of the joint venture, all documentation required for the performance of works covered by the contract. It must be pointed out that this agreement makes no reference to the possibility of the applicant bringing legal proceedings to assert the rights of DOK ING.

98 As regards the document titled 'Power of attorney', signed on 6 December 2005 by a representative of DOK ING, it must be observed that this also makes no reference to the possibility of the applicant bringing legal proceedings to assert the rights of DOK ING.

99 Only the third document submitted by the applicant, a letter from DOK ING dated 1 December 2006 and addressed to the applicant, relates to legal proceedings. That letter reads as follows:

'With reference to the above tender and the subsequent cancellation by the Contracting Authority, we her[e]by authorise you as the Joint Venture Leader, to instruct your lawyer to take legal action against the [EAR], for damages caused by the tender cancellation, also on our behalf.'

100 Accordingly, that document serves only to authorise the applicant to instruct its lawyer to take legal proceedings on behalf of DOK ING also. The document does not however deal with the form and content of the legal proceedings referred to and, consequently, provides no detail of those matters. In particular it does not provide that the applicant is entitled to bring legal proceedings in its name alone and to thereby assert the rights of DOK ING. It is clear that the fact that a company instructs a lawyer for the purpose of bringing legal proceedings also on behalf of a second company normally means that the lawyer will bring the action in the name of two applicants, or by means of two separate actions.

101 It is not acceptable for a company to assert in legal proceedings the rights of another company if it has not been unequivocally instructed to do so. There is an interest in having the status of applicant in order to be able to determine the scope of the

case and, if necessary, to bring an appeal against the judgment to which an action gives rise. Moreover, a company which wishes to obtain payment of a certain sum as compensation for alleged damage normally wants the court to order the defendant to pay that sum to it and not to another company.

102 It follows from the foregoing that the documents provided by the applicant are not such as to establish that it was instructed by DOK ING to assert, as the sole applicant, the rights of the DOK ING before the Community judicature.

103 It follows that the action is inadmissible to the extent that the applicant asserts the rights of DOK ING.

F — *Conclusion on the admissibility of the action*

104 It follows from all of the foregoing that the action is admissible to the extent that the applicant seeks, on its own behalf, annulment of the decision to cancel the tender procedure and to the extent that it seeks damages in respect of the loss which it itself has suffered.

105 On the other hand, the action must be dismissed as inadmissible to the extent that the applicant seeks annulment of the EAR's decision to organise a new tender procedure and to the extent that it asserts the rights of DOK ING.

Substance

A — *The claim for annulment of the decision to cancel the tender procedure*

106 In support of its claim for annulment of the decision to cancel the tender procedure, the applicant relies on a single plea in law alleging infringement of essential procedural requirements. That plea has two parts, the first relating to an inadequate statement of reasons and the second to the claim that the statement of reasons is illogical and contradictory.

1. *Arguments of the parties*

(a) The first part of the single plea in law, alleging that the statement of reasons was inadequate

107 The applicant claims that the EAR did not, in relation to the decision to cancel the tender procedure, comply with the obligation to state reasons laid down in Article 41 of Directive 2004/18 which, in its opinion, is applicable to the EAR. The EAR was obliged to inform the tenderers, in good time and comprehensively, of all the grounds for the cancellation of the tender procedure, given the public interest and the urgency which should, in the applicant's opinion, have ensured that the contract was awarded quickly and satisfactorily, in light of the fact that the contract covered services in an area as sensitive as that in this case.

108 Taking account of the process which led to the taking of the contested decisions, there cannot, according to the applicant, be any doubt but that the cancellation of the procedure is the result of an ill-considered judgment, made without a thorough assessment of the public interest to be protected.

109 The EAR's conduct is even more serious in that almost seven months were needed in order to adopt and give notice of the decision to cancel the tender procedure.

110 The EAR and the Commission do not accept those arguments.

(b) The second part of the single plea in law, alleging that the statement of reasons was illogical and contradictory

111 The applicant considers that comparison of the EAR's letters of 9 October 2006 and 14 December 2006 could lead to the conclusion that the real reason for the decision to cancel the old procedure in order to initiate a new procedure is not to be found in the technical inadequacy of the tenders submitted but rather in a significant alteration of the technical requirements. The applicant considers that reference should be made to the later communication, namely the letter of 14 December 2006, in order to assess the EAR's conduct.

112 Furthermore, the statement of reasons provided in the letter of 9 October 2006, referring to the fact that the professional experience of one of the key experts proposed by

the applicant was less than that specified in the Procurement Notice, is contradicted by the conduct of those in charge of evaluation of the tenders, who authorised calling on the applicant for underwater mine-clearing operations identical to those covered by the Procurement Notice, precisely because of the technical qualities of the applicant's experts and the technology used by the applicant.

113 The EAR and the Commission do not accept those arguments.

2. *Findings of the Court*

(a) Preliminary observations

114 It must first be decided which provisions and principles govern the obligation to state the reasons for the decision to cancel the tender procedure.

115 In that context, the Court must reject the applicant's argument that Directive 2004/18 applies to the procurement procedure at issue. The purpose of that directive which, according to Article 84 thereof, is addressed to Member States, is to coordinate national laws, regulations and administrative provisions applicable to the procedures

for the award of public works contracts, public supply contracts and public service contracts. However, public contracts awarded by the EAR are not subject to the legislation of Member States.

116 It must be noted that public procurement by the Community institutions is subject to the provisions of the Financial Regulation and Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002, laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1, 'the Implementing Rules'). Under Article 162(1) of the Financial Regulation, external actions financed from the general budget of the European Communities are governed by Parts One (Common Provisions) and Three (Transitional and Final Provisions) of that regulation save as otherwise provided in Title IV (External Actions) of Part Two (Special Provisions). Article 7 of Regulation No 2666/2000 moreover expressly provides that the Commission is to implement the Community assistance covered by that regulation in accordance with the Financial Regulation.

117 The provisions which the Commission must respect as regards public procurement also apply to the EAR. Under Article 185(1) of the Financial Regulation, the Commission is to adopt a framework financial regulation for the bodies set up by the Communities and having legal personality which actually receive grants charged to the budget. Under Article 74 of Commission Regulation (EC, Euratom) No 2343/2002 of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Regulation No 1605/2002 (OJ 2002 L 357, p. 72), the relevant provisions of the Financial Regulation and the Implementing Rules are to apply as regards procurement by those bodies.

118 Under Article 101 of the Financial Regulation, the decision to cancel a procurement procedure must be substantiated and brought to the attention of the candidates or tenderers.

119 Furthermore, it is settled case-law that the statement of reasons for a decision must show clearly and unequivocally the reasoning of the institution which enacted the measure so as to inform the persons concerned of the justification for the contested measure and to enable the Community judicature to exercise its powers of review (see Case C-22/94 *Irish Farmers Association and Others* [1997] ECR I-1809, paragraph 39, and case-law cited).

120 However it is not necessary for the decision to give all the relevant factual and legal details. The adequacy of the statement of the reasons on which a decision is based may be assessed with regard not only to its wording but also to the context in which it was adopted and to all the legal rules governing the matter in question (Case T-471/93 *Tiercé Ladbroke* v *Commission* [1995] ECR II-2537, paragraph 33). It is sufficient for the decision to set out, in a concise but clear and relevant manner, the principal issues of law and of fact (Case 24/62 *Germany* v *Commission* [1963] ECR 63, at p. 69).

121 It is in regard to those considerations that the Court must examine whether the EAR has given a sufficient statement of the reasons for the decision to cancel the tender procedure.

(b) The first part of the single plea in law, alleging that the statement of reasons was insufficient

122 It must be recalled that the EAR stated, in the letter of 9 October 2006, that the contract award procedure had been cancelled due to the fact that none of the tenders received was technically compliant, and that the EAR added, in relation to the applicant's tender, that it had been decided that the 'Superintendent Survey Team' did not satisfy the requirements in point 16(x) of the Procurement Notice and point 4.2(x) of the Instructions to tenderers.

123 The statement of reasons provided for the cancellation of the tender procedure, namely the fact that none of the tenders received was technically compliant, although succinct, is clear and unambiguous. The statement of reasons given to explain, more particularly, why the applicant's offer did not comply, is also succinct, but again clear and unambiguous. The EAR referred to the points in the Procurement Notice and in the Instructions to tenderers which specify that the key personnel must have at least 10 years appropriate professional experience, and stated which member of the team proposed by the applicant did not satisfy that requirement.

124 In that regard, it must be noted that the applicant itself had stated, in the curriculum vitae of the person proposed for the post of 'Superintendent Survey Team' that that person had only five years professional experience. Consequently, it was unnecessary for the EAR to give further reasons for the conclusion that the applicant's tender did not satisfy the technical requirements of the tender procedure.

125 As regards the applicant's argument that cancellation of the procedure is the result of an ill-considered judgment, made without a thorough assessment of the public interest to be protected, it is clear that this does not in fact relate to an infringement of essential procedural requirements, but concerns the substance, since it amounts to an allegation of an error of assessment on the part of the EAR.

126 In any event, the facts put forward by the applicant are not such as to establish that the EAR committed a manifest error of assessment. True, there was a public interest in ensuring that unexploded ordnance in the inland waterway transport system of Serbia and Montenegro was removed as soon as possible in order to permit the re-opening of those waters to navigation. None the less, the mere fact that there is a public interest in a contract being awarded quickly does not allow the contracting authority to dispense with the obligatory technical requirements set out in the call for tenders. Under Article 100(1) of the Financial Regulation, the selection of the tenderer to whom the contract is to be awarded must be made in compliance with

the selection and award criteria laid down in advance in the documents relating to the call for tenders. As is stated by the Commission, if a contracting authority could set aside the conditions of the contract, as originally prescribed, that would give an advantage to those who submitted tenders over those undertakings which had decided not to take part in the tender procedure owing to the fact that they — just like the tenderers — could not satisfy the requirements laid down in advance.

127 As regards the argument that the EAR was slow to take and give notice of the decision to cancel the procedure, it must be observed that the applicant does not explain what effect that fact could have on the legality of that decision.

(c) The second part of the single plea, that the statement of reasons was illogical and contradictory

128 The applicant claims, in essence, that there is a contradiction between the statement of reasons for the decision to cancel the tender procedure provided in the letter of 9 October 2006 and that given in the letter of 14 December 2006, in so far as in the former the explanation for that decision was that no tender was technically compliant, whereas the explanation in the latter was that the technical requirements had been changed.

129 First, the Court must reject the applicant's argument that reference should be made to the communication which is later in date, namely the letter of 14 December 2006, in order to assess the EAR's conduct. The letter informing the applicant of the cancellation of the tender procedure is that of 9 October 2006, and accordingly that is the letter which should be referred to in order to assess whether the statement of reasons for the decision to cancel the tender procedure is illogical and contradictory.

130 The letter of 9 October 2006 is not, in itself, contradictory. Even though the EAR provided another explanation in the letter of 14 December 2006, that cannot alter the statement of reasons for the decision which was sent two months earlier. Any difference between those two letters cannot therefore entail a contradiction in the statement of reasons provided for the decision to cancel the tender procedure.

131 In any event, there is no contradiction between the reasons given for the decision to cancel the tender procedure in the letter of 9 October 2006 and those given in the letter of 14 December 2006.

132 It must be noted that the letter of 14 December 2006 refers expressly to the fact that the EAR evaluation committee found that none of the tenders received was technically compliant and states that that committee made no other remarks. That letter therefore confirms that the sole reason for the decision to cancel the tender procedure was that no tender was technically adequate.

133 While that letter also states that the EAR was exercising its right to cancel the tender procedure and to initiate a new procedure due to the fact that the technical conditions had been considerably changed, that sentence must be understood in context. It is in fact expressly stated in the heading to the letter of 14 December 2006 that it is a reply to the applicant's letter of 13 November 2006. In that letter, the applicant had asked EAR to send to it a copy of the decision to cancel the tender procedure and the relevant minutes and also to take a reasoned decision on whether or not it would commence a negotiated procedure.

134 In that context, the sentence to the effect that the EAR was exercising its right to cancel the tender procedure and to initiate a new procedure due to the fact that the technical conditions had been considerably changed must be understood to mean that the EAR was explaining why it had decided to initiate a new procedure instead of commencing a negotiated procedure.

135 Furthermore, the applicant itself states, in its reply, that the new justification appears to have been put forward solely in order to respond to its request for recourse to a negotiated procedure. In that regard, it must be observed that a decision to cancel a tender procedure is distinct from a decision relating to the subsequent action to be taken, namely a decision not to award the contract, to have recourse to a negotiated procedure, or to organise a new tender procedure. It cannot be inferred from the fact that the EAR mentioned, in response to the request for recourse to a negotiated procedure, reasons other than those given to explain the cancellation of the tender procedure, that there is any contradiction in the statement of reasons.

136 Moreover, it must be noted that, once a tender procedure is cancelled, that procedure is at an end and the contracting authority is entirely at liberty to decide on what subsequent action to take. There is no provision which confers on an economic operator the right to have a negotiated procedure set in motion. The EAR was therefore not obliged to take a formal decision in relation to the applicant's proposal that such a procedure should commence. The letter of 14 December 2006 is quite simply a reply to the applicant's letter of 13 November 2006, in which it asked the EAR, inter alia, to take a reasoned decision on whether or not to initiate a negotiated procedure, which led the EAR to inform the applicant, in the interests of sound administration, why the EAR had decided to initiate a new tender procedure instead of a negotiated procedure.

137 The Court must also reject the applicant's argument that the statement of reasons provided in the letter of 9 October 2006 is at variance with the fact that the applicant was subsequently awarded a public contract similar to that at issue in the present case. The statement of reasons provided in the letter of 9 October 2006 relates to the

fact that the technical requirements of the tender procedure had not been complied with, a fact which the applicant moreover does not dispute, since it acknowledges that the 'Superintendent Survey Team' included in its tender did not possess the requisite professional experience. That reasoning does not imply that the applicant is incapable of carrying out such work.

138 As regards the applicant's argument that the letter of 14 December 2006 shows that the real reason for the cancellation of the tender procedure was not the technical inadequacy of the tenders received but the alteration of the technical requirements, it is clear that this, in fact, does not relate to an error in the statement of reasons for the decision to cancel the tender procedure but rather challenges the truthfulness of that statement of reasons, which amounts in essence to contesting that decision as to its substance, alleging misuse of powers.

139 According to settled case-law, misuse of powers is defined as the adoption by a Community institution of a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 69, and case-law cited).

140 In the present case, it has already been determined that there is no contradiction between the statement of reasons provided in the letter of 9 October 2006 and that provided in the letter of 14 December 2006.

141 In addition, the Commission correctly states that notice of the cancellation decision was given to the public in the Official Journal with the same statement of reasons as that provided in the letter of 9 October 2006 (OJ 2006, S 198). That statement of reasons reads as follows: 'The tender process has been cancelled since none of the offers received was technically compliant'.

142 In those circumstances, it is impossible to infer from the subsequent conduct of the EAR that the real reason for the cancellation of the procedure was other than that set out in the letter of 9 October 2006.

143 It follows from the foregoing that the applicant's claim for annulment of the decision to cancel the tender procedure must be dismissed as unfounded.

B — *The request for compensation for damage allegedly suffered*

1. *Arguments of the parties*

144 The applicant considers that the fact that the contract at issue was not awarded is due to the unlawful conduct of the EAR and that has caused it to suffer damage. That damage comprises the expenses needlessly incurred in the framing of the tender and the making available of some of the equipment required over a period of 60 days, and amounts to a total of EUR 118 604.58.

145 The EAR does not accept the applicant's arguments.

2. *Findings of the Court*

146 It is settled case-law that, for the Community to incur non-contractual liability within the meaning of the second paragraph of Article 288 EC, a series of conditions must be met, namely the conduct of which the institutions are accused must have been unlawful, the damage must be real and a causal connection must exist between that conduct and the damage in question (Case 153/73 *Holtz & Willemsen* v *Council and Commission* [1974] ECR 675, paragraph 7, and Case T-19/01 *Chiquita Brands and Others* v *Commission* [2005] ECR II-315, paragraph 76).

147 In so far as those three conditions governing liability must be satisfied cumulatively, the fact that one of them has not been satisfied is a sufficient basis on which to dismiss an action for damages (Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraph 14).

148 In the present case, all the arguments which the applicant has presented in order to establish that the decision to cancel the tender procedure was unlawful have been examined and rejected (see paragraphs 122 to 143 above). The applicant therefore cannot claim damages on the basis of the alleged unlawfulness of the decision.

149 As regards the applicant's argument that the EAR took an unreasonably long time to take the decision to cancel the tender procedure and to inform the applicant, it is clear that the mere fact that more than six months elapsed between the sending of the last request for clarification to the tenderers and the notification of the decision to cancel the tender procedure cannot be characterised as unlawful conduct on the part of the EAR.

150 It is moreover clear that there can be no causal link between the time taken by the EAR to take and give notice of the decision to cancel the tender procedure and the expenses incurred by the applicant in order to frame its tender.

151 It follows from the foregoing that the application for compensation for damage allegedly suffered must be rejected.

C — *The request for production of documents*

152 As regards the applicant's request that the Court order the EAR to produce all the documents relating to the award procedure at issue, it must be noted that, according to the case-law, to enable the Court to determine whether it is conducive to the proper conduct of the procedure to order the production of certain documents, the party requesting production must identify the documents requested and provide the Court with at least minimum information indicating the utility of those documents for the purposes of the proceedings (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 93).

153 In support of that request, the applicant claims that the EAR has provided explanations that are general and succinct in support of its decisions and that it had asked the EAR to produce those documents, but had no response. Furthermore, the applicant argues that it has the right to know the reasons which led to cancellation of the tender procedure so as to be assured that the contracting authority's acts are lawful.

154 As regards, first, the fact that the applicant requested from the EAR production of documents relating to the award procedure and that that request met with no response, it must be observed that that fact is not in itself capable of demonstrating the utility of those documents for the purposes of the proceedings.

155 In relation, secondly, to the applicant's argument that the EAR provided explanations which were general and succinct in support of its decisions, it has been determined, in paragraphs 123 and 124 above, that the EAR communicated to the applicant an adequate statement of reasons for its decision to cancel the tender procedure. In that regard, the Court has sufficient information in the documents on the court file and it does not, moreover, appear that the documents relating to the award procedure could serve any purpose in the assessment of the adequacy of the statement of reasons provided.

156 As regards, third and last, the applicant's argument that it has the right to know the reasons which led to cancellation of the tender procedure so as to be assured of the legality of the contracting authority's acts, it must be held that the applicant has presented no objective evidence to suggest that the real reason for the cancellation of the procedure differs from that set out in the letter of 9 October 2006 (see paragraphs 140 to 142 above).

157 In that context, it must be observed that an application for the production of all the documents relating to the award procedure at issue, as sought by the applicant, is equivalent to a request for the production of the EAR's internal file. It is clear that examination by the Community judicature of the internal file of a Community body with a view to verifying whether that body's decision was influenced by factors other than those indicated in the statement of the reasons is an exceptional measure of inquiry. Such a measure presupposes that the circumstances surrounding the decision in question give rise to serious doubts as to the real reasons and in particular, to suspicions that those reasons were extraneous to the objectives of Community law and hence amounted to a misuse of powers (see, to that effect, as regards decisions of the Commission, order in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v

Commission [1986] ECR 1899, paragraph 11). However, it is clear that in the present case there are no such circumstances.

158 It follows from the foregoing that the applicant has not presented evidence to demonstrate the utility of all the documents relating to the award procedure being produced for the purposes of these proceedings. The request for production of those documents must therefore be rejected.

Costs

159 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

160 Since the applicant has been unsuccessful, the applicant must be ordered to pay the costs, as applied for by the EAR.

161 Furthermore, the first paragraph of Article 87(4) of the Rules of Procedure states that institutions which intervened in the proceedings are to bear their costs. It follows that the Commission must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Eighth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Sogelma — Societá generale lavori manutenzioni appalti Srl to bear its own costs and to pay those incurred by the European Agency for Reconstruction;**

3. **Orders the Commission to bear its own costs.**

Martins Ribeiro Papasavvas Dittrich

Delivered in open court in Luxembourg on 8 October 2008.

Registrar President

E. Coulon M.E. Martins Ribeiro

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