JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
17 March 2005 *

In Case T-160/03,

AFCon Management Consultants, established in Bray (Ireland),

Patrick Mc Mullin, resident in Bray,

Seamus O'Grady, resident in Bray,

represented by B. O'Connor, solicitor, and I. Carreño, lawyer,

applicants,

v

Commission of the European Communities, represented by J. Enegren and F. Hoffmeister, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

APPLICATION for compensation for the damage allegedly suffered as a result of irregularities in the tendering procedure for a project financed by the Tacis programme ('Project FDRUS 9902 – Agricultural extension services in South Russia'),

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

composed of P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges, Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 6 July 2004,

gives the following

Judgment

Facts

1 AFCon Management Consultants ('AFCon') is a consultancy company specialising in agricultural projects in countries whose economies are in transition. Mr Mc Mullin and Mr O'Grady are the directors, shareholders and founding members of the company (together with AFCon 'the applicants').

2 On 28 May 1999, the Commission launched a restrictive tender procedure within the Tacis programme for the supply of technical assistance services, entitled 'Agricultural Extension Services in South Russia' reference FDRUS 9902 ('the tender at issue').

3 On 29 July 1999, the evaluation committee drew up a list of ten companies from the 21 firms which had expressed interest in that call for tenders. The ten companies were then invited to submit a tender.

4 On 16 and 17 December 1999, the evaluation committee met to evaluate the eight tenders received ('the first evaluation'). The committee considered the tender of the GFA — Gesellschaft für Agrarprojekte mbH ('GFA-Agrar') and Stoas Agri-projects Foundation ('Stoas') consortium to be the best. AFCon's tender came in second place.

5 The Commission subsequently discovered that a conflict of interests existed as between a member of the evaluation committee and the GFA-Agrar and Stoas consortium ('GFA'). That member, Mr A, was employed by Agriment International BV, a subsidiary of Stoas. The Commission ended its association with Mr A and informed him that it would no longer require his services.

6 Because of that conflict of interests, the Commission, on 3 March 2000, decided to cancel the first evaluation and to appoint a committee of new members to carry out a second evaluation. The Commission informed the tenderers of that decision by letter of 28 March 2000.

7 On 15 and 16 May 2000, the evaluation committee carried out a second tender evaluation ('the second evaluation'). At the end of that evaluation, GFA's tender was ranked first. GFA's technical proposal scored 72.69 % (third place); its financial proposal was EUR 2 131 870 (first place). AFCon's tender was ranked second with a technical proposal scoring 75.32 % (first place) and a financial proposal of EUR 2 499 750 (sixth place).

8 In August 2000, the Commission awarded the tender to GFA. It informed AFCon of that by letter of 17 August 2000.

9 On 9 October 2000, AFCon complained to the Commission that the tender procedure had been mismanaged. It maintained that GFA's financial proposal was below the market rate. The Commission rejected that complaint on 9 November 2000.

10 By letters of 18 December 2000 and 31 January 2001, AFCon alleged that GFA had infringed the tendering rules. By letter of 28 February 2001, the Commission rejected that allegation.

11 By letter of 15 March 2001, AFCon repeated that GFA's proposal was in breach of the procedure for the award of Tacis contracts. The Commission did not reply to that letter.

12 On 15 May 2001, AFCon made a complaint to the European Ombudsman. According to that complaint:

— GFA's financial proposal was in breach of the tendering rules (first complaint);

— having discovered a conflict of interests, the Commission failed to take the measures required by the rules governing the award of contracts (second complaint);

— the Commission infringed the tendering rules by allowing the successful tenderer to replace the majority of its long-term experts by other persons within weeks of the signature of the contract (third complaint).

13 In his decision of 22 April 2002 (Decision 834/2001/GG), the Ombudsman held that only the first complaint was well founded. In that regard he stated:

'It is good administrative practice in tender procedures for the administration to adhere to the rules established for these procedures. ... By allowing tenderers to include experts' fees under reimbursable items in the present case, the Commission failed to comply with the rules applicable to the tender and the aim pursued by these rules. This constitutes an instance of maladministration.'

14 As regards the second and third complaints, the Ombudsman concluded that there was no maladministration on the part of the Commission.

15 By letter of 25 May 2002, AFCon claimed that the Commission should pay it the following amounts by way of compensation for harm suffered as a result of not having been awarded the contract:

— loss of profit: EUR 624 937

— loss of 'project profile': EUR 600 000

— loss of 'professional development': EUR 150 000.

16 The Commission rejected that claim by letter of 25 July 2002.

17 By letter of 13 September 2002, AFCon requested the Commission to send it a number of documents pertaining to the procedure for the award of the tender at issue. The Commission acceded to that request on 3 October 2002, other than in respect of the evaluation committee's evaluation reports and minutes and competitors' bids, which fell under the exceptions provided for, respectively, in the second subparagraph of Article 4(3) and Article 4(1)(b) 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).

18 By letter of 11 October 2002, AFCon made a confirmatory application under Regulation No 1049/2001. It requested access to various documents relating to the tendering procedure at issue.

19 By letter of 22 November 2002, the Commission granted access to certain documents and, as to the remainder, upheld its refusal to provide the documents requested.

20 At the same time, in a letter of 4 September 2002 sent to Mr Byrne, Member of the Commission, the Irish Minister of State for European Affairs, Mr D. Roche, expressed support for AFCon and asked the Commission to find a solution to the dispute with AFCon.

21 By letters of 10 October and 4 November 2002, the Commission restated its position on the legality of the tender procedure at issue.

22 On 15 November 2002, Mr B. Crowley, a member of the European Parliament, put a written question (3365/02) to the Commission about the award of the contract at issue. Mr Patten, a member of the Commission, replied to it on 23 December 2002. Mr Crowley subsequently sent a letter to Mr Patten, to which the latter responded on 3 April 2003.

23 By letter of 18 February 2003, Mr Roche wrote a second time to Mr Byrne in support of AFCon. By letter of 8 April 2003, Mr Byrne restated the Commission's position.

Procedure

24 By application lodged at the Court Registry on 12 May 2003, the applicants brought the present action.

25 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure and, as measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure of the Court of First Instance, put questions in writing to the parties and asked the Commission to produce certain documents. The parties complied with those requests within the prescribed time-limits.

26 The parties submitted oral argument and answered the questions put by the Court at the hearing on 6 July 2004.

Forms of order sought

27 The applicants claim that the Court should:

— order the Commission to pay damages in respect of the loss suffered as a result of the breach of the tendering procedure for the Tacis FDRUS 9902 project, plus compensatory interest, from the date on which the loss materialised;

— order the Commission to pay interest on the damages from the date of judgment;

— order the Commission to produce certain documents relating to the procedure for evaluating the tenders;

— order the Commission to pay the costs.

28 The Commission contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

Law

A — *The request for measures of inquiry*

29 The applicants have asked the Court to order the Commission, under Article 65(b) of the Rules of Procedure, to produce certain documents relating to the tender procedure and, if necessary, to hear witnesses.

30 The Court, in the context of measures of organisation of procedure, requested the Commission, inter alia, to produce information concerning the tenderers' bids and the documentation relating to the first and second evaluations. Those requests coincide in the main with the applicants' requests for measures of inquiry.

Therefore, the Court finds that the information in the documents before it is sufficient for it to give judgment in the proceedings without ordering the production of further documents or the hearing of witnesses.

B — *The claim for compensation*

31 Community law recognises a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties (Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 51; and Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 41 and 42).

32 It is necessary to ascertain whether the applicants have established that the various conditions were met in this instance.

1. *The unlawfulness of the Commission's conduct*

33 The applicants claim, in essence, that there are three irregularities. First, GFA's bid did not comply with the rules of the tender at issue. Second, the Commission took account of unlawful criteria in the evaluation. Third, the Commission did not take the requisite measures once it had discovered there to be a conflict of interests.

(a) The lawfulness of GFA's tender

Arguments of the parties

34 The applicants submit that GFA's bid failed to comply with the rules of the tender at issue. Those rules include:

— instructions to tenderers (European Commission, SCR(E) Tacis, version of 22 June 1999), in particular point C.2.1;

— guidelines for the preparation of the technical and financial proposal (European Commission, SCR(E) Tacis, January 1999 version) ('the guidelines'), in particular, the provisions relating to the preparation of Annexes B ('Organisation and methods') and D ('Breakdown of prices for Tacis contracts');

— terms of reference for the tender at issue (European Commission, 'Technical assistance to economic reform in the food and agriculture sector, Terms of reference for a project: Russia "Agricultural extension services in South Russia — Farm extension project"', of 4 June 1999).

35 In the applicants' submission, it is clear from those rules that the financial proposal must correspond to the technical proposal and show the remuneration of the persons responsible for training activities in the heading attributed to that purpose.

36 Those rules are unambiguous. They are intended to place all tenders on an equal footing in order that a comparison may be made. The rules were confirmed by the Commission's practice in a similar project which was contemporaneous with the project in question (FDRUS 9901).

37 GFA infringed those rules because:

— the number of man-days given in its technical proposal is higher than the number referred to in its financial proposal;

— in its financial proposal, GFA allocated a part of the remuneration for persons responsible for training to the heading 'reimbursable expenses', which is normally reserved for the reimbursement of costs relating to training activities 'such as flights, *per diem* for trainees, registration fees etc.'.

38 GFA thus succeeded in reducing the amount of its financial proposal. The differences between the two proposals are as follows:

Technical Proposal	Financial Proposal	Difference
2 687 man-days (EU experts)	2 200 man-days (EU experts)	(487) hommes/jours
4 615 man-days (local experts)	2 250 man-days (local experts)	(2 365) man-days
5 300 man-days (support staff)	3 500 man-days (support staff)	(1 800) man-days
Total 12 602 man-days	7 950 man-days	(4 652) man-days

Those differences were allocated to reimbursable expenses.

39 The applicants submit that the Ombudsman, in substance, endorsed their argument when he found that the fact that the Commission had allowed GFA, in breach of the relevant tender rules, to include training fees as expenses within the heading restricted to reimbursable items constituted an instance of maladministration.

40 Finally, the applicants submit that their criticisms were borne out by the difficulties which the Commission encountered while GFA was performing the contract.

41 The applicants conclude from those matters that the Commission, in failing to exclude GFA on account of the irregularities, infringed the principles of equal treatment, of proportionality and of legitimate expectations.

42 The Commission contends that the way in which GFA presented its tender was not unlawful, since:

— the rules on which the applicants rely are not legally binding; they do not unequivocally prescribe how experts' fees are to be presented in the financial proposal;

— Article 117 of the Financial Regulation of 21 December 1997 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), as amended by Council Regulation (EC, ECSC, Euratom) No 2548/98 of 23 November 1998

(OJ 1998 L 320, p. 1; 'the Financial Regulation'), and Council Regulation (Euratom, EC) No 1279/96 of 25 June 1996 concerning the provision of assistance to economic reform and recovery in the New Independent States and Mongolia (OJ 1996 L 165, p. 1) (Article 7 and Annex III) contain no specific rules on the allocation of training fees to the heading reserved for reimbursable expenses;

— the Commission does not have an established practice in this regard and therefore the applicants cannot rely on an infringement of the principle of legitimate expectations;

— since the allocation of training fees to reimbursable expenses was not specifically prohibited, GFA could perfectly well use that method;

— GFA's presentation of its tender did not distort any comparison of the tenders, since the evaluators were in a position to take into account in their comparative assessment the fact that the trainers' fees had been treated as reimbursable expenses;

— the Ombudsman's finding is not decisive;

— circumstances subsequent to the award of the tender, in particular the performance of the contract, are irrelevant.

Findings of the Court

43 Point C.2.1 of the instructions to tenderers provides:

'Breakdown of prices should be prepared in accordance with the format of Annex D of the draft contract and prices must be expressed in euros. Tenders in any other currency or an incorrect presentation of the breakdown of prices may lead to the rejection of the tender.'

44 Annex D to the guidelines contains an introductory section which sets out the method to be followed in presenting the tender. It also includes a form consisting of a table intended for the tenderers' data. The table contains the following four main headings:

'1. Fees, including

(a) Western experts

(b) Local experts

(c) Support staff

2. Per diem

3. Direct expenses

4. Reimbursable expenses.'

45 According to the guidelines:

'The following notes are provided to assist tenderers in the preparation of Annex D (financial breakdown). ... Where these guidelines are not followed, the tenderer is advised to justify deviations through an explanatory note. ...

4. ... The figures given in Annex D (for each category or individual expert) should exactly reflect the figures in the time allocation chart (time spent on the project for each expert) submitted as part of Annex B (summary input of staff).'

46 The Commission thus stated clearly and unequivocally that there was to be an 'exact' correspondence between the data in Annex B and those in Annex D, with any inconsistencies to be justified by an explanatory note.

47 The principle that the financial proposal and the technical proposal should tally is also mentioned in the explanatory notes preceding the form in Annex B to the guidelines, which state:

'Important: Above summary must be consistent with the input given in the breakdown of remuneration — Annex D.'

48 In order to ascertain whether GFA's tender complied with those provisions, it must be borne in mind that, as regards the 'training' section, GFA's technical proposal (Annex A) gave the following figures:

Table 1

Input (man-days)	Technical assistance	Training Replication Dissemination	Total
EU experts	2 200	487	2 687
Local experts	2 250	2 365	4 615
Support staff	3 500	1 800	5 300
Total	7 950	4 652	12 602

49 In the financial proposal (Annex D) GFA put forward the following figures under the heading 'A. Fees':

Table 2

	Input (man-days)	Amount EUR
EU experts	2 200	821 000
Local experts	2 250	58 750
Support staff	3 500	61 250
Total	7 950	941 000

50 The number of man-days (7 950) is 4 652 lower than the figure given in the technical proposal (12 602).

51 However, it is clear from the actual terms of GFA's financial proposal that that difference arises because those 4 652 man-days have been treated as reimbursable expenses.

52 GFA's financial proposal restates, in a footnote and an accompanying explanatory note, the data given in the technical proposal, which have been set out above (Table 1). That note explains that the difference between the two proposals arises because of the treatment of the costs of the fees of the staff responsible for training, replication and dissemination. GFA's financial proposal also contains a table giving a detailed description of all the reimbursable expenses relating to those activities. It is clear from that table that in total 4 652 man-days were thus included as reimbursable expenses with a total value of EUR 282 425. Contrary to the applicants' contention, the difference between the financial proposal and the technical proposal is therefore purely formal and it does not impede an effective comparison of the various tenderers' bids.

53 Furthermore, GFA's financial proposal included, in compliance with the terms of reference, supplies to the value of EUR 500 000 for training and EUR 200 000 for activities relating to replication and dissemination.

54 Consequently, the Court must reject the complaints that the Commission acted unlawfully in failing to reject GFA's tender because of the alleged disparities between the technical proposal and the financial proposal.

(b) The use of unlawful criteria in the evaluation

Arguments of the parties

55 The applicants complain that the Commission allowed the evaluators to take account, in the second evaluation, of AFCon's previous experience on Tacis projects, in breach of the applicable rules. Point 3 of Annex III to Regulation No 1279/96, and point 3 of Annex IV to Council Regulation (EC, Euratom) No 99/2000 of 29 December 1999 concerning the provision of assistance to the partner States in Eastern Europe and Central Asia (OJ 2000 L 12, p. 1), provide that 'specific experience of the tenderer in Tacis shall not be taken into account' in the evaluation of tenders. By virtue of those provisions, the tender is evaluated solely 'on the basis of a weighing of technical quality against price[; t]he weighing of the two criteria shall be announced in each invitation to tender, [and t]he technical evaluation shall be carried out according, in particular, to the following criteria: organisation, time schedule, methods and plan of work proposed for providing the services, the qualifications, experience, skills of the staff proposed for the provision of the services and the use made of local companies or experts, their integration into the project, and their contribution to the sustainability of the project results'.

56 In this instance, one of the members of the committee which conducted the second evaluation, Mr G. Rea, thought that the existing advisory centres established by Mr Mc Mullin and AFCon in the Tacis project FDRUS 9405 'Support to individually operated farms in Russia', between 1996 and 1998, were not operational at the time of the interview and were not providing technical advice. That statement, which was incorrect, influenced the other evaluators.

57 Having obtained, pursuant to measures of organisation of procedure, disclosure of various documents relating to the work of the evaluation committee, the applicants claimed at the hearing that one of the evaluators, Ms K. Karttunen, specifically mentioned in her report that she had taken into account the fact that AFCon had no experience in other projects in Russia.

58 The Commission denies that there was any irregularity whatsoever. It acknowledges that it is required, under Annex III, point 3, of Regulation No 1279/96, not to take into account the experience of the tenderers in other Tacis projects.

59 In this instance, the evaluation committee heard each tenderer in connection with its technical proposal. No general list of questions was prepared for that purpose; the interviews differed from one tenderer to the other. During the interview Mr Mc Mullin had an opportunity to rebut any statement detrimental to AFCon.

Findings of the Court

60 The complaints relating to the consideration of AFCon's experience in earlier projects funded by the Tacis programme are not sufficiently established.

61 The documentation relating to the evaluation of the tenders, produced to the Court following measures of organisation of procedure, does not establish that the members of the evaluation committee included in the criteria for evaluating the tenders the earlier experience of the tenderers in respect of projects financed by the Tacis programme. It is clear from the documents headed 'Detailed Technical Evaluation per Tenderer' that the evaluation committee took as its basis eight objective criteria relating to the experts' experience, the project's approach and the involvement of local experts. Moreover, the evaluators' note relating to the evaluation of AFCon's tender does not contain any negative appraisal about an alleged lack of experience or difficulties previously encountered in the implementation of Tacis programme projects. Thus, the members of the evaluation committee noted, as one of the strong points of AFCon's tender, the strength of the team leader and his experience in the region covered by the project. Among the weak points, the

members of the evaluation committee noted, in particular, that the team leader had only limited Russian language skills and that, in general, the tender seemed too ambitious and, in some respects, too rigid.

62 As regards the arguments relating to the comments which Mr Rea is alleged to have made, it must be stated that in his final report he did not make any remarks at all about any difficulties which AFCon had encountered in previous projects.

63 Likewise, the report of the external evaluator, Ms Karttunen, to which the applicants referred at the hearing, contains no negative comments about AFCon's earlier experience in Tacis programme projects. That report drew attention, in particular, to the experience gained in Russia by the team leader whilst stating that in the interview 'he was not transparent regarding the current situation of the existing Farm Advisory Centres in the project area'.

64 Consequently, it is sufficient to state that the applicants have not established that the Commission relied on a negative assessment of AFCon's experience in earlier Tacis-programme projects when evaluating AFCon's tender. Therefore, the complaints relating to the unlawfulness of the criteria used in evaluating AFCon's tender must be rejected.

(c) The consequences of the conflict of interests

Arguments of the parties

65 The applicants complain that the Commission failed to draw conclusions from the conflict of interests between a member of the evaluation committee, Mr A, and one

of the tenderers, GFA. They submit, in essence, that the Commission did not act with due diligence once it had discovered that there was a conflict of interests and that it should not have allowed GFA to take part in the next stage of the tendering procedure.

66 As regards the first of those criticisms, the applicants maintain that the Commission did not use its discretion in a responsible manner when it refused to consider taking disciplinary action with regard to both Mr A and GFA. The Commission did not consider excluding GFA even though it had been informed by the Chairman of the evaluation committee of the links between GFA and one of the members of the evaluation committee. They are also in doubt as to whether the Commission tried to find out if GFA knew that Mr A was a member of the evaluation committee. Having analysed all the documentation relating to the tendering procedure, which was provided to them following the measures of organisation of procedure ordered by the Court, the applicants stated at the hearing that there was no evidence from which it could be concluded that the Commission had even asked itself whether disciplinary measures should be taken with regard to GFA.

67 The applicant's second criticism is that the Commission failed to comply with its obligation to manage Tacis-funded projects properly by failing to sanction GFA and by allowing the consortium to take part in the second evaluation. The fact that Mr A was employed full-time by one of the members of the GFA consortium should have prompted the Commission to exclude both the committee member concerned and the relevant tenderer.

68 The Commission contends that it acted lawfully and did not stray beyond the limits of its broad discretion.

69 In the absence of any evidence establishing that GFA sought to use Mr A's presence on the evaluation committee to influence the procedure for the award of the contract, the Commission contends that there is no rule which would have allowed it to exclude or sanction GFA. Indeed, Article 114(1) of the Financial Regulation provides:

'Participation in tendering procedures shall be open on equal terms to all natural and legal persons coming within the scope of application of the Treaties and to all natural and legal persons in the recipient State.'

70 Therefore, GFA could easily have challenged, as a breach of Article 114(1) of the Financial Regulation, any decision to exclude it from the tender at issue. Furthermore, the Commission contends that by reason of the proportionality principle it can exclude an undertaking from a tender procedure only in exceptional circumstances.

71 The conflict of interests was solely attributable to the evaluator. He infringed Article 12(4) of the General Regulations for Tenders and the Award of Service Contracts financed from Phare/Tacis funds. He was not connected to GFA but to one of the firms in the consortium. Since GFA had no authority over the evaluator, the conflict of interests could not be imputed to GFA.

72 What is more, the exclusion of GFA would have unduly advantaged AFCon, in breach of the principle of equal treatment.

73 Having excluded Mr A from its proceedings, the evaluation committee did not select AFCon. Although the Beneficiary Representative for the tender at issue was in favour of recommending that AFCon be awarded the contract, the three other members were against such an outcome.

Findings of the Court

74 The fact that a person who helps to evaluate and select tenders for a public contract has the contract awarded to him is highly questionable and constitutes a chargeable offence under the criminal law of several Member States, regard being had to the principle of equal treatment in the award of public contracts, the concern for sound financial management of Community funds and the prevention of fraud (Case T-277/97 *Ismeri Europa* v *Court of Auditors* [1999] ECR II-1825, paragraph 112).

75 After the discovery of a conflict of interests between a member of the evaluation committee and one of the tenderers, the Commission must act with due diligence and on the basis of all the relevant information when formulating and adopting its decision on the outcome of the procedure for the award of the tender at issue. That obligation derives in particular from the principles of sound administration and equal treatment (see, by analogy, Case T-231/97 *New Europe Consulting and Brown* v *Commission* [1999] ECR II-2403, paragraph 41). The Commission is required to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers (see, to that effect, Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 108, and Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 164).

76 It is necessary to examine whether, in this instance, the Commission acted in accordance with that obligation.

77 In that regard, where a conflict of interests between one of the tenderers and a member of the committee responsible for evaluating the tenders comes to light, the Commission has some discretion to determine the measures which must be taken in respect of the conduct of the subsequent stages of the procedure for the award of the tender.

78 It is not disputed that, once it had been put on notice by the Chairman of the Evaluation Committee, the Commission did not investigate the links between Mr A and GFA in order to satisfy itself that GFA did not seek to influence the evaluation committee's proceedings. The Commission confirmed at the hearing that there was no evidence suggesting that GFA sought to influence the proceedings, using one of its employees sitting on the evaluation committee as an intermediary. In response to the Court's questions, the Commission none the less stated that it had taken no measures of inquiry in order to ascertain whether GFA and Mr A had collaborated during the tendering procedure. The Commission insisted on the fact that, in the absence of anything giving it grounds for suspecting there to have been fraud, there was no reason to investigate GFA's role.

79 Given the circumstances of the present case, such an assessment is manifestly incorrect. Since it had failed to investigate whether there was any collusion between GFA and Mr A, the Commission in fact had no grounds for ruling out, with any reasonable degree of certainty, the possibility that GFA had sought to influence the tendering procedure. Rather, a number of objective and consistent factors should have led the Commission to take particular care and to consider the possibility that there was collusion between GFA and Mr A. Those factors reasonably gave grounds for forming the view that the conflict of interests could have arisen not merely as the result of a combination of circumstances but as the result of a fraudulent intention.

80 In the first place, it is necessary to stress the seriousness of the terms in which the Chairman of the evaluation committee criticised the questionable nature of the first evaluation. He proposed in a note of 4 January 2000 that the evaluation should be

cancelled and that a further evaluation should take place before a committee with a different membership. The Chairman of the evaluation committee had, in particular, drawn attention to the 'highly questionable' nature of the results of the first evaluation owing to the fact that Mr A was then working 'as team leader in a Dutch Government sponsored project in Ukraine being implemented by Agriment International, a member of Stoas Holding Group'.

81 In addition to that conflict of interests, the Chairman of the evaluation committee also pointed out that there were signs that Mr A had, in fact, sought to give preferential treatment to GFA to the detriment of the other tenderers. The note stated that 'Mr A [had] placed the companies that the other three evaluators [had] ranked either first or second in fourth or fifth position'. He added that '[t]aking these issues together, there are significant suspicions of a "Conflict of Interest" and resulting preferential markings for the GFA/Stoas partnership'.

82 The Chairman of the evaluation committee had also stated that GFA's financial proposal of EUR 2.13 million 'was significantly below those of the first and second companies' and that 'such a low offer could be interpreted as a form of dumping'. It is thus clear from the statements and findings of the Chairman of the evaluation committee that the questionable nature of GFA's tender derived not only from the conflict of interests resulting from the presence of an employee of the consortium on the committee but also from the fact that its financial proposal was abnormally low.

83 In the second place, the circumstances were such as to give reasonable grounds for doubting that the conflict of interests in which Mr A found himself arose purely by chance or could be attributed exclusively to his negligence.

84 To start with, Mr A had failed to tell the Commission of his activities within the Stoas Group. Thus, when he applied for the post of external evaluator and in the course of the evaluation committee's subsequent work, Mr A did not disclose that he was carrying out managerial tasks for the Stoas Group in connection with an agricultural assistance project (see the note of 4 January 2000). The relevance of such information for the purposes of Mr A's appointment as an evaluator was particularly obvious given that the tender FDRUS 9902 concerned agricultural assistance services showing certain similarities with those for which Mr A was responsible in Ukraine.

85 Further, Mr A, far from merely failing to disclose his activities within the Stoas Group, expressly stated that he was not linked, directly or indirectly, with any of the tenderers, either individually or in their capacity as members of a consortium. It is evident that on 16 December 1999 Mr A had signed a declaration of impartiality, in which he stated:

'I have no direct or indirect links with any of the Tenderers, whether individuals or members of a consortium, who have replied to the Tender Dossier, nor with any of the sub-contractors proposed. I confirm that, should I discover during the course of evaluation that such a link exists, I will declare this immediately and resign from the Evaluation Committee. I understand that if such a link is known to me and I have neglected to declare it, the European Commission may decide to cancel the Tendering in question and I may be exposed to liabilities.'

86 Finally, the questionable nature of the foregoing matters is reinforced by the fact that, once Mr A had begun to examine GFA's tender, he could not claim to be unaware that he was in a situation which was incompatible with his undertaking to be impartial. The tender made it clear that Stoas was one of the members of the GFA consortium. Moreover, during the evaluation interview in which Mr A took part,

GFA was represented by, inter alia, the director of the division responsible for the Stoas Group's international activities, Mr B. Although he was thus face to face with a person with a highly responsible position in the group which was employing him, Mr A, in breach of the terms of his declaration of impartiality set out above, failed to disclose his links with the group and to resign from the evaluation committee.

87 In the third place, particular importance must be attached to the fact that the seriousness of the situation gave reasonable grounds for suspecting that there might be collusion between Mr A and GFA.

88 First, it is reasonable to be in doubt as to the lawfulness of GFA's conduct. As was stated above, GFA was represented during the evaluation interview by the director of the division responsible for the Stoas Group's international activities, to which Mr A was answerable. According to GFA's tender, the division for which Mr B was responsible consisted of just 25 people and the Commission could therefore reasonably assume that Mr B knew Mr A. Those facts should have prompted the Commission to ask itself why Mr B did not disclose the links which he had with one of the members of the evaluation committee.

89 Second, Mr A was appointed by the Commission as an external expert at the beginning of September 1999, at a time when GFA had not yet submitted its tender. Although Mr A had not taken part in drawing up the terms of reference, it was conceivable that during the two months between his appointment as external evaluator and the date of submission of tenders he had been in contact with representatives of the GFA consortium. On that point, the Commission acknowledged at the hearing that if such contacts had taken place, it would then have been obliged to exclude GFA from the procedure for the award of the tender at issue. The Commission did not, however, attempt to question Mr A on this point.

90 It follows from the foregoing that the Commission, in failing to investigate the relations between Mr A and the GFA consortium, made a manifest error of assessment. In infringing the principle of sound administration in that way, the Commission also violated the principle of equal treatment as between tenderers, which requires it to examine each tender impartially and objectively in the light of the requirements and general principles governing the tendering procedure, in order to ensure that all the tenderers are afforded the same opportunities.

91 The principle of equal treatment prohibits comparable situations from being treated differently and different situations from being treated alike, unless such treatment is objectively justified. In this instance, there were serious doubts as to the lawfulness of GFA's tender. As long as those doubts subsisted, the consortium's situation was different from that of all the other tenderers. By failing to open an inquiry aimed at putting an end to that situation, the Commission treated GFA in the same way as all the other tenderers, even though such treatment was not objectively justified. In infringing the principle of equal treatment in that way, the Commission violated a rule of law whose purpose is to confer rights on individuals.

92 However, since it has been established that the Commission failed to act with due diligence to take the steps needed to continue with the tendering procedure, the legality of the decision not to exclude GFA from the remainder of the procedure cannot be assessed. Whether the decision is lawful is directly dependent on the result of the inquiry which the Commission should have undertaken in order to satisfy itself that there was no collusion. Since the factual aspects of the case-file do not support a finding of such collusion, the Court must reject the complaints by which the applicants seek to show that the Commission should have excluded GFA from the tendering procedure.

93 As regards whether the illegality found is such as to cause the Community to incur liability, it is necessary to bear in mind that the decisive test for finding that a breach

of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion (see *Brasserie du Pêcheur and Factortame*, cited above, paragraph 55, and *Bergaderm and Goupil* v *Commission*, cited above, paragraph 43). The Court therefore holds that, on account of the abovementioned circumstances of the conflict of interests and of the risk of fraud which it entails, the Commission's omission is of a manifest and serious nature and is thus such as to cause the Community to incur liability.

2. *Damage and the causal connection*

94 The applicants point to a number of heads of damage, namely:

— loss sustained in the tender procedure;

— loss of profit;

— loss of 'profile';

— harm to AFCon's reputation and that of its directors, Mr Mc Mullin and Mr O'Grady.

(a) Compensation for the harm corresponding to the losses sustained in the tender procedure

Arguments of the parties

95 The applicants claim compensation for damage corresponding to the losses sustained as a result of their taking part in the tender procedure. This entails the costs which AFCon incurred to no effect when it submitted its tender and the costs relating to the complaints made to the Commission and the Ombudsman. Those losses consist of the remuneration of the staff employed in developing the project and of all the travel and subsistence expenses incurred as a consequence. On the basis of the unit costs indicated in AFCon's financial proposal, the applicants calculate that damage at EUR 82 570.

96 The Commission challenges those claims. It contends that, if AFCon had been awarded the contract, the costs reimbursement of which is sought would still have necessarily been incurred. Consequently, the Commission cannot be liable for such losses.

Findings of the Court

97 A distinction must be drawn between the loss represented by the costs and expenses incurred, on the one hand, in taking part in the tender procedure and, on the other, in challenging the legality of that procedure.

— Costs relating to the submission of AFCon's tender

98 It must be borne in mind that economic operators must bear the economic risks inherent in their activities, regard being had to the circumstances of each particular case. As regards a tendering procedure, those economic risks include, in particular, the costs relating to preparation of the tender. The expenses thus incurred therefore remain the responsibility of the undertaking which chose to take part in the procedure, since the opportunity to compete for a contract does not involve any certainty as to the outcome of the procedure. In accordance with that principle, Article 24 of the General Regulations for Tenders and the Award of Service Contracts financed from Phare/Tacis Funds provides that in the event of closure or annulment of a tendering procedure, the tenderers are not entitled to compensation. It follows that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute damage which is capable of being remedied by an award of damages. However, the provision in question cannot, without potentially undermining the principles of legal certainty and of protection of legitimate expectations, apply in cases where an infringement of Community law in the conduct of the tendering procedure has affected a tenderer's chances of being awarded the contract (Case T-203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II-4239, paragraphs 75 and 97, and Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraphs 70 to 72).

99 In this instance, the applicants have established that there was a breach of Community law in the way the tendering procedure was conducted. That breach fundamentally undermined the tendering procedure and affected AFCon's chances of securing the tender at issue.

100 If the Commission had conducted an inquiry into the links between GFA and Mr A, it is possible that it would have concluded that there was collusion such as to warrant the exclusion of GFA from the remainder of the tendering procedure. In

that regard, it is noteworthy that the Commission actually acknowledged, at the hearing, that if an inquiry had produced such a result, it would have then been obliged to penalise GFA by excluding it from the procedure.

101 In taking the decision to proceed with the tendering procedure without holding an inquiry, the Commission evaluated GFA's tender and awarded the contract to it even though there were a number of signs all of which suggested that there might have been collusion with a member of the evaluation committee. In acting in that way and failing to satisfy itself that GFA's participation entailed no irregularities, the Commission allowed GFA to remain in contention and accordingly undermined AFCon's chances of being awarded the contract.

102 It is true that any tenderer who participates in a tendering procedure must, as a general rule, accept the risk that he will remain liable for the costs associated with submission of his tender in the event of the contract being awarded to one of his competitors. However, that risk is accepted on the presumption inherent in any call for tenders that the Commission will act impartially in accordance with the principles set out at paragraph 90 above in order to ensure equal treatment as between the tenderers. By allowing GFA to take part in spite of the signs mentioned above and by failing to open an inquiry, the Commission disregarded that presumption and directly prejudiced AFCon's chances. Consequently, AFCon must be compensated for the loss relating to the costs incurred in participating in the procedure.

103 As regards quantum, the applicants assess their loss at EUR 31 070: in respect of costs incurred in a reconnaissance trip to south Russia (EUR 8 800), the time and costs entailed in preparing the tender (EUR 14 950) as well travel costs to Brussels in order to attend the two evaluation interviews (EUR 7 320). Since that estimate is not excessive, the loss sustained by AFCon in respect of costs relating to submission of its tender must be set at EUR 31 070.

— Costs incurred in challenging the legality of the tendering procedure

104 It must be held that this loss is present, real and certain and flows directly from the unlawfulness of the conduct for which the Commission is criticised. The applicants have maintained that this head of damages amounts to EUR 51 500, an amount made up of the following elements:

— resources allocated to the various complaints and proceedings other than this action instigated by AFCon following the award of the tender at issue to GFA (EUR 26 500);

— expenses for travel and meetings in Russia, Ireland and Belgium with contacts, politicians and lawyers (EUR 25 000).

105 In relation to the expenses connected with travelling, meetings and lawyers, the applicants have adduced neither any material allowing the Court to verify that those expenses constitute loss for which reparation may be granted nor any evidence capable of substantiating their estimate. In the absence of proof, these expenses therefore cannot be taken into account when quantifying the loss sustained.

106 There are two aspects to the estimate of the resources employed in the various complaints AFCon made to the Commission and the Ombudsman.

107 The first concerns the number of fee days which AFCon spent defending its interests in order to challenge the legality of the tendering procedure. For the period between AFCon being notified of the award of the contract on 17 August 2000 and the final occasion on which Irish Minister of State for European Affairs contacted a member of the Commission to express support for AFCon in February 2003 that number is calculated at 28 fee-days. The daily rate of fees is set at EUR 500 by reference to the rate applied by AFCon in its financial proposal. That estimate does not appear excessive. Consequently, the loss sustained by AFCon and attributable to the time thus spent in defending its interests must be set at EUR 14 000.

108 The second aspect concerns research costs amounting to EUR 12 500. However, the applicants have not produced any material showing exactly what those costs covered or any documentation substantiating the amount claimed. Therefore, the claim in respect of the research allegedly carried out cannot be allowed.

109 Consequently, the Commission must be ordered to pay AFCon EUR 14 000 as compensation for the loss sustained on account of costs incurred by AFCon in defending its interests.

(b) Compensation for loss of profit

Arguments of the parties

110 As loss of profit, the applicants claim 25% of the value of AFCon's financial proposal, EUR 741 591. That amount corresponds to the profit margin which AFCon would have obtained if the contract had been awarded to it.

111 The Commission reserves its position on this calculation in the absence of any supporting evidence from AFCon.

Findings of the Court

112 The damage claimed in respect of loss of profit presupposes that AFCon was entitled to be awarded the contract. Even if the Commission had investigated the links between Mr A and GFA and had concluded that there was collusion such as to warrant GFA's exclusion from the procedure, AFCon would not have been certain of securing the contract.

113 The contracting authority is not bound by the evaluation committee's proposal but has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract (*TEAM* v *Commission*, cited above, paragraph 76). It is true that the applicants have cited in this regard the Court of Auditors' Special Report No 16/2000 on tendering procedures for service contracts under the Phare and Tacis programmes, together with the Commission's responses (OJ 2000 C 350, p. 1), from which it appears that out of 120 contracts entered into under those programmes the Commission followed the evaluation committee's recommendation on 117 occasions. However, it cannot be concluded from those statistics that in this case the contract would definitely have been awarded to AFCon if GFA had been excluded from the procedure.

114 Therefore, the damage represented by AFCon's loss of profit is not real and certain but conjectural. Therefore it cannot be the subject of compensation.

(c) Compensation for loss of 'profile'

Arguments of the parties

115 The applicants claim that the award of the contract in question would have permitted AFCon to take part in other calls for tenders. After the tender procedure at issue, AFCon's business began to collapse. The award of the tender at issue to GFA harmed both AFCon's reputation and its business.

116 AFCon was automatically excluded from tendering in subsequent calls for tenders. From 2002, new rules on eligibility prevented AFCon from tendering, since the rules required tenderers to have an annual turnover and experience which AFCon no longer had.

117 The applicants provisionally estimate their loss of 'profile' at EUR 600 000.

118 The Commission disputes those assertions, which it contends are not substantiated.

Findings of the Court

119 The harm in respect of which reparation is sought is founded on the contention that the award of the tender at issue to GFA subsequently brought about a reduction in AFCon's activity to the point that it was, *de facto*, excluded from tendering for projects comparable to the one at issue in this case. That contention is not substantiated.

120 Consequently, the Commission cannot incur liability for that head of damage.

(d) Compensation for the harm to AFCon's reputation and that of its directors

Arguments of the parties

121 The applicants maintain that AFCon's reputation was harmed by the fact of not having been awarded the contract and by the unlawful manner in which the tendering procedure was conducted.

122 The Commission discredited AFCon's technical and professional expertise. Its decision not to award the contract to AFCon has had wide-reaching repercussions, since, having been excluded from 27 tender procedures, AFCon has taken the decision not to tender for Phare and Tacis projects any more.

123 The applicants submit that those failures coincide with AFCon's complaints in relation to the FDRUS 9902 project. They state that they have evidence showing that AFCon has been 'blacklisted'. This head of damage is estimated at EUR 600 000 euros.

124 The applicants maintain that the harm to AFCon's reputation also affects Mr Mc Mullin's reputation and that of Mr O'Grady. They estimate this head of damage at EUR 75 000 per person.

125 The Commission submits that the applicants' claims are not substantiated. Any number of reasons other than the fact that GFA was awarded the tender at issue can explain AFCon's lack of success. It denies that a 'blacklist' exists. It also denies that it has caused any harm to Mr Mc Mullin's reputation or to that of Mr O'Grady.

Findings of the Court

126 It must be stated that the applicants have not proved that a blacklist exists or that any comments or practices detrimental to AFCon's reputation may be attributed to the Commission. Therefore, the harm alleged cannot be regarded as present, real and certain.

127 The claims relating to the harm which was allegedly caused to the reputations of Mr Mc Mullin and Mr O'Grady must be rejected on the same grounds.

(e) Interest

Arguments of the parties

128 The applicants claim that the Court should increase the damages awarded by compensatory interest at a rate of 8% per annum, the rate currently applying in Ireland.

129 The applicants also claim that the Commission should be ordered to pay default interest, at the same rate, from the date of judgment in this action.

Findings of the Court

130 As regards the calculation of compensatory interest, such interest should start to run from the first day of the month following the month in which AFCon last took steps prior to commencing proceedings. Since that was during February 2003, the starting point must be fixed at 1 March 2003.

131 It is clear from the annexes to the application that, in their assessment of the harm they claim to have suffered, the applicants did not ask for compound interest. Therefore, in order to establish the amount which the Commission is to pay, simple interest must be applied.

132 The rate of compensatory interest must be calculated on the basis of the rate fixed by the European Central Bank for its principal refinancing operations, in force during the period concerned, increased by two percentage points, namely an annual rate of 4%. As at the date of delivery of this judgment, the Commission's debt to AFCon amounts to EUR 48 605, including interest.

133 To that sum must be added default interest from delivery of this judgment until full payment. The rate of default interest to be applied is calculated on the basis of the rate fixed by the European Central Bank for its principal refinancing operations, in

force during the period concerned, increased by two percentage points. The amount of interest is to be calculated on the basis of compound interest.

Costs

134 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 other party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicants.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Orders the Commission to pay AFCon the sum of EUR 48 605, together with interest thereon from delivery of this judgment until full payment. The rate of interest to be applied is to be calculated on the basis of the**

European Central Bank's rate for its main refinancing operations, in force during the period concerned, plus two percentage points. The amount of interest is to be calculated on the basis of compound interest;

2. Dismisses the application as to the remainder;

3. Orders the Commission to pay the costs.

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 17 March 2005.

H. Jung P. Lindh

Registrar President

Table of contents

Facts ..... II - 985

Procedure ..... II - 990

Forms of order sought ..... II - 991

Law ..... II - 992

A — The request for measures of inquiry ..... II - 992

B — The claim for compensation ..... II - 993

1. The unlawfulness of the Commission's conduct ..... II - 993

(a) The lawfulness of GFA's tender ..... II - 994

Arguments of the parties ..... II - 994

Findings of the Court ..... II - 998

(b) The use of unlawful criteria in the evaluation ..... II - 1002

Arguments of the parties ..... II - 1002

Findings of the Court ..... II - 1003

(c) The consequences of the conflict of interests ..... II - 1004

Arguments of the parties ..... II - 1004

Findings of the Court ..... II - 1007

2. Damage and the causal connection ..... II - 1013

(a) Compensation for the harm corresponding to the losses sustained in the tender procedure ..... II - 1014

Arguments of the parties ..... II - 1014

Findings of the Court ..... II - 1014

— Costs relating to the submission of AFCon's tender ..... II - 1015

— Costs incurred in challenging the legality of the tendering procedure ..... II - 1017

(b) Compensation for loss of profit ..... II - 1018

Arguments of the parties ..... II - 1018

Findings of the Court ..... II - 1019

(c) Compensation for loss of 'profile' ..... II - 1020

Arguments of the parties ..... II - 1020

Findings of the Court ..... II - 1020

(d) Compensation for the harm to AFCon's reputation and that of its directors ..... II - 1021

Arguments of the parties ..... II - 1021

Findings of the Court ..... II - 1022

(e) Interest ..... II - 1022

Arguments of the parties ..... II - 1022

Findings of the Court ..... II - 1023

Costs ..... II - 1024