JUDGMENT OF THE COURT OF 23 NOVEMBER 1978 [1]

Agence Européenne d'Interims S.A. v Commission of the European Communities

Case 56/77

Request for tenders — Conclusion of a contract following a request for tenders — Discretion of the administration — Judicial review — Limits
(Financial Regulation No 73/91 (ECSC, EEC, Euratom), Art. 59 (2))

Although the Court has jurisdiction to review the judgment of the departments of the Commission to decide whether there is any misuse of powers or a serious and manifest error of judgment it must, however, respect the discretion given to the competent authorities in assessing the factors to be taken into account in the interests of the department with a view to taking a decision to enter into a contract following a request for tenders under Article 59 (2) of the Financial Regulation of 25 April 1973.

In Case 56/77

AGENCE EUROPÉENNE D'INTERIMS S. A. a company incorporated under Belgian law, whose registered office is at 19 Avenue de la Renaissance, Brussels, represented and assisted by Michel Waelbroeck and Robert Libiez, Advocates of the Brussels Bar, with an address for service in Luxembourg at the Chambers of André Elvinger, 84 Grand Rue,

applicant,

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Gianluigi Campogrande, a member of the Legal Service of the Commission, acting as Agent, with an address for service in Luxembourg at the office of Mario Cervino, a member of the Legal Service of the Commission, Jean Monnet Building, Kirchberg,

defendant,

supported by

1 — Language of the Case: French.

RANDSTAD S.A., a company incorporated under Belgian law, whose registered office is at 184 Avenue de la Forêt, Brussels, represented and assisted by L. Jedid and X. Magnée, Advocates of the Brussels Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, Centre Louvigny, 34/B/IV Rue Philippe II,

intervener,

APPLICATION for annulment of the decision of the Commission dated 1 March 1977 by which the Commission rejected the applicant's offer to make temporary staff available and for an order that the defendant pay to the applicant the sum of Bfrs 26 600 000 as compensation for damage caused to the applicant by the said decision and by the acts of certain officials of the Commission.

THE COURT,

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), A. M. Donner, P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

Since 31 July 1970 the Belgian company Agence Européenne d'Interims S.A. (hereinafter sometimes referred to as "the Agence"), has been supplying the Commission in Brussels with temporary staff pursuant to standard contracts not containing an exclusivity clause.

In November 1976 the Commission resolved not to renew the contract with the Agence after its expiry on 19 March 1977 and issued on 7 December 1976 a restricted invitation to tender within the meaning of Article 59 (2) of the Financial Regulation of 25 April 1973 applicable to the general budget of the European Communities (Official Journal L 116, p. 1) for temporary staff and the Agence was invited to tender.

Article 59 (2) provides as follows:

"A contract following a request for tenders is a contract entered into by the contracting parties following an invitation to tender. In this case, the offer thought to be the most attractive may be freely chosen, taking into account the cost of performance, running costs involved, technical merit, the time for performance, together with the financial guarantees and the guarantees of professional competence put forward by each of the tenderers.

A request for tenders ... is said to be restricted where it is addressed only to those whom it has been decided to consult because of their special qualifications."

Although not required to do so the Commission previously sought an opinion from the Purchases and Contracts Advisory Committee on the content and wording of the tender and the procedure to be followed.

The relevant paragraphs of the invitation to tender are as follows:

"*Subject-matter:* invitation to tender in respect of temporary staff

1. The Commission of the European Communities contemplates employing temporary staff in its departments in Brussels on the basis of provision of services on the terms set out in Annex I.

2. ...

3. The tender must:

   (a) ...

   (b) contain an express acceptance without reservation of the terms contained in Annex I

   (c) be drafted in the form of Annex II.

   The hourly terms shall be calculated in Belgian francs: gross remuneration chargeable to the Commission and gross remuneration receivable by the person concerned.

   The tender must be accompanied by documents or references confirming the capacity of your firm to supply the services required and:

   (a) information relating to the company (articles of association, paid-up capital, registered office, any other agencies in other countries) and evidence that the company complies with all legal provisions in force relating to the regulation and admission of undertakings providing temporary staff;

   (b) a copy of the standard contract which the company sends its staff (rights and duties);

   (c) a statement of the general clauses proposed for this type of service.

4. ...

5. Tenderers will be informed of the outcome of their tenders."

Of the terms set out in Annex I the following should be noted:

"1. ...

2. It is estimated that between 50 and 100 temporary staff will be required each month (save August).

3. The staff will be made up approximately of:

   75 % secretarial staff

   25 % other categories

4. The figures given in paragraphs 2 and 3 are for guidance only and cannot bind the Commission.

...

7. The contract shall be for a term of two years from 1 April 1977; ...

8. The tender must set out, *inter alia*, the clause for the review of prices and the possibilities of reduction — and terms of billing — on the basis of the forecast of monthly turnover.

9. The temporary staff made available must have the benefit of all the provisions of Belgian law relating to them."

The Agence, along with 18 others, submitted a tender in accordance will the prescribed terms.

The tenders were submitted for the necessary opinion of the Purchases and Contracts Advisory Committee (under Article 62 of the Financial Regulation) which on 25 February 1977 pronounced itself in favour of the conclusion of a contract with the company *Randstad* S.A. for the following reasons:

"— It is proposed that the tender should be accepted which, for all the categories of staff required, having regard to the reductions granted, appears the lowest among those perfectly and unconditionally meeting all the terms in the invitation to tender;

— The salaries actually paid to the staff are among the highest in comparison with the prices paid by the Commission;

— The staff previously supplied from time to time by the firm in question has always fully met requirements and the firm has always earned the trust placed in it."

The authorizing officer accepted this assessment and it was decided to give the contract to Randstad S.A. after the signature of the Financial Comptroller had been obtained. The firm concerned was informed of this decision. All the other tenderers, including the Agence, were informed that their tenders had not been accepted.

Subsequently the majority of the temporary staff of the Agence offered their services to Randstad S.A. who thereupon engaged them.

On 29 April 1977 the Agence brought the present action against the Commission which was registered at the Court on 3 May 1977.

By application lodged on 28 October 1977 Randstad S.A. applied to intervene in the action in support of the Commission's claims. By order dated 30 November 1977 the Court allowed the intervention.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure and to invite the parties' views at the hearing on the admissibility of the application, especially in the light of Articles 178 and 183 of the Treaty. Further the Court invited the Commission to answer at the hearing the question set out in Section IV below.

II — Conclusions of the parties

In its statement of claim the *applicant* claims that the Court should:

Primarily

1. Annul the contested decision;
2. Order the defendant to pay to the applicant the sum of Bfrs 26 600 000 by way of damages;
3. Order the Commission to pay the costs.

Alternatively

Before giving judgment:

1. Order the production of the following documents:
   (a) tender submitted by Randstad S.A. in reply to the invitation to tender dated 7 December 1976;
   (b) opinion of the Purchases and Contracts Advisory Committee;
   (c) minutes of the meeting of the Commission at which the decision to award the contract to Randstad S.A. was taken;
   (d) list of names of the temporary staff supplied by Randstad S.A. to the Commission from 21 March 1977;
2. Authorize the applicant to prove by all lawful means, including the calling of witnesses, the facts set out in the statement of claim and in particular

the circumstances in which Randstad S.A. largely re-engaged the whole of the temporary staff which the applicant made available to the Commission;

3. Appoint an expert to determine the extent of the damage suffered by the applicant by reason of the fact that it has unlawfully been barred from the contract in question and forced to reconstitute its staff in order to carry on.

In its defence the *Commission* contends that the Court should:

1. Dismiss the application;
2. Order the applicant to pay the costs.

In its reply to the defence the applicant claims that the Court should:

Allow the applicant to maintain its previous claims subject to supplementing the discovery sought as follows:

1. Order the production of the following documents:
   (f) list of the temporary staff made available to the Commission by Randstad S.A. as from 21 March 1977;
   (g) scale of remuneration paid by the Commission to those of its officials carrying out the same duties as the temporary staff of the categories requested in the invitation to tender;
   (h) tenders submitted by all the undertakings who answered the invitation to tender of 7 December 1976.

In its rejoinder the *Commission* contends that the application should be dismissed as unfounded and the applicant be ordered to bear the costs.

In its written observations the *intervener* supports the submissions made by the Commission both in the defence and the rejoinder for the dismissal of the action brought by the applicant.

III — Submissions and arguments of the parties

Facts

The *applicant* observes that according to Annex I to the invitation to tender the contract entered into between the Commission ard Randstad S.A. ought to have taken effect from 1 April 1977. However, on 17 March 1977 Randstad S.A. proceeded during a meeting held at the International Press Center in Brussels to sign up all the temporary staff which had previously been made available to the Commission by the Agence so that as from 21 March the same temporary staff was put to work at the Commission by Randstad.

This enrolment procedure was conducted irregularly. Following instructions received from the departments of the Commission to which they were attached, the staff in question had contacted Randstad, who thereupon asked the staff to attend an "information meeting for the temporary staff working at the Commission" fixed for 17 March 1977.

According to the applicant, there was present at this meeting Mr J. P. Meunier, director of Randstad and Mr. Y. Desbois, head of the Recruiting, Appointments, Promotion Division of the Directorate-General for Personnel and Administration of the Commission, together with other officials.

The "information session" was followed by a session at which there was a wholesale engagement of the temporary staff of the applicant, according to the list of names drawn up by the recruiting department of the Commission so that as from 17 March 1977 contracts were systematically drawn up for all the temporary staff of the applicant (some 160) present at that meeting. As from 21 March 1977 the persons concerned were assigned to the departments to which the applicant has previously made them available and where they still were as at

17 March 1977. Further it must be stressed that the invitation to tender was made in respect of an average number of 75 (between 50 and 100) persons. The effect of the procedure adopted was, with the active collaboration of the departments of the Commission, to deprive the applicant for the benefit of Randstad of the whole of the staff which it had made available to the Commission.

The *Commission* outlines the course the procedure followed in the present case on the invitation to tender. It states in particular that the criteria for assessing the tenders as shown in the invitation and in its annexes were as follows:

— the price required including "possibilities of reduction... on the basis of the forecast of monthly turnover";

— the remuneration offered to the temporary staff;

— documents or references showing the capacity of the tenderer to provide the services requested;

— the "size" of the tenderer in respect also of its capacity to supply staff in the other States in which the Commission has seats;

— places of business or offices;

— the rights and duties and in general the contractual clause binding the tenderer to the staff made available.

It then observes that to perform the contract entered into with the applicant and in application of the national provisions concerned with public business and governing the matter it had during the last week of each month to inform the applicant in writing of the temporary staff required for the following month. The applicant thereupon recruited the necessary temporary staff for the same period and made them available to the Commission.

Since the contract expired on 19 March 1977, the Commission on 22 February 1977 sent the applicant a request for the month of March limited to the period from 1 to 18 March. The applicant engaged the necessary staff to meet this request.

Several of the temporary staff thereupon asked the departments of the Commission the reasons for such limitation. The Directorate for Personnel answered that the contract with the applicant was terminating and the Commission had just entered into a new contract with Randstad.

The Commission formally denies that its departments and in particular the Directorate for Personnel and its Recruiting, Appointments, Promotion Division did anything whatever to suggest or encourage the transfer of the applicant's staff to Randstad. It is possible that certain officials belonging to other departments advised the temporary staff concerning the measures allowing them to be made available to the Commission.

Randstad asked the Commission to inform the prospective temporary staff of the conditions under which they would work at the Commission. This is why the Commission appointed Mr Desbois, head of the Recruitment, Appointments, Promotion Division to take part in the information session organized by Randstad on 17 March 1977. At that meeting Mr Desbois stated:

— the temporary staff would come wholly under Randstad;

— the conditions and hours of work would be determined in respect of each member of the temporary staff by Randstad;

— the fact of being made available to the Commission would not give entitlement to take part in any internal competitions or give exemption from the age limit normally prescribed for officials and other servants of the Communities in open competitions.

The Commission denies that other information was given by its officials at the meeting or on any other occasion.

In its *reply* the *applicant* complains that the Commission alleged in its statement relating to the procedure for the invitation to tender that the invitation and the annexes thereto set out the "criteria for assessing the tenders". In fact the invitation and annexes state only how the tenders must be drawn up and the conditions which they must satisfy.

In the applicant's opinion assessment of the most attractive tender had to be made in accordance with the criteria set out in the Financial Regulation.

More serious however than this confusion was the introduction by the Commission into its defence of the "criterion" of the "size" of the tenderer in relation to its capacity to supply staff in the other States in which the Commission has seats, places of business or offices. Such a "criterion of assessment" is quite contrary to the invitation to tender which stated: "The Commission... contemplates employing temporary staff *in its departments in Brussels* on the basis of provision of services on the terms set out in Annex I". The most attractive tender could be assessed only in relation to that objective.

The Commission's allegation that the applicant "engaged" the necessary temporary staff after receiving the requisition from the Commission is contrary to the facts. The applicant could not have "engaged" staff in the very brief period between the receipt of the requisitions and their being complied with. It was only because it had the necessary temporary staff available that the applicant could comply with such requisitions.

After also denying that the Commission was in fact its only important customer, the applicant refers to the Commission's allegation that Randstad S.A. asked the Commission to inform the temporary staff of the conditions under which they would work at the Commission. It is apparent from this admission that before Thursday 17 March 1977 Randstad did not yet have the temporary staff which it was going to make available to the Commission as from the following Monday 21 March. Further the Commission sent a representative to the meeting to facilitate their engagement. In this respect the applicant repeats its offer to supply evidence as to the exact part played by Mr Desbois at that meeting.

Even if the part played by Mr Desbois was limited to what the Commission alleges, the applicant considers that he failed in his duty not to become involved by taking part in a meeting organized by a private company.

The *Commission* denies having introduced a new criterion of assessment in relation to the invitation to tender. The latter stated that the tenderer was required to supply information relating *inter alia* to its articles of association, its paid-up capital, its registered office and *any other agencies in other countries*...".

Although it is true that the invitation to tender did not contain a specific heading "criteria of assessment" there is no doubt from the Commission's assertions that since the factors on which the decision would be based were stated, the tenderers were in a position to know clearly the criteria which the Commission would adopt in assessing each tender. The possibility of occasionally using the services of the same firm in other countries outside the standard contract specified for Brussels constituted a factor, albeit ancillary, in assessing each tender.

The fact that the applicant "had available the necessary temporary staff" does not mean what the applicant is attempting to imply, namely that it contracted with the temporary staff for employment outside the periods when the temporary staff was made available to the Commission.

As regards the "size" of the applicant company, the Commission observes that

the applicant was not able to show a single customer apart from the Commission in the references which it was invited to annex to its tender.

Regarding the facts the Commission refers to what it has already written on its alleged involvement in the engagement of temporary staff by Randstad S.A. It adds that the engagement by Randstad as from 17 March 1977 of the applicant's former temporary staff who applied to be engaged is in no way inconsistent with the fact that from the outset Randstad had available the staff necessary for the Commission without the necessity of engaging the applicant's temporary staff.

Law

1. Infringement of essential procedural requirements

The *applicant* claims that the decision of rejection in question disregards essential procedural requirements in so far as it contains no reasons. Reasons are necessary both to enable the parties whose tender has been rejected to assess whether this has been done in compliance with the rules which Article 59 (2) of the Financial Regulation and its implementing regulation impose on the Commission and to allow the Court effectively to carry out its review. Any decision of rejection which contains no express reasons therefore infringes Article 190 of the EEC Treaty and the general principle of the right of defence of which that provision is only one example.

In the *Commission's* view the decision to award the contract to Randstad has the reasons properly stated since the authorizing officer followed the opinion given by the Purchases and Contracts Advisory Committee. The objective of the decision was to appoint the contractor and not to oust the other tenderers. The reasons therefore have expressly to justify such appointment, whilst it is sufficient that the reasons for the rejection of the other tenders may be inferred *a contrario.*

2. Infringement of the Financial Regulation

The *applicant* claims that the decision in question infringes Article 59 (2) of the Financial Regulation in that it rejects the applicant's tender whereas

(a) this tender was, from the point of view of the factors of assessment listed in that article, more attractive than the tender which was accepted;

(b) the Commission did not seriously consider the tenders submitted and more particularly the one which it accepted.

(a) In the light of the criteria listed in Article 59 (2) the applicant's tender appears undoubtedly more attractive than that of Randstad. In fact:

(i) as regards the price of the services and the running costs involved, the applicant's tender is in respect of almost all the posts less than that of Randstad;

(ii) the fact that the technical value of the services, the time within which they were performed and the professional and financial guarantees of the applicant were quite satisfactory is fully established by its previous relations with the Commision. In the decision in question the latter expressly recognizes the value of the services rendered and has moreover not questioned it.

In this respect it is surprising that Randstad could have offered better services and guarantees than the applicant since Randstad did not have the necessary staff available at the time when it submitted its tender and it was able to obtain it only by having recourse to the extensive signing up of the applicant's staff which itself was due to the unlawful assistance given by certain members of the Commision's staff.

(b) In the applicant's opinion a serious comparative examination of the tenders would have shown Randstad's inability to render the requisite services in due time. The Commission therefore disregarded the rules of good administration by adopting the decision in question.

The *Commission* in answer says that a comparison based on the criteria of assessment set out in the invitation to tender between Randstad's tender and that of the applicant revealed the following:

— from the point of view of the prices for the whole of the requisite categories of staff having regard to the reductions afforded Randstad's tender appears to be the lowest of those perfectly and unconditionally meeting all the specifications in the invitation to tender;

— the salaries actually paid to the staff by Randstad are among the highest relative to the prices paid by the Commission. It is necessary to stress in this respect that under the Belgian Law of 28 June 1976 on temporary employment "the pay of a temporary employee shall not be lower than that to which he would have been entitled if he were employed on the same terms as a permanent employee by the person using his services" (Article 10). The salaries proposed by the applicant are considerably lower than the salaries paid by the Commission to its officials doing the same work as that entrusted to temporary staff (Annex V to the application);

— Randstad had always given satisfaction when there had been recourse to its services in cases where the applicant was having difficulty in making staff available to the Commission. On the other hand the departments of the Commission made a list of complaints *vis-à-vis* the applicant in the statements submitted to the Purchases and Contracts Advisory Committee with the tenders (Annex 7 to the defence).

— Randstad, the size of which ensured from the outset that there would be the necessary staff available to the Commission without its being necessary to engage the applicant's temporary staff (it appears from Randstad's register that at the time Randstad was satisfying an average of 3 500 orders annually), had shown in its tender 11 multi-national or large-sized companies operating in Belgium to whom it normally made staff available. The applicant had supplied no information of this kind, for the Commission was in fact its only important customer.

— unlike Randstad the applicant supplied no reference to its capacity to provide services in the other countries in which the Commission has a seat, place of business or office.

The considerations which led the various departments of the Commission, after making a comparison, to choose Randstad appear justified. They led to the decision which was best suited to the requirements of the institution and the financial interests of the Community.

In its reply the *applicant* says that if "the statements submitted to the Purchases and Contracts Advisory Committee" is the report provided for in Article 65 of the regulation implementing the financial regulation, it is not open to the Purchases and Contracts Advisory Committee simply to endorse the comments and criticisms of the official who drew up the report.

Further, the opinion given by the Purchases and Contracts Advisory Committee on 25 February 1977 refers to another report (CCAM (77)186), which has not been produced. The applicant is therefore forced to conclude that there was no real investigation by the Purchases and Contracts Advisory Committee.

In Annex No 3 to its reply the applicant gives a comparative table from which it is

apparent that the rates charged by it in 1976 and during the first three months of 1977 were much less than those of Randstad during the same period. In fact Randstad's rates were Bfrs 548 275 per month higher than those of the applicant.

The statement in the opinion of the Purchases and Contracts Advisory Committee to the effect that "the salaries actually paid are among the highest relative to the prices paid" is difficult to understand. According to the invitation to tender the tenders must provide that the staff should enjoy the benefits of the provisions of the Belgian legislation concerning them. The applicant's tender meets this condition (Annex 2 to the tender). Concern as to the social aspect was fully satisfied by the Belgian legislation and therefore of what relevance was the amount of the salaries actually paid to the temporary staff? But even accepting that the salary paid to the temporary staff was a valid criterion of assessment this does not justify the choice of Randstad. In fact:

— if the basic rates of the Agence and Randstad both satisfy the requirements of the Belgian Law and consequently those of the invitation to tender, the lowest tender should be accepted;

— the basic rates of the Agence were less than the salaries paid by the Commission to its officials contrary to the position with Randstad. In this case the review clause (Annex II to the tender of the Agence) would apply and the Commission ought to have compared the revised rates of the Agence with those of Randstad;

— neither of the two basic rates satisfied the requirements of the Law of 1976. It is therefore necessary to compare the two rates after correction.

The applicant asks the Court to order the Commission:

— to produce the full tender of Randstad in order that it may be seen whether it contains a clause ensuring that the Law of 1976 is applied;

— to specify the salaries which it pays to officials doing the same work as the temporary staff asked for in order that it may be ascertained whether the salaries offered by Randstad were in accordance with the Belgian Law.

The applicant challenges *seriatim* the comments made in the "statement" (Annex 7 to the defence) regarding the unfavourable experience which the Commission had with the applicant. In addition if formally challenges the statements contained in that document to the effect that it did not sign the letter accompanying the tender and that it questions the annex to the invitation to tender.

Regarding the "size" of Randstad, which made it more able than the applicant to supply staff to the Commission, the applicant repeats that Randstad had to organize a recruitment meeting to which it invited all the temporary staff of the applicant and that on that occasion it signed them up on a large scale.

The applicant asks the Court to order the Commission to produce the list of temporary staff made available by Randstad from 21 March 1977 which will enable it to be seen that they were the same as the temporary staff supplied by the applicant.

Further, in March 1977, Randstad published advertisements in newspapers for staff whose qualifications exactly matched those which were the subject of the Commission's invitation to tender (Annex 9 to the reply).

The above-mentioned facts permit the conclusion that at the time when Randstad replied to the invitation to tender it did not yet have sufficient staff.

As for the fact that the applicant had supplied no information "on its capacity to provide services in the other countries in which the Commission has a seat, place of business or office" this absence of information was perfectly logical since the invitation to tender was limited to the Commission's departments in Brussels. Taking this additional factor into consideration violates the principle of equality between the tenderers and the necessarily comparable nature of the tenders.

In its rejoinder the *Commission* makes the preliminary observation that it is apparent from several arguments and from the discovery that the applicant is seeking that it is asking not only for a review of the lawfulness of the measure taken (as is its right) but also a review of the genuineness, correctness and relevance of the facts on which the Commission based its assessment. In order to assess their expediency the applicant claims to re-examine the measures leading to the opinion of the Purchases and Contracts Advisory Committee, the discussions held within that body, the assessment made by the Commission's departments of the need for temporary staff and the decision of the Commission to accept the opinion of the Purchases and Contracts Advisory Committee. The Commission challenges this attempt at widening the remedy given by Article 173 of the Treaty.

The Commission then explains that the department responsible gave the Purchases and Contracts Advisory Committee a detailed report on the tenders submitted, annexing thereto the tenders and documents which were included with them. This report was numbered CCAM(77)186. From this document the Commission extracted the statement relating to the applicant (Annex 7 to the defence under the heading "Comparative Study of the Tenders"). It is the duty of the Commission to protect the confidential nature, *vis-à-vis* the applicant, of the particulars relating to the other tenderers.

The minutes of the Purchases and Contracts Advisory Committee (Annex 3 to the defence) show that this report was considered by the consultative technical department of the Commission which was able to assess the genuineness and relevance of all the factors which led to the choice of Randstad's tender.

The applicant is attempting to exceed the limits of a review of the lawfulness of the measure and to review the assessment of the facts by the Purchases and Contracts Advisory Committee.

Factors leading to the choice of Randstad's tender

The rates

The calculations made by the applicant in Annex 3 to the reply are wholly erroneous. They are based on the prices proposed in the applicant's tender without taking into account the clause providing for an increase. If the Belgian Law had to be applied to the temporary staff the rates which the Commission would have had to pay would have been very much higher.

In fact the Commission considered the applicant's prices on the basis of the clause providing for an increase. On this basis and having regard to the anticipated reductions (which are part of the staff policy contemplated by the Commission for the future) Randstad's tender appeared the lowest of those fully and unconditionally meeting all the specifications in the invitation to tender.

The extrapolation which the applicant made in Annex 3 to the reply between the period January 1976 to March 1977 and the two years of application of the new contract is the outcome of a subjective assessment by the applicant whereas the forecast depends on the Commission's assessment of its staff

policy which can lead to considerable variations (paragraph (2) of Annex I to the invitation to tender).

The salary level for the temporary staff

Prices and all other conditions being equal, it was undeniably in the Commission's interest to choose the tenderer who in relation to the prices asked, offered the staff some of the highest salaries. The relationship of price and salary was far and away more attractive in Randstad's tender than in that of the applicant.

The unfavourable experience of the applicant mentioned in the Comparative Study of the Tenders

The Commission considers *seriatim* the arguments advanced by the applicant in the reply and provides for the file by way of example a number of documents to establish the validity of the criticism contained in the Comparative Study of the Tenders.

It stresses that the fact that the applicant did not give full satisfaction in the past and the other negative aspects of its tender (such as the absence of a signature to the letter accompanying the tender, which letter is Annex No 4) was only one of the factors taken into account in the overall assessment leading to the choice of Randstad's tender.

The Commission states that in any event, in the context of an invitation to tender, it is for it to assess the importance to be given to the various criteria on which it bases its choice.

3. Infringement of Commission Regulation of 30 June 1975 on measures of implementation of certain provisions of the Financial Regulation (Official Journal L 170 of 1 July 1975)

According to the *applicant* the decision in question infringes the second paragraph of Article 61 of the implementing regulation which provides as follows:

"Tenders which do not satisfy the conditions laid down in the invitation to tender shall be eliminated."

Paragraph 3 of the invitation to tender provided that the tender should be "accompanied by documents or references confirming the capacity ... to provide the services required". Since Randstad, when it submitted its tender, was quite unable to provide the services required, the Commission ought to have rejected its tender on the basis of the second paragraph of Article 61 of the implementing regulation.

The *Commission* states that Randstad's tender was accompanied by references and documents showing that it was able to provide the necessary services.

4. Misuse of powers

The *applicant* states that the procedure of the invitation to tender was not used to provide the Commission with the best services of competing firms but unlawfully to favour one of them, namely Randstad. This is apparent not only from the fact that the price proposals which were made by the applicant were more advantageous than those of Randstad but also from the signing up of staff which immediately followed the invitation to tender and in which the Commission's officials took part, which intervention was indispensable for Randstad to be able to satisfy its contractual obligations towards the Commission.

The *Commission* states that the lawful objective of the decision was to obtain the service considered the best-suited to the requirements of the Commission on satisfactory financial terms. It considers that it has shewn that the choice of Randstad (in which all the departments, technical, decision-making and reviewing agreed) was justified and judicious in view of the multiple requirements of the Commission.

To rebut the applicant's allegations made as showing a misuse of powers, the

Commission refers to what it has previously said and adds, as regards Randstad's price proposals on the one hand and the applicant's on the other that the latter presents the facts in a tendentious manner by comparing (Annex 9 to the application) its prices after the reduction with Randstad's prices before the reduction.

5. The claim for damages

In its *application* the *applicant* states that by rejecting its tender and accepting that of Randstad, although the latter was less attractive and in any event did not meet the requirements specified in the invitation to tender, the Commission has committed a wrongful act and is accordingly liable to make good the resulting damage to the applicant. The wrongful nature of the Commission's act is corroborated by the unusual behaviour of certain of its officials and in particular the head of the Recruting, Appointments, Promotion Division.

Having regard to the fact that the invitation to tender provided that the contract was to last for two years, the amount of business on average which the applicant had done with the Commission during the previous three years and the affront to its reputation by the signing up of its staff as from 17 March 1977, the applicant assesses this damage at

— Bfrs 20 000 000 for the loss of the contract

— Bfrs 6 500 000 for the loss of staff and

— Bfrs 100 000 as general damages

The *Commission* stresses in its *defence* that even if the decision in question were annulled, the applicant could claim damages for the loss of the contract only by showing that it alone would have been chosen from among the other tenderers.

The *Commission* has previously stated that it was not liable through the acts of certain officials for the signing up by Randstad of the temporary staff previously made available to the Commission by the applicant. In any event the contracts entered into by the applicant with such temporary staff for their engagement and the contract between the applicant and the Commission terminated simultaneously.

Regarding the claim for general damages the Commission observes that the applicant has offered no proof at all of the damage which it alleges it has suffered. Nor does it specify the principles of law governing its claims in the present case.

The applicant has offered no proof at all of its claim as regards the amount of damage which it alleges it has suffered.

In its *reply* the *applicant* asks the Court to order the Commission to produce the 19 tenders which would allow it to be shown whether the applicant's tender was the most attractive.

Regarding the damage, the applicant states that from 1970 to 1976 its costs of recruitment and selection amounted to Bfrs 10 285 207 (Annex 11 to the reply). Its efforts were nullified by the behaviour of the Commission which collaborated in the signing up of this staff by Randstad. The assessment of the damage suffered at Bfrs 6 500 000 is therefore very moderate.

Further the applicant's aggregate gross profits for the last three years amounted to Bfrs 31 545 000 before taxation. The contract lost (having a minimum period of two years) represents an average loss of

$$\frac{31\,545\,000 \times 2}{3} =$$

more than Bfrs 20 000 000.

The expert evidence sought is of the kind which would confirm the scope of this damage.

In its *rejoinder* the Commission denies that there is any damage whatsoever under the head of loss of staff. There

could have been such damage only if it had been impossible to meet obligations already contracted. The applicant had not only failed to show that there were any such obligations but it is established that there were none since there were no customers other than the Commission. Even if there could be damage in the abstract by reason of the applicant's not being able to enter into new contracts, the loss of such contracts due to the loss of the staff would be the direct result of competition. It is a matter of course that if the applicant condemns its temporary staff to unemployment since it is not able to offer them a new contract immediately they will automatically disperse according to the offers of work which other undertakings are able to make them.

The Commission adds that the figure of Bfrs 6 500 000 claimed under this head of damage does not take account of the fact that the expenses incurred by the applicant were incurred to perform the contract which bound the applicant to the Commission from 1970 to 1977. They were normal costs incurred to perform a current contract and not to create "human capital" for the future.

As for the sum of Bfrs 20 000 000 claimed for damages for the loss of the contract, there is no computation to support this figure, since the statement of profits by the applicant cannot be taken into account.

Randstad S.A. as *intervener* states that it completely adopts the submissions made by the Commission in support of the rejection of the action brought by the applicant. It considers, however, that it should make certain observations in support of its application to intervene.

Facts

The intervener states that at the end of February 1977 when it had not yet been informed that its tender had been accepted by the Commission, several of its temporary staff who were already working with the Commission, together with temporary staff of the applicant, went to its offices in Brussels to sign on.

The Commission gave the intervener no addresses of temporary staff. The applicant's staff, after learning that the applicant's contract with the Commission was terminating on 19 March 1977 and that the new approved supplier was to be the intervener, signed on with the intervener of their own accord before being invited by letter to the meeting of 17 March 1977.

The intervener states that it was perfectly able to fulfil as from 21 March 1977 the contract entered into with the Commission. During 1976 it registered 1 302 temporary staff while during 1977 it registered 2 173 temporary staff at its agencies. In particular for the period from 1 December 1976 to 25 March 1977 489 registrations of temporary staff were made by the intervener.

The fact that 116 temporary staff of the applicant were perfectly legally signed up by the intervener was not due to a shortage of temporary staff but for obvious human reasons, namely to avoid the unemployment of numerous temporary staff. Further it was necessary to avoid disorganizing certain departments of the Commission.

The intervener produced its tender of 21 December 1976 which shows that it adduced all the particulars and supporting matter which it was requested to do in the Commission's invitation to tender.

Law

Whilst supporting the Commission's argument that the calculations in Annex 3 to the reply are without foundation in that they have been made on the basis of prices (hourly rates) included in the tender and do not take into account the *increase clause*, the intervener provides additional particulars (tables showing the difference between its own billing and that of the applicant) on the errors which

it notes in the comparison of the tenders which the applicant has made in the said annex. It is apparent from these particulars that expressed as a percentage the real difference in cost is only 4.6 % in favour of the applicant.

In its written observations on the intervener's statement the *applicant* states that the objective of the meeting of 17 March 1977 was, with the agreement and connivance of the Commission, to transfer the applicant's temporary staff to the intervener. On this basis the operation had fully succeeded since at the end of that meeting 163 temporary staff and not 116 as the intervener incorrectly claims transferred to the intervener.

As regard the comparison of the tenders the applicant observes that even after having "corrected" the figures contained in the applicant's tender the intervener recognizes that this tender was the lowest even if "the real difference in cost is only 4.6% in favour of the Agence Européenne d'Intérims S.A.". This obviously contradicts the Commission's statement that Randstad's tender appeared the lowest of those perfectly and unconditionally meeting all the specifications in the invitation to tender.

The above-mentioned facts confirm and reinforce the submissions made by the applicant in support of its claim.

1. Disregard of essential procedural requirements

The fact that the intervener recognizes that its offer was not lower than that of the applicant clearly shows that the reasons given by the Commission for rejecting the applicant's tender were not well founded.

2. Infringement of the Financial Regulation

It is clearly apparent that contrary to the requirement of Article 59 (2) of the Financial Regulation it has not been the tenderer submitting the lowest tender who has been chosen. The intervener admits this expressly even if it considers that the difference was only 4.6%. In the applicant's view the difference is 10%.

The applicant observes further that the "customer" price which it offered remains the lowest even if it is adjusted, as required by Article 10 of the Law of 28 June 1976, on the basis of the amount of salary paid to Cumminity officials. The applicant has shown this (in Annex 5 to its observations) as regards multilingual telex operators and bilingual typists. However, this is not possible for other categories of staff without knowing the Community salaries applicable to them. Accordingly it repeats its request for production of the documents referred to at 1 (g) of its reply.

Although the reductions granted by the applicant are less than those of the intervener, they are in respect of lower rates so that the applicant's bills, *even when the reductions are made*, are substantially lower than those of the intervener.

3. Misuse of powers

If it is accepted, as the intervener alleges, that from the end of February 1977 before the result of the invitation to tender was officially known the applicant's temporary staff signed on at agencies of the intervener this is because they were apprised of the new approved supplier to the Commission. Such information could come only from the departments of the Commission itself. This fact, together with other facts already mentioned, reveals the lack of objectivity which the Commission has shown in considering the invitations to tender to the applicant's detriment and to the advantage of the intervener.

While reaching the same conclusions and basically adopting the same arguments as those contained in the intervener's statement, the *Commission* observes

nevertheless that the comparison of prices in the "tables relating to the difference between Randstad S.A.'s bills and those of the S.A. Agence Européenne d'Interims", included in Annex 2 to the said statement, takes the prices actually charged by the intervener against the applicant's prices as contained in its tender without taking account of the clause providing for an increase which it was necessary to apply in order to make the applicant's tender comply with the provisions of Article 10 of the Belgian Law of 28 June 1976.

The Commission accordingly refers on this subject to the arguments put forward in its rejoinder.

IV — Question put to the Commission

In view of what the intervener says at page 7 of its observations the Commission is asked to show in detail and taking into account all the factors to be considered (adjustment clauses, clauses relating to the index and reductions) why it considered that the tender made by Randstad was more attractive than that made by the applicant.

V — Oral procedure

At the hearing on 15 June 1978 the applicant, represented by M. Waelbroeck, P. Gigon and G. Vandersanden of the Brussels Bar, the Commission, represented by L. Jedid and X. Magnée, Advocates of the Brussels Bar, made oral observations.

In reply to the written question put by the Court the Commission gave explanations relating to the comparison of prices of the tenders made by the applicant and by the intervener and stated that if the Court considered it desirable the Commission was ready to produce a document containing a number of comparative tables which document had been shown to the advocates for the applicant before the hearing.

The applicant's advocates objected both orally at the hearing and by letter of 20 June 1978 sent to the Court to the filing of the document which had been produced at the hearing by the Commission's agent and had not been shown to the applicant's advocates in sufficient time and further objected to the Court's taking account of the explanations of the Commission based on the said document.

On 29 June 1978 the Court invited the Commission to file the document in question and decided to reopen the oral procedure and to adjourn the hearing to 19 September 1978 for such reopening.

On 15 September 1978 the applicant filed at the Court Registry written observations on the above-mentioned document.

At the hearing on 19 September 1978 the applicant, represented by R. Libiez, P. Gigon and G. Vandersanden of the Brussels Bar, the Commission, represented by its Agent P. Campogrande and the intervener, represented by L. Jedid and X. Magnée, made oral observations.

The Advocate General delivered his opinion at the hearing on 11 October 1978.

Decision

1 By application registered at the Court on 3 May 1977 the applicant, Agence Européenne d'Intérims S.A., claims on the one hand the annulment of the decision of the Commission dated 1 March 1977 by which the Commission rejected the applicant's tender lodged in response to the Commission's invitation to tender for the supply of temporary staff and further an order that the Commission pay compensation for the damage the applicant suffered as a result of the said decision and because of the conduct of certain officials of the Commission.

2 It appears from the file that after the Commission had decided in November 1976 to terminate the contracts which it had had with the applicant since 1970 for the supply of temporary staff it issued on 7 December 1976 a restricted invitation to tender for the supply of temporary staff within the meaning of Article 59 (2) of the Financial Regulation of 25 April 1973 applicable to the general budget of the European Communities (Official Journal L 116, p. 1) and that the applicant duly followed the procedure.

3 Although not required to do so the Commission previously sought an opinion from the Purchases and Contracts Advisory Committee on the content and wording of the tender and the procedure to be followed.

4 The applicant, along with 18 others, lodged a tender in accordance with the conditions laid down in the invitation to tender.

5 In accordance with Article 62 of the Financial Regulation the tenders were submitted for the opinion of the Purchases and Contracts Advisory Committee. On 25 February 1977 the latter pronounced itself in favour of the conclusion of a contract with Randstad S.A. for the supply of temporary staff to the Commission.

6 The authorizing officer accepted the assessment of the Purchases and Contracts Advisory Committee and the Commission decided to enter into a contract with Randstad after obtaining authorization from the Financial Comptroller.

7 By letter dated 1 March 1977 the Commission informed the applicant that its tender had not been accepted.

8 Subsequently the majority of the temporary staff which had previously been employed by the applicant offered their services to Randstad who thereupon signed them up.

9 By order dated 30 November 1977 the Court gave Randstad leave to intervene in support of the Commission's claim to reject the application as unfounded.

10 The applicant is seeking the annulment of the Commission's decision of 1 March 1977 by which the Commission rejected the applicant's tender and alleges disregard of essential procedural requirements, infringement of the Financial Regulation of 25 April 1973 and of the measures implementing it and misuse of powers, all of which claims are contested by the Commission.

11 None of the parties has questioned the lawfulness of the extent of the Commission's recourse to the employment of temporary staff to provide the necessary staff for the performance of its normal work.

12 In the first place the applicant says the Commission disregarded essential procedural requirements when giving notice of rejection of the tender by letter dated 1 March 1977 since, contrary to the obligation on the Commission under Article 190 of the Treaty to state its reasons, no reasons were given.

13 Since the rejection of the applicant's tender was only the necessary and inevitable consequence of the decision to accept Randstad's tender it was unnecessary for the reasons to be separately stated.

14 In the second place the applicant alleges that the decision taken in favour of the intervener infringes the provisions of Article 59 (2) of the Financial Regulation in so far as it involves the rejection of the applicant's tender whereas

(a) this tender was, from the point of view of the factors of assessment listed in that paragraph, more attractive than the tender which was accepted; and

(b) the Commission did not seriously consider the tenders submitted and more particularly the one which it accepted.

15 Article 59 (2) of the Financial Regulation provides:

"A contract following a request for tenders is a contract entered into by the contracting parties following an invitation to tender. In this case, the offer thought to be the most attractive may be freely chosen, taking into account the cost of performance, running costs involved, technical merit, the time for performance, together with the financial guarantees and the guarantees of professional competence put forward by each of the tenderers.

A request for tenders . . . is said to be restricted where it is addressed only to those whom it has been decided to consult because of their special qualifications."

16 According to this provision of the Financial Regulation the administration may freely choose the offer thought to be the most attractive; this gives it a certain discretion.

17 It is not stipulated that in the assessment of the technical and financial factors the price must constitute the sole criterion.

18 By providing in Article 62 that contracts involving amounts exceeding 12 000 units of account shall, before the authorizing officer takes a decision, be submitted for the opinion of a Purchases and Contracts Advisory Committee the Financial Regulation itself contains a procedure for review of the administration's judgment.

19 In the present case the proposal to enter into a contract with Randstad received a favourable opinion from the Purchases and Contracts Advisory Committee.

20 Although the Court has jurisdiction to review the judgment of the departments of the Commission to decide whether there is any misuse of powers or a serious and manifest error of judgment it must, however, respect the discretion given to the competent authorities, including the Purchases and Contracts Advisory Committee, in assessing the factors to be taken into account in the interests of the department for the purpose of deciding to enter into a contract for the supply of temporary staff to an institution.

21 By producing a number of comparative tables of figures the applicant has attempted to show the obviously erroneous nature of the Commission's finding that Randstad's tender was the lowest.

22 On the other hand at the request of the Court the Commission has filed calculations in support of its claim that the prices offered by Randstad were more attractive than those proposed by the applicant.

23 The applicant has filed written observations on the Commission's calculations.

24 Provided that the Commission has assessed the tenders fairly on the same basis and according to the same criteria the choice of methods which it has employed to compare the tenders cannot be questioned.

25 It is accordingly necessary to consider the methods of comparison employed by the Commission.

26 The Commission has explained the basic principle of the calculations made by its departments when considering the prices of the tenders.

27 According to its explanations it drew up a scale of the net hourly salaries of its officials and other servants doing the same work as that required of the temporary staff in the invitation to tender.

28 A net figure in respect of the gross salaries proposed by the tenderers was obtained by adding 14.8 % for holiday pay and making the normal deductions, including social security contributions for which the worker is liable.

29 Comparison of the amounts so calculated with the scale of net salaries of officials or other servants of the Commission showed that the applicant's tender did not in most cases comply with the provisions of Article 10 of the Belgian Law of 28 June 1976 (Moniteur Belge, 7 August 1976) which came into force on 1 December 1976 and requires that the salary of temporary staff should not be less than that to which such staff would have been entitled if they had been employed on the same terms as a permanent worker

and the Commission, therefore, in accordance with the review clause which the applicant's tender contained calculated the necessary coefficients of increase and applied them to the prices sought by the applicant.

30 Once the review clause was applied it was apparent that the applicant's prices were almost all higher than Randstad's prices all of which were already above the Commission's scale.

31 After the Commission had made a forecast of the use of temporary staff according to the staff policy which it contemplated pursuing it compared the costs of the tenders by multiplying the hourly rates proposed by the tenderers, after applying the review clause in the case of the applicant, by the number of hours stated in the said forecast and taking account of any effect the index and reductions might have.

32 As regards the index the variations in 1976 were taken.

33 As a result of the above-mentioned operations the applicant's prices were higher than those of Randstad.

34 The objections raised by the applicant against the methods of calculation adopted by the Commission basically concern the factors of assessment which these involve and in particular the choice of the net salaries of the officials of the Commission applicable on 31 December 1976 as a criterion of conformity with Article 10 of the Belgian Law, the forecast of the use of temporary staff and reference to the variations in the index in 1976 as a criterion for the influence of the index on the prices proposed.

35 In view of the fact that when the Commission had to apply the Belgian Law for the purpose of its calculations that law had just entered into force and having regard to the absence of precise indications it is not possible to reproach the Commission for having adopted as a criterion of the conformity of the two tenders with the provisions of Article 10 of the Belgian Law the net hourly salary as at 31 December 1976 of officials of the Commission doing the same work as that stated in the invitation to tender for temporary staff.

36 Further, the Commission had to judge the tenders on the basis of an assessment of its future needs and in particular of the number of hours of use of the temporary staff and the allocation of these according to occupations and only the Commission is in a position to make this assessment.

37 It is apparent from the Commission's calculations that this assessment relates in turn to the calculation of the amount of reductions offered respectively by the applicant and by Randstad.

38 It is not possible from the facts adduced by the applicant to show that the methods of calculation of the Commission or the criteria which it has adopted are such as to distort the comparison of prices proposed in the two tenders or the Commission's conclusion that Randstad's tender was the lowest.

39 Even assuming that in a procedure for request for tenders the Commission chose an undertaking whose offer was higher in price than the others, this is not in itself decisive.

40 Other factors referred to by the Commission to justify its choice, in particular the references of Randstad and the fact that the salary paid by it to temporary staff was, in relation to the prices paid by the Commission, among the highest, came within the considerations of a technical nature which it could take into account under Article 59 (2) of the Financial Regulation for the purpose of making its choice.

41 As has already been stated, the applicant claims that there was a misuse of powers in that the procedure for request for tenders was used not to supply the Commission with the most attractive services of competing firms but to favour Randstad.

42 This is apparent, according to the applicant, not only from the fact that the price proposals made by it were more attractive than those of Randstad but also from the fact that Randstad signed up the applicant's temporary staff in March 1977 immediately after the procedure for request for tenders and that the Commission's officials were involved in this, as was necessary if Randstad was to fulfil its contractual obligations towards the Commission.

43 On 17 March 1977 at a meeting held in Brussels Randstad, with the improper assistance of certain officials of the Commission, proceeded to sign up almost the whole of the temporary staff which the applicant had made available to the Commission.

44 This wrongful conduct by the Commission's officials corroborates the applicant's claim that the procedure for requests for tenders was used to favour one of the tenderers, namely Randstad.

45 Nevertheless, such conduct, which, however, is denied by the Commission, is no ground for challenging the choice of Randstad made previously by the Commission having regard to the fact that the applicant has not succeeded in establishing the unjustified nature of the said choice for the requirements of the Commission and having regard to Article 59 (2) of the Financial Regulation.

46 Accordingly the application for annulment must be dismissed.

47 The applicant claims further in its application that by rejecting its tender and accepting the less attractive tender of Randstad, the Commission acted wrongly and this is corroborated by the above-mentioned conduct of its officials which renders it liable to make good the damage ensuing to the applicant by the loss of the contract entered into with Randstad and for the loss of staff.

48 In its reply the applicant states more particularly that its recruitment efforts and selection of staff were largely nullified by the conduct of the Commission which assisted in the signing up of this staff by Randstad.

49 Since it has not been established that the choice of Randstad's tender was unjustified, the applicant's claim for damages for the loss of the contract must be dismissed.

50 As regards the damage which the applicant suffered by the loss of its temporary staff, it appears from the file that the contractual ties between the applicant and such staff did not continue beyond the duration of a contract between the applicant and the person who used the services of the temporary staff.

51 Accordingly the applicant cannot claim any legally protected interest in retaining its temporary staff after its contractual ties with such a person have been terminated.

52 Further it appears that the applicant did not have any important customers other than the Commission so that it could not offer employment prospects to the temporary staff which had previously been on its books.

53 In these circumstances even assuming that certain officials of the Commission had acted in such a way as to bring to the notice of the temporary staff in question the decision of the Commission to terminate the contract with the applicant and the possibility of continuing to work for the Commission as temporary employees of Randstad, such conduct, motivated by considerations of the interests of the service or social considerations is not an act giving rise to liability on the part of the Commission towards the applicant.

54 It follows from the premises that the claim for damages in respect of the applicant's loss of temporary staff must also be dismissed.

Costs

55 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party shall be ordered to pay the costs.

56 The applicant has failed in its submissions.

57 However, it is right to order the Commission to pay the costs relating to the further hearing necessitated by its belated notification of the above-mentioned calculations.

On those grounds,

THE COURT,

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs, save those relating to the re-opening of the hearing which are to be borne by the Commission**

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 23 November 1978

For the Registrar
J. Pompe
Deputy Registrar

For the President
J. Mertens de Wilmars
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 11 OCTOBER 1978 [1]

Mr President,
Members of the Court,

Regarding the *facts* of the case with which we are concerned today allow me to say the following:

Since 31 July 1970 the plaintiff, the Belgian company Agence Européenne d'Intérims S.A. (hereinafter referred to as "the Agence"), has been supplying the Commission in Brussels with "personnel intérimaire" (temporary staff) pursuant to outline agreements. In November 1976 the defendant resolved not to renew the contract with the applicant after its expiry on 19 March 1977 and issued on 7 December 1976 a restricted invitation to tender within the meaning of Article 59 (2) of the Financial Regulation of 25 April 1973 (Official Journal L 116 of 1 May 1973, p. 1) which is worded as follows:

"A contract following a request for tenders is a contract entered into by

1 — Translated from the German.