JUDGMENT OF THE GENERAL COURT (Third Chamber)

2 March 2010 *

In Case T-70/05,

Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis, lawyer,

applicant,

v

European Maritime Safety Agency (EMSA), represented by W. de Ruiter and J. Menze, acting as Agents, and J. Stuyck, lawyer,

defendant,

ACTION for annulment of the decisions of EMSA not to accept the tenders submitted by the applicant in tendering procedures EMSA C-1/01/04, relating to the contract entitled 'SafeSeaNet Validation and further development', and EMSA C-2/06/04,

* Language of the case: English.

relating to the contract entitled 'Specification and development of a marine casualty database, network and management system', and to award those contracts to other tenderers,

THE GENERAL COURT (Third Chamber),

composed of J. Azizi, President, E. Cremona (Rapporteur) and S. Frimodt Nielsen, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 20 January 2009,

gives the following

Judgment

Legal context

1 The European Maritime Safety Agency (EMSA) was established by Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 (OJ

2002 L 208, p. 1). Its task is to ensure a high, uniform and efficient level of maritime safety and of prevention of pollution caused by ships in the European Union.

2 Pursuant to Article 5(1) of that regulation, EMSA is a body of the Community and has legal personality.

3 Article 8 of Regulation No 1406/2002 provides:

'1. The contractual liability of [EMSA] shall be governed by the law applicable to the contract in question.

2. The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by [EMSA].

3. In the case of non-contractual liability, [EMSA] shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its servants in the performance of their duties.

4. The Court of Justice shall have jurisdiction in disputes relating to the compensation for damage referred to in paragraph 3.

5. The personal liability of its servants towards [EMSA] shall be governed by the provisions laid down in the Staff Regulations or Conditions of employment applicable to them.'

4 Article 185(1) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the Financial Regulation') provides:

'The Commission shall adopt a framework financial regulation for the bodies set up by the Communities and having legal personality which actually receive grants charged to the budget. The financial rules of these bodies may not depart from the framework regulation except where their specific operating needs so require and with the Commission's prior consent.'

5 Article 74 of Commission Regulation (EC, Euratom) No 2343/2002 of 23 December 2002 on the framework financial regulation for the bodies referred to in Article 185 of the Financial Regulation (OJ 2002 L 357, p. 72), in the version applicable at the material time, states:

'As regards procurement, the relevant provisions of the general Financial Regulation and the detailed rules for implementing that Regulation shall apply.'

6 That provision is repeated in Article 74 of the EMSA financial regulation adopted by its Administrative Board on 3 July 2003.

7 The award of service contracts by the bodies referred to in Article 185 of the Financial Regulation is, accordingly, subject to the provisions of Title V of Part One of the Financial Regulation and to the provisions of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1) ('the implementing rules'). Those provisions are based on the relevant directives, in particular, with regard to service contracts, on Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended.

8 Under Article 89(1) of the Financial Regulation:

'All public contracts financed in whole or in part by the budget shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination.'

9 Article 97 of the Financial Regulation, in the version applicable at the material time, states:

'1. The selection criteria for evaluating the capability of candidates or tenderers and the award criteria for evaluating the content of the tenders shall be defined in advance and set out in the call for tender.

2. Contracts may be awarded by the automatic award procedure or by the best-value-for-money procedure.'

10 In that regard, Article 138 of the implementing rules, in the version applicable at the material time, states:

'…

2. The tender offering the best value for money shall be the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability, completion or delivery times, after-sales service and technical assistance.

3. The contracting authority shall specify, in the contract notice or in the [tender] specifications, the weighting it will apply to each of the criteria for determining best value for money.

The weighting applied to price in relation to the other criteria must not result in the neutralisation of price in the choice of contractor.

If, in exceptional cases, weighting is technically impossible, particularly on account of the subject of the contract, the contracting authority shall merely specify the decreasing order of importance in which the criteria are to be applied.'

11 Article 98 of the Financial Regulation provides:

'1. The arrangements for submitting tenders shall ensure that there is genuine competition and that the contents of tenders remain confidential until they are all opened simultaneously.

…

3. With the exception of the contracts involving small amounts …, applications and tenders shall be opened by an opening board appointed for this purpose. Any tender or application declared by the board not to satisfy the conditions laid down shall be rejected.

4. All applications or tenders declared by the opening board to satisfy the conditions laid down shall be evaluated, on the basis of the selection and award criteria laid down in the documents relating to the call for tenders, by a committee appointed for this purpose with a view to proposing to whom the contract should be awarded.'

12 In the version applicable at the material time, Article 143(2) of the implementing rules provided:

'Tenderers may submit tenders:

(a) by post, for which purposes the invitation to tender documents shall specify that the relevant date is to be the date of despatch by registered post, as evidenced by the postmark; or

(b) by hand-delivery to the premises of the institution by the tenderer in person or by an agent, including courier service; for which purposes the invitation to tender documents shall specify, in addition to the information referred to in point (a) of Article 130(2), the department to which tenders are to be delivered against a signed and dated receipt.'

13 Article 100(2) of the Financial Regulation provides:

'The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.

However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.'

14 In that regard, Article 149 of the implementing rules, in the version applicable at the material time, states:

'1. The contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the award of the contract, including the grounds for any decision not to award a contract for which there has been competitive tendering or to recommence the procedure.

2. The contracting authority shall, within not more than fifteen calendar days from the date on which a written request is received, communicate the information provided for in Article 100(2) of the Financial Regulation.'

Background to the dispute

15 The applicant, Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, is a company established under Greek law, active in the field of information technology and communications.

16 The present case concerns two calls for tender, relating to 'SafeSeaNet validation and further development', under reference EMSA C-1/01/04-2004 ('call for tenders C-1/01/04'), and to 'specification and development of a marine casualty database, network and management system (marine casualty information platform)', under reference EMSA C-2/06/04 ('call for tenders C-2/06/04').

1. *Tendering procedure EMSA C-1/01/04*

17 By a contract notice of 1 July 2004 published in the Supplement to the *Official Journal of the European Union* (OJ 2004 S 126), EMSA launched call for tenders C-1/01/04. The time-limit for submitting tenders was 9 August 2004.

18 Point 13 of the tender specifications, entitled 'Criteria for the award of the contract', is worded as follows:

'… The contract will be awarded to the tenderer who submits the most economically advantageous bid, as assessed on the basis of the following factors:

(a) Technical evaluation criteria in their order of importance as weighted by percentage:

1. Proposed methodology for the project – this includes the detailed proposals of how the project would be carried out including milestones and deliverables (as defined in [point] 3 [of the tender specifications]). (40%)

2. Understanding of the specifications in terms of reference and the succinct presentation of that understanding. (20%)

3. Quality of the operational services (Helpdesk). (10%)

(b) Total price. (30%)

"Only bids that have reached a total score of a minimum of 70% and a minimum score of 60% for each criteri[on] will be taken into consideration for awarding the contract…."

19 With regard to the first of those three award criteria, point 3 of the tender specifications, entitled 'Reports and documents to be submitted', provided that tenders were to include detailed information regarding the project implementation structure, each work package was to be clearly defined, and the project implementation structure was to include (as a minimum) the following: horizontal activities (point 3.1); a description of the project management team and responsibilities (point 3.2); quality control (point 3.3); deliverables on project management level (point 3.4); work package description and relations (point 3.5); and other relevant information concerning the submission of reports (point 3.6).

20 On 1 July 2004, the invitation to tender and the tender specifications were sent to the applicant.

21 The applicant claims that it sent to EMSA, by fax of 31 July 2004, a request for additional information. It claims to have repeated that request by fax of 1 August 2004.

22 By email of 2 August 2004, EMSA informed the applicant that the fax of 1 August 2004, containing that request for information, had been received incomplete and

asked it to resend its questions by email, which the applicant did that same day. In that email, the applicant stated that it had tried to send the fax on 31 July 2004 and again on 1 August 2004, but that there seemed to have been a problem in transmitting the fax. It therefore asked that its request be dealt with, since the last day for submitting such requests, namely Saturday, 31 July 2004, was not a working day.

23 By email of 3 August 2004, EMSA informed the applicant that its questions would not be answered on account of their late submission, in accordance with point 8 of the invitation to tender. By email of the same day, the applicant pointed out once more that it had tried in vain to send that request for information on the days indicated and that, in any event, since the deadline for submitting questions was Saturday, 31 July 2004, it should have been extended to the next working day, namely, Monday 2 August 2004.

24 On 9 August 2004, the applicant submitted its tender.

25 By letter of 6 December 2004, EMSA informed the applicant that its tender had not been selected because its price/quality ratio was worse than that of the successful tender.

26 By fax of 7 December 2004, the applicant asked EMSA for the name of the successful tenderer, the characteristics and relative advantages and the scores given under each award criterion to both the applicant's tender and that of the successful tenderer, a copy of the evaluation committee report and a comparison between its financial offer and that of the successful tenderer.

27 By letter dated 16 December 2004, which the applicant states it did not receive until 7 January 2005, EMSA informed the applicant of the scores achieved by its tender

under each award criterion, as well as the total score of the successful tender. With regard to the latter's characteristics, EMSA stated as follows:

'clear approach in terms of methodology to be used for managing the whole project. The description of the tasks is realistic (well completed with tables indicating the effort and resources affected, Gantt diagram and breakdown of tasks); the number of man days offered is sufficient; deliverables have been assigned per type of task; good understanding of the project and good approach in the management plan; the proposed Service Level Agreement complies with the requirements of the project.'

28 On 5 January 2005, the applicant sent a fax to EMSA stating that it had not been informed about the outcome of the contract award process in respect of the two calls for tender within the time-limits imposed by the Financial Regulation. It also complained that EMSA had proceeded to the signature of contracts with the selected tenderers and published this information in the *Official Journal*.

29 EMSA replied, by letter and fax of 7 January 2005, attaching a copy of its letter of 16 December 2004.

30 By fax of 18 January 2005, the applicant pointed out that it had received the letter from EMSA dated 16 December 2004 late. It also complained that EMSA had infringed the Financial Regulation in that it had failed to answer the applicant's request for information within the time-limit, had not informed the applicant of the name of the successful tenderer, the amount of its financial offer, or the technical evaluation of its tender in comparison to the applicant's own, and had decided to proceed to signature of the contract. Furthermore, it asserted that the reference made by EMSA, in its letter of 16 December 2004, to the score given to the applicant's tender by the evaluation committee for each award criterion was not detailed and did not include reasons

for its decision. Finally, the applicant requested a number of clarifications with regard to the evaluation committee's assessment.

31 By fax of 9 February 2005, EMSA replied to the applicant, informing it of the name of the successful tenderer and stating that the applicant had already received the result of the tender evaluation and that more detailed information, such as financial and commercial details of the successful tenderer, would harm that party's legitimate interests and could therefore not be disclosed.

2. *Tendering procedure EMSA C-2/06/04*

32 By a contract notice of 3 July 2004, published in the Supplement to the *Official Journal of the European Union* (OJ 2004 S 128), EMSA launched call for tenders C-2/06/04. The time-limit for submitting tenders was 9 August 2004.

33 Point 13 of the tender specifications, entitled 'Criteria for the award of the contract', reads as follows:

'… The contract will be awarded to the tenderer who submits the most economically advantageous bid, as assessed on the basis of the following factors as weighted by percentage:

(a) Technical evaluation criteria: 70% in total

Technical criteria in their order of importance

— proposed methodology – this must include detailed proposals of how the work as a whole would be carried out and by whom (named individuals) including key milestones and deliverables (40%)

— understanding of the specification in the terms of reference and a succinct presentation of that understanding, and previous experience with comparable work (20%)

— quality of proposed tools, programs and modules (10%)

(b) Total price: (30%)

Only bids that have reached a total score of a minimum of 70% and a minimum score of 60% for each criteri[on] will be taken into consideration for awarding the contract.'

34 On 9 July 2004, the invitation to tender and the tender specifications were sent to the applicant.

35 By email of 26 July 2004, sent to all undertakings which had shown an interest in the call for tenders, the EMSA project officer responsible supplied a certain amount of additional information concerning the call for tenders in question.

36 As stated in paragraph 21 above, the applicant claims that it sent, by fax of 31 July 2004, a request for additional information also in respect of this call for tenders. It claims to have repeated that request on 1 August 2004.

37 On 2 August 2004, EMSA received that request for information by email. In that email, the applicant claims that it had tried to send the attached documents on 31 July 2004 and again on 1 August 2004 but that there had been a transmission problem with the fax. The applicant thus asked that the attached requests be considered, since the last day for their submission, namely Saturday, 31 July 2004, was not a working day.

38 By email of 3 August 2004 in response to requests for clarification of certain points in the tender specifications, EMSA sent to the applicant and to the other interested companies additional information concerning call for tenders C-2/06/04.

39 On 5 August 2004, EMSA informed the applicant that it would not reply to its questions because of their late submission, in accordance with point 8 of the invitation to tender.

40 On 9 August 2004, the applicant submitted a tender in respect of call for tenders C-2/06/04.

41 On 25 August 2004, the tender opening board – composed of four persons and appointed by EMSA on 16 July 2004 – opened the tenders, noting, in particular, that the tender submitted by SSPA Sweden AB ('SSPA'), received on 10 August 2004, namely one day after the deadline for the submission of tenders, required written confirmation of when it was despatched, since the envelope containing it did not bear any postmark.

42 On 26 August 2004, the president of the opening board sent a letter to SSPA, asking it to supply proof that the tender had been submitted within the deadline and by the method specified in the invitation to tender.

43 On examination of the documents produced by SSPA, the opening board decided, on 21 September 2004, to accept the tender submitted by that company.

44 By letter of 30 November 2004, which the applicant states it did not receive until 13 December 2004, EMSA informed it that its tender had not been selected because the price/quality ratio was worse than that of the successful tender.

45 On 7 December 2004, the applicant sent a fax to EMSA, which stated as its subject and referred to call for tenders C-1/01/04, requesting EMSA, inter alia, to inform it of whether its tender in respect of call for tenders C-2/06/04 had been accepted or rejected and to send it the same information as that requested for the first call for tenders.

46 By fax of 5 January 2005, the applicant indicated to EMSA that it had not received any information about the outcome of the two calls for tender within the time-limit imposed by the Financial Regulation. The applicant also complained about the fact

that EMSA had proceeded to the signature of contracts with the successful tenderers and published this information in the *Official Journal*.

47 EMSA replied by letter of 6 January 2005, also sent by fax on 7 January 2005, giving the scores achieved by the applicant's tender, as well as the total score of the successful tender and a copy of the contract award notice published in the *Official Journal* containing the name of the successful tenderer. With regard to the characteristics of the successful tender, EMSA stated as follows:

'[t]he offer of the successful bidder reflected relevant expertise and was presented as a well-prepared proposal. The tasks and the role of the project leader were reasonably described. The team leader would supervise a team with a high degree of relevant expertise from prior projects which perfectly match the tendered project. A very good understanding of the project has been proven. The proposed tools have already been successfully applied and are compatible with the IT frame of EMSA.'

48 In response to that letter, the applicant sent a fax to EMSA on 18 January 2005 in which it complained that EMSA had infringed the Financial Regulation, because it had failed to answer the applicant's request for information within the time-limit imposed, had failed to communicate to the applicant the name of the successful tenderer, the amount of its financial offer, or the technical evaluation of its tender in comparison to the applicant's own, and had decided to proceed to signature of the contract. Finally, it requested a number of clarifications concerning the evaluation committee's assessment.

49 EMSA replied to the applicant by letter of 9 February 2005, stating that the applicant had already received the relevant information and that more detailed information, such as certain financial and commercial details of the successful tenderer, would harm that party's legitimate interests and could therefore not be disclosed.

Procedure and forms of order sought by the parties

50 By application lodged at the Court Registry on 14 February 2005, the applicant brought the present action.

51 Acting upon a report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, by way of the measures of organisation of procedure provided for in Article 64 of its Rules of Procedure, requested the parties to produce certain documents and EMSA to reply in writing to a question. The parties complied with those requests within the time-limit set.

52 The parties presented oral argument and their answers to the Court's questions at the hearing on 20 January 2009.

53 The applicant claims that the Court should:

— annul EMSA's decisions not to accept its tenders and to award the contracts to the successful tenderers;

— annul all of EMSA's subsequent decisions relating to the calls for tender at issue;

— order EMSA to pay the costs, even if the application is dismissed.

54 EMSA contends that the Court should:

— declare the action inadmissible or, in the alternative, dismiss it as unfounded;

— order the applicant to pay the costs.

Admissibility

55 Without formally raising an objection of inadmissibility, EMSA has put forward two pleas of inadmissibility, alleging that the Court does not have jurisdiction to hear an action brought on the basis of Article 230 EC against an act of EMSA and alleging the formal irregularity of the application. First of all, the Court will examine the first plea of inadmissibility.

1. *The jurisdiction of the Court to hear an action brought on the basis of Article 230 EC against an act of EMSA*

Arguments of the parties

56 EMSA submits that its acts, because of its status, are not subject to review pursuant to Article 230 EC. Since that article does not contain any explicit or implicit reference to acts of European Union agencies or bodies other than the institutions mentioned therein, the Court cannot review the legality of those acts. In its submission, Case

294/83 *Les Verts* v *Parliament* [1986] ECR 1339, '*Les Verts*', is not applicable in this case, since it concerned review by the Courts of a decision of an institution and not of an agency.

57 Article 8 of Regulation No 1406/2002, by providing only for the jurisdiction of the Court of Justice in disputes relating to the contractual and non-contractual liability of EMSA, confirms, *a contrario*, that neither the General Court nor the Court of Justice has jurisdiction to review the legality of its acts. In addition, given that that provision refers only to the Court of Justice, it must be inferred that if any court has jurisdiction to give a ruling, it ought to be the Court of Justice and not the General Court.

58 The inadmissibility of an application for annulment of a decision taken by an agency is, moreover, confirmed by Case C-160/03 *Spain* v *Eurojust* [2005] ECR I-2077, paragraphs 35 to 37 and 40, and by the order in Case T-148/97 *Keeling* v *OHIM* [1998] ECR II-2217.

59 Since that judgment and that order introduce a double test in order to determine whether Article 230 EC applies – namely a reference to the body in that article and the lack of effective review by the Courts –, that would mean that both conditions must be satisfied and, in the present case, EMSA does not satisfy the first, since it is not referred to in Article 230 EC. In addition, even if each of those conditions were sufficient in itself, the second would not be satisfied, since Article 8 of Regulation No 1406/2002 provides for review by the Courts but limits its scope to disputes relating to the contractual and non-contractual liability of EMSA.

60 The applicant contests that plea of inadmissibility.

Findings of the Court

61 At the outset, it must be noted that agencies established on the basis of secondary legislation, such as EMSA, are not included in the list of institutions in the first paragraph of Article 230 EC.

62 It should also be noted that Article 8 of Regulation No 1406/2002 provides that the Court of Justice is to have jurisdiction in disputes relating to compensation for damage in the case of EMSA's non-contractual liability, and to give judgment pursuant to any arbitration clause contained in a contract concluded by EMSA. However, that regulation does not provide that the Court of Justice has jurisdiction to give judgment on actions for annulment against other decisions adopted by EMSA.

63 Nevertheless, those considerations do not preclude the Court from reviewing the legality of those acts of EMSA which are not referred to in Article 8 of Regulation No 1406/2002.

64 As the Court observed in Case T-411/06 *Sogelma* v *EAR* [2008] ECR II-2771, paragraph 36, referring to *Les Verts*, paragraph 56 above, the European Community is a community based on the rule of law and the Treaty has established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. The general scheme of the Treaty is to make a direct action available against all measures adopted by the institutions which are intended to have legal effects. On that basis, the Court of Justice accordingly concluded, in *Les Verts*, paragraph 56 above, that an action for annulment could be brought against measures of the European Parliament intended to have legal effects vis-à-vis third parties, even though the provision of the Treaty on actions for annulment, in the version then in force, referred only to acts of the Council and the Commission. The Court of Justice held that an interpretation of that provision which excluded measures adopted by the European Parliament from those which can be contested would have led to a result contrary both to the spirit of the Treaty as

expressed in Article 164 of the EC Treaty (now Article 220 EC) and to its general scheme (see, to that effect, *Les Verts*, paragraph 56 above, paragraphs 23 to 25).

65 The general principle to be elicited from that judgment is that any act adopted by a body such as EMSA, which is intended to have legal effects vis-à-vis third parties, must be amenable to review by the Courts.

66 It is true that *Les Verts*, paragraph 56 above, refers only to the institutions, while EMSA, as noted in paragraph 61 above, is not one of the institutions referred to in Article 230 EC. Nevertheless, the situation of such bodies, endowed with the power to adopt acts intended to have legal effects vis-à-vis third parties – which is without any doubt the case where, in public procurement procedures, those bodies adopt decisions rejecting the tender of one tenderer and awarding the contract to another tenderer – is identical to the situation which gave rise to the judgment in *Les Verts*, paragraph 56 above. It cannot therefore be acceptable, in a community based on the rule of law, that such acts escape all review by the Courts (see, to that effect, *Sogelma* v *EAR*, paragraph 64 above, paragraph 37).

67 It follows that decisions which are adopted by EMSA in public procurement procedures and are intended to have legal effects vis-à-vis third parties are acts open to challenge.

68 That conclusion is not called into question by the case-law cited by EMSA in support of its argument concerning the inadmissibility of the action.

69 With regard to *Spain* v *Eurojust*, paragraph 58 above, it is true that the Court of Justice held in that case that the acts contested were not included in the list of acts the legality of which it may review under Article 230 EC (paragraph 37 of that judgment). However, in the following paragraph of that judgment, the Court observed

that Article 41 EU, applicable to that case, did not provide that Article 230 EC is to apply to the provisions on police and judicial cooperation in criminal matters in Title VI of the Treaty on European Union, the jurisdiction of the Court of Justice in such matters being defined in Article 35 EU, to which Article 46(b) EU refers. Furthermore, as regards the right to effective judicial protection, the Court of Justice also held, in paragraphs 41 and 42 of that judgment, that the acts contested in that case were not exempt from all review by the Courts (see, to that effect, *Sogelma* v *EAR*, paragraph 64 above, paragraph 45).

70 In the order in *Keeling* v *OHIM*, paragraph 58 above, the General Court similarly did not confine itself to stating, in paragraph 32, that the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) was not one of the institutions of the Community listed in Article 4 of the EC Treaty (now Article 7 EC) and was not mentioned in the first paragraph of Article 173 of the EC Treaty (now Article 230 EC), but also found, in paragraph 33, that other remedies were potentially available against the contested decision of the President of OHIM, mentioning, inter alia, Article 179 of the EC Treaty (now Article 236 EC). That order therefore does not preclude an action lying under Article 230 EC against a decision of a body not mentioned in that article (see, to that effect, *Sogelma* v *EAR*, paragraph 64 above, paragraph 46).

71 The case-law relied on by EMSA does not therefore call into question the finding that an act of such a body which is intended to have legal effects vis-à-vis third parties is not exempt from review by the Courts.

72 Moreover, that solution cannot be called into question by the interpretation of *Sogelma* v *EAR*, paragraph 64 above, relied on by EMSA at the hearing, to the effect that its situation is different from that of the European Agency for Reconstruction (EAR), since that agency was made responsible by the Commission, in connection with the implementation of Community assistance to Serbia and Montenegro, for preparing and evaluating invitations to tender and awarding contracts. It follows, EMSA argued, that decisions which the Commission would have taken itself, if it had not delegated its powers, could not cease to be subject to review by the Courts solely

because the Commission had delegated its powers to the EAR, if a legal vacuum was not to be created.

73 EMSA's interpretation disregards the terms of paragraphs 39 and 40 of *Sogelma* v *EAR*, paragraph 64 above, from which it is apparent that the argument based on the nature of the power on the basis of which the EAR acts is referred to by the Court for the sake of completeness and is intended only to reinforce the conclusion reached in paragraph 37 of that judgment, in which the Court states the general principle that any act of a Community body intended to produce legal effects vis-à-vis third parties must be open to review by the Courts. Moreover, contrary to EMSA's submissions, the identical risk of creating a legal vacuum would exist in the present case, if it were necessary to consider that the acts in question are exempt from review by the Courts.

74 Finally, with regard to EMSA's argument that it is possible to deduce from Article 8 of Regulation No 1406/2002 – which refers only to the Court of Justice – that if any court has jurisdiction to hear the present case, it ought to be the Court of Justice, not the General Court, it is sufficient to note that the words 'Court of Justice' are used here generically to designate the institution which now includes the Court of Justice, the General Court and a specialised court, the European Union Civil Service Tribunal. Consequently, the reference in Article 8 of Regulation No 1406/2002 to the 'Court of Justice' must be taken to be a reference to that institution and not to one of the courts of which it is composed (see, to that effect and by analogy, Case C-294/02 *Commission* v *AMI Semiconductor Belgium and Others* [2005] ECR I-2175, paragraph 49).

75 Thus the effect of the first paragraph of Article 230 EC, as interpreted in the light of *Les Verts*, paragraph 56 above (paragraphs 23 to 25), and of *Sogelma* v *EAR*, paragraph 64 above (paragraphs 36 and 37), is that the present action is admissible. Moreover, that solution is confirmed by the first paragraph of Article 263 TFEU, pursuant to which the Court of Justice of the European Union has jurisdiction to review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. Consequently, the first plea of inadmissibility raised by EMSA must be rejected.

2. *The exceptio obscuri libelli*

Arguments of the parties

76 By its plea alleging that the application is unclear, EMSA submits, in essence, that the applicant fails to specify which plea is applicable to which call for tenders and, accordingly, that the application, which confuses the two calls for tender, does not contain a sufficiently clear and precise summary of the pleas relied on, in breach of the Statute of the Court of Justice, the Rules of Procedure of the General Court and the relevant case-law.

77 The applicant disputes that assertion.

Findings of the Court

78 Under the first paragraph of Article 21 of the Statute of the Court of Justice, applicable to proceedings before the General Court by virtue of the first paragraph of Article 53 thereof, and under Article 44(1)(c) of the Rules of Procedure of the General Court, an application must set out the subject-matter of the proceedings and a summary of the pleas in law on which it is based. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to exercise its review, if necessary without other supporting information. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible the essential facts and law on which it is based must be apparent from the text of the application itself, at the very least summarily, provided that the statement is coherent and intelligible (see, to that effect, Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraphs 106 and 107; Case T-210/00 *Biret et Cie* v

Council [2002] ECR II-47, paragraph 34; and Case T-209/01 *Honeywell* v *Commission* [2005] ECR II-5527, paragraphs 55 and 56, and the case-law cited).

79 In the present case, the application satisfies the requirements laid down in the Rules of Procedure, since it enables both the defendant and the Court to identify the EMSA conduct complained of and the facts and circumstances which gave rise to the dispute. Furthermore, it is apparent from the documents before the Court that EMSA was able to organise its defence as necessary and to develop detailed arguments in response to each complaint raised by the applicant.

80 The plea alleging the formal irregularity of the application must, therefore, be rejected.

Substance

81 The applicant raises four pleas in law in support of its claims for annulment. The first alleges breach of the principles of good faith, good administration and diligence. The second alleges infringement of the Financial Regulation, the implementing rules and Directive 92/50. The third alleges manifest errors of assessment by EMSA. The fourth alleges lack of relevant information and failure to state reasons. In addition, following the lodging by EMSA, as annexes to its defence, of the administrative files relating to the two tendering procedures at issue, the applicant put forward, at the stage of the reply, an ad hoc series of complaints, in support of the pleas set out in its application, concerning a number of alleged breaches which are claimed to be apparent from those administrative files and, with regard to tendering procedure C-2/06/04, a separate plea in law alleging non-compliance of the tender submitted by the successful tenderer with the arrangements for submitting tenders set out in point 2 of the

invitation to tender. The Court will first examine the claim for annulment of the decisions taken by EMSA in connection with tendering procedure C-2/06/04.

1. *The claim for annulment of the decisions taken by EMSA in connection with tendering procedure C-2/06/04*

The plea alleging non-compliance of the tender submitted by the successful tenderer

Arguments of the parties

82 In its reply, the applicant puts forward a new plea in law, alleging that the tender of the successful tenderer should not have been considered to have satisfied point 2(a) of the invitation to tender C-2/06/04. It is apparent from the file that the successful tenderer, not having any proof of the despatch of its tender, merely supplied *ex post facto* a certification letter from an official of the Swedish post office stating that the item had indeed been despatched on time. In the applicant's submission, a letter from a postal employee cannot replace 'the stamp of the post office' and 'act as proof'; accordingly it cannot constitute sufficient proof. Acceptance of such an irregularity can, according to the applicant, create a dangerous precedent and create uncertainty with regard to compliance with deadlines in public procurement.

83 EMSA counters that the purpose of point 2(a) of the invitation to tender at issue was to have a means of checking that all tenderers had delivered their tenders before the deadline. The decision of the evaluation committee to accept an alternative means of proof was, accordingly, reasonable, since in this case the post office, contrary to its normal practice, had not postmarked the item.

Findings of the Court

84 As a preliminary point, it must be noted that the plea alleging that the tender submitted by the successful tenderer in respect of call for tenders C-2/06/04 did not comply with the arrangements for lodging tenders set out in point 2 of the invitation to tender, raised by the applicant in its reply, constitutes a new plea. Nevertheless, it can be admitted on the basis of Article 48(2) of the Rules of Procedure since it is based on matters of law or of fact which came to light in the course of the procedure, namely the written record of the tender opening board in relation to that call for tenders, which EMSA put before the Court as an annex to its defence.

85 According to settled case-law, the contracting authority 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; see also, to that effect, judgments of 12 July 2007 in Case T-250/05 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 45, and the case-law cited, and of 12 March 2008 in Case T-332/03 *European Service Network* v *Commission*, not published in the ECR, paragraph 122). A system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators (*Evropaïki Dynamiki* v *Commission*, paragraph 46).

86 It should also be borne in mind that, under Article 98(1) of the Financial Regulation, '[t]he arrangements for submitting tenders shall ensure that there is genuine competition and that the contents of tenders remain confidential until they are all opened simultaneously'.

87 In the present case, the contract notice had fixed 9 August 2004 as the closing date for lodging tenders. Furthermore, the invitation to tender – which, pursuant to Article 130(2)(a) of the implementing rules, must at least specify 'the rules governing the

lodging and presentation of tenders, including in particular the closing date and time for submission' – stated, in point 2, that tenders could be submitted either by registered mail to the address given and posted not later than 9 August 2004 (the stamp of the post office acting as proof), or by hand-delivery to the address given, made not later than 16:00 on 9 August 2004, submission of the tender being attested, in that case, by a signed and dated receipt issued by an official of EMSA. The invitation to tender also stated that any type of delivery other than registered mail, including delivery by 'private courier services', would be considered 'hand delivery'.

88 Those arrangements for communication comply with Article 143(2) of the implementing rules, cited in paragraph 12 above, under which 'tenderers may submit tenders … by post, for which purposes the invitation to tender documents shall specify that the relevant date is to be the date of despatch by registered post, as evidenced by the postmark, or … by hand-delivery to the premises of the institution by the tenderer in person or by an agent, including courier service, for which purposes the invitation to tender documents shall specify … the department to which tenders are to be delivered against a signed and dated receipt'. In that regard, it should be noted that, under Article 2(9) of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14), a 'registered item' means a service providing a flat-rate guarantee against risks of loss, theft or damage and supplying the sender, where appropriate upon request, with proof of the handing in of the postal item and/or of its delivery to the addressee.

89 Moreover, also under point 2 of the invitation to tender, non-compliance with those formal conditions was to entail rejection of the tenders at the opening session.

90 According to a first written record drafted by the tender opening board on 25 August 2004, SSPA's tender – namely that which was subsequently accepted – was not submitted with proof of despatch and, if it was to be declared to have satisfied the

conditions laid down, it was therefore necessary for the tenderer to produce written confirmation of despatch. It is apparent from a second written record, dated 21 September 2004, that, in response to a letter from the tender opening board requesting it to produce that written confirmation, SSPA sent EMSA a certification letter from an employee of the Swedish post office confirming that the tender had been despatched in time. The tender opening board therefore considered SSPA's tender to have satisfied the conditions laid down.

91 The documents annexed to the second written record were produced for the file by EMSA in response to a measure of organisation of procedure ordered by the Court. They include copies of the envelopes containing the tender sent by SSPA, as received by EMSA, copies of the correspondence between them and copies of the receipt of the post office in Gothenburg dated 6 August 2004 and of the declaration signed by an employee of that post office dated 2 September 2004 confirming, in essence, that the envelope deemed to contain the tender in question had indeed been despatched by that post office on 6 August 2004.

92 In the first place, it is apparent from those documents that SSPA's tender reached EMSA on 10 August 2004, that is to say a day after the deadline for submission of tenders, and that there was no post office stamp, either of despatch or receipt, on the envelopes containing that tender.

93 In the second place, although EMSA stated, in the letter sent to SSPA on 26 August 2004, that 'the envelope did neither carry any indication that it was submitted in the form of post office registered mail, nor did it carry any date of submission to the post office', and asked SSPA to provide it with 'any further proof that [the tender had been submitted to EMSA] within the deadline and in the form asked for in [the] invitation to tender', SSPA sent it a mere receipt from a post office in Gothenburg.

94 In that regard, the argument put forward by EMSA at the hearing, that that receipt proves that the letter was logged – which can be equated, more or less, to its being registered – cannot succeed. Firstly, such a receipt cannot in any way be equated to a formal receipt for handing in a registered item, which, irrespective of whether the

envelope is postmarked, is, as a general rule, issued to the sender as proof that the postal item has been handed in, as set out in paragraph 88 above. The receipt from Gothenburg does not bear the name of the sender, the name of the addressee, or even the destination of the item or anything else to show that it related to the despatch of a registered item. Furthermore, it is apparent from the file that EMSA considered another tenderer's bid to have satisfied the requirements laid down solely upon production by that tenderer, of its own initiative, of a formal receipt indicating the date on which the registered item was sent and a digital code linking it to the envelope containing that tender, although the tender had initially been excluded on the ground that the envelope containing it was stamped only with the date of receipt. Secondly, contrary to the suggestion made by EMSA at the hearing, it is clear from the file that it was not the receipt from Gothenburg which, finally, induced it to consider SSPA's tender to have satisfied the requirements laid down, but the declaration of the employee of the Swedish post office, whereas, in the case of the abovementioned tenderer, EMSA considered the formal receipt which that tenderer submitted after learning that its tender had been rejected to be sufficient proof.

95 In the third place, the declaration by the employee of the post office in Gothenburg states: 'I hereby certify …, after having examined the attached copy of the receipt … along with the photocopy of the delivered envelope, that this envelope was mailed from the above named post office on Friday, 6th August, 2004'. The employee of the Swedish post office thus declared that he had despatched the envelope deemed to contain SSPA's tender on 6 August 2004, firstly, without however explaining why there was no post office stamp on that envelope and, secondly, omitting to indicate whether the item had been sent by registered mail. When asked at the hearing about that point, EMSA was unable to show that the item had been sent by registered mail.

96 There is, therefore, nothing in the file to show that SSPA's tender was submitted by registered mail.

97 Accordingly, the question arises whether SSPA's tender ought to have been, first, opened by the tender opening board and, subsequently, examined by the evaluation committee, even though it was received at EMSA on the day after the closing date for the submission of tenders.

98 In that regard, it should be borne in mind that the closing date and time for receipt of tenders were fixed, in the contract notice, on 9 August 2004 at 16:00. It is clear from point 2 of the invitation to tender that, as a general rule, tenders were to reach EMSA no later than the date and time stated above, whether they were tenders submitted by hand delivery or tenders delivered by private courier services, the only exception to that rule being tenders sent by post office registered mail, which had to be posted no later than 9 August 2004 – although receipt could be later – the stamp of the post office acting as proof of the date of posting. It follows that, as an exception, the possibility of having tenders arrive after the closing date and time fixed, as a rule, for their receipt must be interpreted strictly.

99 It should next be observed that point 2(a) of the invitation to tender sets out two distinct formal conditions to be met by a tenderer intending to submit its tender by post, which are the closing date for posting the tender and the fact that it must be sent by registered mail. Those conditions, although complementary, are of independent significance in the assessment of whether a tender has been submitted in compliance with the provisions in the invitation to tender documents and Article 143 of the implementing rules.

100 Compliance with those two conditions – the importance of which had been expressly pointed out by EMSA in the letter sent to SSPA on 26 August 2004 – must, accordingly, be checked by the contracting authority, more specifically by the tender opening board, before it goes on to open the tenders and, subsequently, to examine them. In that regard, the tender opening board does not have any discretion: once it has been found that a tender received after the closing date was not sent in accordance with the requirements under the invitation to tender and the implementing rules, the board can only reject that tender, as pointed out in paragraph 86 above.

101 Moreover, the stage of opening the tenders – the rules for conduct of which are set out in Article 145 of the implementing rules – is characterised precisely by its formal nature and is intended to enable a board, made up of at least three persons, to assess

and ensure compliance with the rules concerning, in particular, the arrangements for submission of the tenders, having regard to the importance of those rules in public procurement procedures. The members of the board are to initial, in particular, the documents proving the date and time of despatch of each tender and sign the written record of the opening of the tenders received, which is to identify those tenders which satisfy the requirements and those which do not, and which is to give the grounds on which tenders were rejected for non-compliance, by reference to the methods of submitting tenders referred to in Article 143 of the implementing rules. These are, therefore, formalities compliance with which is essential for the purposes of public procurement procedures.

102 In the light of the foregoing considerations and of the principle of equal treatment of tenderers, compliance with which must, as set out in paragraph 85 above, be ensured at each stage of a tendering procedure, the tender submitted by SSPA in the present case should not have been opened or accepted by the tender opening board since, in the absence of a post office stamp as evidence and of proof that it was sent by registered mail, it should have been deemed to have reached EMSA on the date of its receipt, namely 10 August 2004, that is to say, out of time. It follows that the opening board was wrong to open SSPA's tender and, subsequently, that the evaluation committee was wrong to evaluate it and rank it in first place.

103 According to settled case-law, a procedural defect leads to the annulment in whole or in part of a decision only if it is shown that, but for that defect, the administrative procedure could have had a different outcome and, consequently, the contested decision might have been different (see, to that effect, Case T-345/03 *Evropaïki Dynamiki* v *Commission* [2008] ECR II-341, paragraph 147, and *European Service Network* v *Commission*, paragraph 85 above, paragraph 130, and the case-law cited).

104 In the present case, if SSPA's tender had not been taken into consideration by EMSA because of its non-compliance by reference to the methods for submission referred to in point 2 of the invitation to tender and in Article 143 of the implementing rules, the

administrative procedure would clearly have had a different outcome, since SSPA's tender would not have been evaluated by the evaluation committee and the award decision, which is based inter alia on a comparative examination of the tenders, would clearly have been different.

105 Furthermore, in the light of the fact that, in the present case, only two undertakings exceeded the minimum threshold indicated in point 13.1(b) of the tender specifications, if SSPA's tender had been rejected when the tenders were opened, only one tender would have remained on conclusion of the procurement procedure for the contract in question. In those circumstances, the contracting authority – since it was no longer in a position to compare the prices or the other characteristics of various tenders in order to award the contract to the most economically advantageous – would not have been required to award the contract to the only tenderer judged to be suitable (see, to that effect and by analogy, Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697, paragraphs 31 to 33). Moreover, that consideration does not allow the possibility to be ruled out that EMSA, as it accepted at the hearing in reply to a question put to that effect by the Court, could have cancelled the contract in question and launched a fresh call for tenders. As a consequence, it is sufficiently demonstrated that, but for that defect, the administrative procedure could have had a different outcome.

106 Accordingly, EMSA's decision to award the contract to the successful tenderer must be annulled in that it infringed Article 143 of the implementing rules and point 2 of the invitation to tender, without its being necessary to rule on the other pleas in law relied on by the applicant in connection with call for tenders C-2/06/04.

107 Thus, the Court will pursue its examination of the pleas and arguments raised by the applicant only in as much as they are relied on against EMSA's decisions to reject the applicant's tender and to award the contract to another tenderer on conclusion of the procedure in respect of call for tenders C-1/01/04.

2. *The claim for annulment of the decisions taken by EMSA in connection with tendering procedure C-1/01/04*

108 As set out in paragraph 81 above, the applicant raises four pleas in law in support of its claim for annulment, alleging, firstly, breach of the principles of good faith, good administration and diligence, secondly, infringement of the Financial Regulation, the implementing rules and Directive 92/50, thirdly, manifest errors of assessment and, fourthly, lack of relevant information and failure to state reasons. The Court considers it appropriate to examine first the first plea, then the second, then the fourth and finally the third.

The first plea in law, alleging breach of the principles of good faith, good administration and diligence

Arguments of the parties

109 According to the applicant, by acting with significant delay, and by failing to provide adequate answers to the questions raised by the tenderers before the submission of their tenders, EMSA has infringed the principles of good faith, good administration and diligence, which, in accordance with case-law, can constitute a ground for annulment of the decision if that decision would have been different had the breach not occurred.

110 The applicant points out that it sent questions which EMSA refused to answer, arguing that they had not been submitted in time, that is to say, before 31 July 2004. In that regard, it insists that it tried unsuccessfully to send those questions by fax on 31 July 2004 and that they were not received by EMSA, probably because its fax machine was not functioning correctly, a fact allegedly acknowledged by EMSA in its email of 2 August 2004. In addition, the applicant points out that the questions were finally received by EMSA on Sunday, 1 August 2004. In any event, given that the period for submission of a request for additional information expired on a Saturday, EMSA

should have extended the deadline until the first working day thereafter, namely Monday, 2 August 2004. By refusing to answer the applicant's questions, EMSA not only infringed the principles of good faith, good administration and diligence, but also prevented the applicant from submitting a more competitive tender.

111 Finally, the applicant states that, contrary to what EMSA implies, it never tried to obtain information that the other tenderers would not have had, given, it claims, that all replies to requests for additional information are communicated to all tenderers. In that regard, it points out that the contracting authority is required to reply to requests for additional information where the tender specifications are unclear.

112 At the hearing, the applicant claimed, in addition, for the first time, that EMSA had infringed Article 141 of the implementing rules since, in the invitation to tender, it fixed a deadline for making requests for additional information which was shorter than that laid down in Article 141.

113 EMSA disputes the applicant's arguments.

Findings of the Court

114 The applicant complains that EMSA, firstly, acted with significant delay and, secondly, failed to give adequate replies to the requests for additional information from the tenderers. It then adds that, on 31 July 2004, it put questions seeking clarification on points of the calls for tender which were allegedly unclear, which EMSA refused to answer.

115 First of all, the Court finds not only that the applicant has failed in any way to substantiate its assertion that EMSA acted tardily and failed to give adequate replies to the tenderers requests, but also that it has failed to state either to which replies it refers or the reasons for which they should be considered inadequate. It follows that, despite its rather vague wording, this plea must be understood, in essence, as a complaint by the applicant that EMSA failed to answer its questions although they were submitted in time and that, for that reason, it was prevented from submitting a tender which was more competitive both technically and financially.

116 In that regard, in the first place, it should be noted that the applicant has not substantiated its assertions. Although it refers to its numerous attempts to send the requests for information both on Saturday, 31 July and on Sunday, 1 August 2004, it has not produced any transmission reports which could prove either transmission (complete or incomplete) of those documents to EMSA, or an error in their transmission. Nor has the applicant stated how that alleged irregularity could have affected the decision to award the contract.

117 In the second place, under point 8 of the invitation to tender, additional information could be requested in writing at the latest 10 days before the deadline for submission of tenders. Contrary to the applicant's claim, that point of the invitation to tender can only be interpreted as meaning that the day for submission of tenders must not be taken into account in calculating that period. Since that deadline was fixed, under point 2 of the invitation to tender, as 9 August 2004, the period for submission of requests for additional information must therefore have expired on Friday, 30 July 2004 and not, as the applicant claims, on Saturday, 31 July 2004.

118 As EMSA rightly points out, the applicant – as it acknowledges in its pleadings – tried to send its request for additional information from Saturday, 31 July 2004, thus after expiry of the period set for its submission. Since that request was submitted out of time, EMSA was right in not replying to it, if indeed it received it.

119 Finally, with regard to the alleged breach of Article 141(2) of the implementing rules, the Court notes that that plea was raised for the first time during the oral procedure. Under the first subparagraph of Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. However, a submission or argument which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith does not constitute a new plea in law within the meaning of Article 48(2) of the Rules of Procedure (see, to that effect, Case T-40/01 *Scan Office Design* v *Commission* [2002] ECR II-5043, paragraph 96, and Case T-495/04 *Belfass* v *Council* [2008] ECR II-781, paragraph 87).

120 In the present case, the submission alleging breach of Article 141(2) of the implementing rules, made by the applicant at the hearing, cannot be regarded either, on the one hand, as a complaint based on matters of law or of fact which have come to light in the course of the written procedure, since it is based on an alleged illegality which was capable of being known and pleaded when the action was commenced, or, on the other, as amplifying a plea made previously, since it was only during the oral procedure that the applicant mentioned the legal rule allegedly infringed and the ground for annulment thus invoked had not been referred to, either directly or by implication, in the application initiating proceedings, since the present submission alleges breach of the principles of good faith, good administration and diligence (see, to that effect, Case 108/81 *Amylum* v *Council* [1982] ECR 3107, paragraph 25). Moreover, the applicant puts forward no matters of law or of fact which came to light in the course of the procedure and on which that complaint could be based. It follows that the complaint is inadmissible as out of time under the first subparagraph of Article 48(2) of the Rules of Procedure.

121 In the light of the foregoing considerations, the first plea in law, so far as tendering procedure C-1/01/04 is concerned, must be rejected as unfounded.

The second plea in law, alleging breach of the Financial Regulation, the implementing rules and Directive 92/50

Arguments of the parties

122 By this plea, the applicant submits, in essence, that EMSA infringed the Financial Regulation, the implementing rules and Directive 92/50 by using vague criteria that were not correctly specified in the call for tenders. Furthermore, it asserts, at the stage of the reply, that, by deciding to subdivide the award criteria into sub-criteria, the evaluation committee not only openly accepted that those criteria were not well defined and needed to be clarified and/or replaced, which was also acknowledged by EMSA in its defence, but also infringed the Financial Regulation.

123 In addition, the applicant argues that certain elements of the call for tenders, such as the real duration of the contract, the number of Member States that had already implemented the applications, the role of specific technicians (help desk), the content and the duration of their services, and so on, which were necessary in order to submit a competitive tender, were also given in vague terms, in breach of Article 97(1) of the Financial Regulation and of Article 17(1) of Directive 92/50. In support of its argument, it refers to institutional calls for tender in which the documentation was more complete and clearer.

124 Finally, the applicant complains that, in its letter of 16 December 2004, EMSA refused to provide it with the name of the successful tenderer, because of the provisions on public procurement, although some weeks later the same official who had signed the letter called the applicant and proposed a meeting in person in order to explain the result of the tendering procedure, which the applicant refused.

125 EMSA disputes the applicant's arguments.

Findings of the Court

126 As a preliminary point, the applicant is incorrect to plead breach of Article 17 of Directive 92/50. Under Article 105 of the Financial Regulation, from 1 January 2003 – the date on which that regulation entered into force – the directives on the co-ordination of procedures for the award of public supply, service and works contracts are applicable to contracts awarded by the institutions, offices and agencies on their own account only in respect of questions relating to the thresholds which determine the publication arrangements, the choice of procedures and the corresponding time-limits. It follows that, in the present case, which concerns a public service contract awarded by an agency, in this case EMSA, the applicant's complaint concerning the award criteria for the contract at issue must be examined, as under the rules applicable to the institutions, solely in the light of the provisions of the Financial Regulation and the implementing rules.

127 In that regard, it should be noted that Article 97(1) of the Financial Regulation imposes on the contracting authority the obligation of defining the award criteria in advance and setting them out in the call for tenders. That obligation, which is to ensure an appropriate level of advertising for the criteria and the conditions governing each contract, is set out in more detail in Article 138 of the implementing rules.

— The complaint that the award criteria are vague

128 With regard to the applicant's complaint that EMSA infringed the Financial Regulation and the implementing rules, in that it used criteria which were not correctly defined in the call for tenders, it must be recalled, first of all, that the method used to award the contract at issue was the best-value-for-money procedure, in accordance with Article 97(2) of the Financial Regulation and Article 138(1) of the implementing rules (see point 13 of the tender specifications, cited in paragraph 18 above).

129 When a contract is awarded by the best-value-for-money procedure, the contracting authority must define in the tender specifications the award criteria enabling evaluation of the content of tenders. In addition, those criteria must, in accordance with Article 138(2) of the implementing rules, be justified by the subject of the contract. In accordance with Article 138(3) thereof, the contracting authority must also specify, in the contract notice or in the tender specifications, the weighting it will apply to each of the criteria for determining best value for money. Those provisions seek to ensure compliance with the principles of equal treatment and of transparency at the stage of evaluation of the tenders with a view to award of the contract (see, to that effect and by analogy, Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 21 and 22; Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 90 to 92; see also, to that effect, judgment of 12 November 2008 in Case T-406/06 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 85, and the case-law cited).

130 The aim of those provisions is, accordingly, to allow all reasonably well-informed and normally diligent tenderers to interpret the award criteria in the same way (see, to that effect and by analogy, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 42) and, consequently, to have equal opportunity in formulating the terms of their tenders (see, to that effect and by analogy, *Universale-Bau and Others*, paragraph 129 above, paragraph 93).

131 Although it is true that the criteria which contracting authorities may apply are not listed exhaustively in Article 138(2) of the implementing rules and that that provision therefore leaves it open to contracting authorities to select the criteria on which they propose to base their award of the contract, their choice is nevertheless limited to criteria aimed at identifying the tender which is economically the most advantageous (see, to that effect and by analogy, Case C-532/06 *Lianakis and Others* [2008] ECR I-251, paragraph 29, and the case-law cited; see also, to that effect, Case T-4/01 *Renco* v *Council* [2003] ECR II-171, paragraph 66, and Case T-183/00 *Strabag Benelux* v *Council* [2003] ECR II-135, paragraphs 73 and 74).

132 In addition, the criteria used by the contracting authority to identify the most economically advantageous tender must not necessarily be either quantitative or related solely to prices. Even if award criteria which are not expressed in quantitative terms are included in the tendering documents, they can be applied objectively and uniformly in order to compare the tenders and are clearly relevant for identifying the most economically advantageous tender (see, to that effect, *Renco* v *Council*, paragraph 131 above, paragraphs 67 and 68).

133 In the present case, EMSA indicated, in point IV.2 of the contract notice and in point 13 of the tender specifications, the award criteria which it intended to apply with a view to awarding the contract to the most economically advantageous tender, namely, on the one hand, three qualitative criteria with the weighting which it intended to give to each of those criteria and, on the other, one quantitative criterion, that is to say, the total price of the tender with its weighting on the tender as a whole.

134 The three quality criteria, and their respective weighting, are set out as follows:

'1. Proposed methodology for the project – this includes the detailed proposals of how the project would be carried out including milestones and deliverables (as defined in [point] 3 [of the tender specifications]). (40%)

2. Understanding of the specifications in terms of reference and the succinct presentation of that understanding. (20%)

3. Quality of the operational services (Helpdesk). (10%)'.

135 The applicant confines itself to pleading that those criteria are vague, raising the question of how EMSA could evaluate objectively the quality of the tenders in respect of each of them. It does not put forward any evidence in support of its assertions to support the view that, in defining those criteria, EMSA disregarded the principles of transparency, equal treatment and non-discrimination.

136 In that regard, it should be noted that the quality criteria at issue, such as the proposed organisation and methodology for the supply of the services, a good understanding of the specifications in the terms of reference and the quality of the services requested, read in context, namely in the light of the details set out in point 3 of the tender specifications (see paragraph 19 above), can be conditions for the proper supply of the services to be provided and therefore the value of the tenders in themselves. Accordingly, they are relevant criteria for the identification of the economically most advantageous tender. Furthermore, as recalled in paragraph 132 above, the mere fact that those criteria are not quantitative is not sufficient to permit a deduction that the contracting authority has not applied them objectively and uniformly (see, to that effect, *Renco* v *Council*, paragraph 131 above, paragraphs 67 and 68). Finally, EMSA indicated, in accordance with the applicable provisions, the relative weighting given to each of those quality criteria by means of percentages, thus informing tenderers of the importance which it intended to give to each criterion in the comparative evaluation of the tenders.

137 There is nothing in the file, contrary to the applicant's claim, to indicate that EMSA exceeded the limits which stem from the abovementioned legislation in the choice and definition of the award criteria used to identify the economically most advantageous tender.

138 In the light of the foregoing considerations, the conclusion must be that the applicant has failed sufficiently to show that EMSA failed to meet its obligation to define in the

call for tenders the award criteria in accordance with the principles of transparency, equal treatment and non-discrimination.

139 That conclusion cannot be called into question by the applicant's assertion relating to the terms in which other institutions have drafted call for tender documents in connection with other public procurement procedures.

140 In that regard, by granting to contracting authorities the power freely to choose the contract award criteria which they intend to apply, the legislature sought to enable them to take into consideration the nature, subject and specific features particular to each contract in choosing and formulating the award criteria. The formulation of the award criteria chosen by certain institutions in the context of other public procurement procedures cannot, accordingly, be usefully relied on by the applicant to demonstrate the vagueness of the award criteria applied in the present case. Reference to the tender documents of other public procurement procedures does not constitute either relevant or sufficient evidence for that purpose.

141 Finally, with regard to the argument that the evaluation committee, by deciding to subdivide them into sub-criteria, openly accepted that the award criteria chosen were not well defined and needed to be clarified and/or replaced, it must be observed that, irrespective of whether, in the present case, there was such a subdivision of the criteria, the existence of sub-criteria for a principal criterion in no way shows that the principal criteria are vague.

142 Accordingly, the complaint that the award criteria are vague must be rejected as unfounded.

— The complaint that certain elements of the call for tenders are vague

143 With regard to the argument that certain elements of the call for tenders are vague, it must be borne in mind that, as set out in paragraph 78 above, the application must contain the subject-matter of the proceedings and a summary of the pleas in law on which it is based. This information must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without other supporting information. However, in the present case, the applicant merely refers to an alleged breach of the Financial Regulation resulting from the vagueness of certain elements of the call for tenders without putting forward any argument in support of its claim and, above all, without stating to which call for tenders it is referring. Consequently, in the light of the abovementioned principles, the argument must be rejected as inadmissible.

— The complaint that subdivision of one of the award criteria into sub-criteria was unlawful

144 As a preliminary comment, it must be noted that, although this complaint was raised by the applicant at the stage of the reply, it can nevertheless be admitted on the basis of Article 48(2) of the Rules of Procedure, since it is based on matters of law or of fact which came to light in the course of the procedure, namely the report to the authorising officer of 19 November 2004 and the technical evaluation sheets, which EMSA put before the Court as annexes to its defence.

145 As set out in paragraph 129 above, under Article 97 of the Financial Regulation and Article 138(3) of the implementing rules, when a contract is awarded by the best-value-for-money procedure, the contracting authority must indicate, in the tender specifications or in the contract notice, the award criteria applicable and their weighting.

146 Those provisions, read in the light of the principles of equal treatment of economic operators and of transparency, referred to in Article 89(1) of the Financial Regulation, require that potential tenderers be aware of all the features to be taken into account by the contracting authority in identifying the economically most advantageous tender and their relative importance when they prepare their tenders (see, to that effect and by analogy, Case C-331/04 *ATI EAC e Viaggi di Maio and Others* [2005] ECR I-10109, paragraph 24, and *Lianakis and Others*, paragraph 131 above, paragraph 36).

147 It follows that a contracting authority cannot apply sub-criteria for award criteria which it has not previously brought to the tenderers attention (see, to that effect and by analogy, *Lianakis and Others*, paragraph 131 above, paragraph 38).

148 In accordance with settled case-law, it is, none the less, possible for a contracting authority, after expiry of the period for submission of tenders, to determine weighting coefficients for sub-criteria of award criteria previously established, on three conditions, namely that that ex post determination, firstly, does not alter the criteria for the award of the contract set out in the contract documents or the contract notice; secondly, does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; and, thirdly, was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers (see, to that effect and by analogy, *ATI EAC e Viaggi di Maio and Others*, paragraph 146 above, paragraph 32, and *Lianakis and Others*, paragraph 131 above, paragraphs 42 and 43).

149 In the present case, it should be borne in mind that point 13.1 of the tender specifications stated, as the first award criterion, the 'proposed methodology for the project', and that that was to include 'detailed proposals of how the project would be carried out', including milestones and deliverables as defined in point 3 of the tender specifications. The tender specifications allotted to this criterion 40 points out of 100.

150 In accordance with point 3 of the tender specifications, tenderers were to include in their tenders detailed information regarding the project implementation structure, each work package was to be clearly defined, and the project implementation structure was to include as a minimum certain information (see paragraph 19 above). This was to include, in particular, horizontal activities (point 3.1), a description of the project management team and responsibilities (point 3.2), deliverables on project management (point 3.4), and work package description and relations (point 3.5). In particular, point 3.2, concerning the description of the project management team, states that tenderers were to 'clearly define in the offer the exact services and … provide detailed information in respect of response time [and] provide with their offer detailed curriculum vitae of each staff member responsible for carrying out the work, including his or her educational background, degrees and diplomas, professional experience, research work, publications and linguistic skills'. In point 3.4, concerning deliverables on project management, it is stated in addition that tenderers were to provide in their tenders a detailed description regarding the requirements set out in that point, and the Gantt planning diagram for the project. Finally, point 3.5 states that a total overview was to be given of the 'man days' and 'man days cost' for each work package.

151 It is apparent from the report to the authorising office of 19 November 2004 that the evaluation committee had agreed to break down the first criterion concerning the proposed methodology for the project (which was to include detailed proposals of how the project would be carried out, and milestones and deliverables, as defined in point 3 of the tender specifications), into two sub-criteria: 'repartition of tasks, manpower offered of quality and man-days (roadmap) – 20%; deliverables – 20%'.

152 Contrary to what the applicant claims, the evaluation committee did not subdivide that award criterion into sub-criteria which had not previously been brought to the tenderers' attention. Those sub-criteria correspond, essentially, to the description of the first criterion, concerning methodology, as specified in point 13.1 of the tender specifications, read in the light of point 3 thereof (see paragraphs 149 and 150 above).

Accordingly, the evaluation committee merely weighted the 40 points available for the first award criterion by dividing them fairly between those sub-criteria.

153 In the light of those considerations, it must be determined whether, in providing for such weighting, the evaluation committee infringed the Financial Regulation and its implementing rules.

154 It is apparent from the case-law cited in paragraph 148 above that a contracting authority cannot infringe the Financial Regulation or the implementing rules when it divides among the subheadings of an award criterion which are defined in advance the number of points allotted to that criterion when the tender specifications were prepared, provided that that division does not alter the award criteria defined in the tender specifications or the contract notice, does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation, and was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

155 In the present case, the applicant, by merely referring generically to the fact that the contracting authority subdivided a criterion into two sub-criteria, has not shown that the decision of the contracting authority to make such a division led to an alteration of the contract award criteria previously defined in the tender documents, or that it contained elements which could have affected the preparation of the tenders, or that it gave rise to discrimination against the applicant or one of the tenderers.

156 In the light of those considerations, that complaint must be rejected as unfounded.

157 With regard, finally, to the complaint that, in substance, the name of the successful tenderer was communicated late – since, instead of being communicated by EMSA, in accordance with Article 100(2) of the Financial Regulation, within 15 days of the applicant's request, it was revealed only some weeks later, by means of the contract award notice published in the *Official Journal*, annexed to EMSA's letter of 6 January 2005 –, it must be held that that delay, although it is to be deplored and cannot be justified, has not, however, restricted the applicant's opportunity to assert its rights before the Court and thus cannot, by itself, lead to the annulment of the contested decision (see, to that effect and by analogy, judgment of 10 September 2008 in Case T-465/04 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 52). Moreover, the applicant does not state what effect that fact could have on the legality of the award decision or the concrete effect which it may have had on its rights of defence.

158 In the light of all the foregoing, the conclusion must be that the second plea in law, as regards tendering procedure C-1/01/04, must be rejected in its entirety.

The fourth plea in law, alleging breach of the duty to give reasons and lack of relevant information

Arguments of the parties

159 The applicant submits that EMSA's decision to reject its tender and award the contract to another tenderer is vitiated by a lack of sufficient reasoning.

160 Firstly, it complains that, by failing to reply to the applicant's timely questions and provide clarifications repeatedly requested in writing, EMSA denied the applicant the possibility of assessing the legality of its acts.

161 Secondly, it submits that EMSA did not provide it with all the information requested regarding the grounds on which its tender was rejected. In that regard, it recalls that, in accordance with Article 253 EC and Article 8 of Directive 92/50, the contracting authority has the duty to give sufficient reasons for its decision to reject a tender when the tenderer asks the reasons for the rejection, within 15 days of that request.

162 In the present case, EMSA failed clearly to explain the reasons for which it rejected the applicant's tender, and merely provided it – after a significant delay and only further to a reminder – with a small amount of information which did not comply with the provisions of the Financial Regulation or the case-law on public procurement. It also failed to make any reference to the characteristics and comparative advantages of the successful tender, thus denying the applicant the possibility of effectively commenting upon the choice made and countering it, and of seeking legal redress.

163 In support of its argument, the applicant produces, as an example, a copy of an evaluation committee report, concerning a different public procurement procedure, which was sent to it by a Directorate General of the Commission. A simple comparison between that document and EMSA's letter of 16 December 2004 is sufficient to show that the latter does not satisfy the duty to state reasons imposed by the legislation and case-law on public procurement.

164 Next, the applicant refutes EMSA's argument that only the decision not to state reasons can be annulled by the Court and not the contested decisions themselves. Following such an argument would mean that the contracting authorities can take arbitrary decisions, without giving reasons, and proceed to sign contracts.

165 EMSA disputes the applicant's arguments.

Findings of the Court

166 First of all, by its first complaint, the applicant seeks to criticise EMSA's refusal to debate with it the merits of its tender by comparison with those of the successful tender. In that regard, it is sufficient to recall that no contracting authority is obliged, on the basis of its duty to state reasons for a decision rejecting a tender, to enter into such a debate (see, to that effect, judgment of 1 July 2008 in Case T-211/07 *AWWW* v *EFILWC*, not published in the ECR, paragraph 43). Moreover, that fact cannot call in question, of itself, the legality of the decision (*Evropaïki Dynamiki* v *Commission*, paragraph 85 above, paragraph 78). Accordingly, the applicant cannot criticise EMSA for failing in its duty to state reasons because it refused to answer the questions and requests for clarification which the applicant had put to it after having received the letter of 16 December 2004.

167 With regard to the second complaint, concerning breach of the obligation to state reasons, in the narrow sense, alleged by the applicant, in that EMSA declined to send it the information requested on the grounds for the rejection of its tender, it must be stated that, in the context of a public procurement procedure such as that at issue, the legislative provisions which determine the content of the contracting authority's obligation to state reasons to tenderers whose tenders have not been successful are Article 100(2) of the Financial Regulation and Article 149 of the implementing rules, and not the provisions of Directive 92/50, as the applicant claims (see paragraph 126 above).

168 It is clear from the abovementioned articles that, in public procurement matters, the contracting authority fulfils its duty to state reasons if it confines itself, first of all, to notifying immediately all tenderers whose tenders are rejected of the grounds on which the decision was taken and subsequently informs tenderers whose tenders were admissible and who make an express request of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract was awarded, within 15 calendar days of the date on which a written request is received (see *Evropaïki Dynamiki* v *Commission*, paragraph 85 above, paragraph 68, and *Evropaïki Dynamiki* v *Commission*, paragraph 157 above, paragraph 47, and the case-law cited).

169 That manner of proceeding satisfies the purpose of the duty to state reasons enshrined in Article 253 EC, according to which the reasoning followed by the authority which adopted the measure in question must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to assert their rights; and, on the other, to enable the Court to exercise its supervisory jurisdiction (see *Evropaïki Dynamiki* v *Commission*, paragraph 157 above, paragraph 48, and the case-law cited).

170 It should be added that compliance with the duty to state reasons must be assessed in the light of the information available to the applicant at the time the application was brought (*Strabag Benelux* v *Council*, paragraph 131 above, paragraph 58; *Renco* v *Council*, paragraph 131 above, paragraph 96, and *Evropaïki Dynamiki* v *Commission*, paragraph 129 above, paragraph 50).

171 In addition, it is necessary to note that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and the case-law cited).

172 In the present case, it should finally be borne in mind that the tender specifications set out, in point 13.1, three award criteria, entitled, respectively, 'Proposed methodology for the project' – which refers expressly to point 3 of the tender specifications, indicating a certain amount of detailed information to be provided by tenderers (see paragraph 19 above) –, 'Understanding of the specifications in terms of reference' and 'Quality of the operational services'. A system of points was established for evaluation of the tenders in respect of each of those three award criteria. A minimum threshold of points (60%) was also laid down for each criterion and an overall minimum of 70% was required. Only those tenders which attained the minimum thresholds of points were to be taken into account for awarding the contract.

173 Accordingly, in order to determine whether EMSA satisfied the requirement for a statement of reasons laid down in the Financial Regulation and the implementing rules, its letter of 6 December 2004 and that of 16 December 2004, sent in reply to the applicant's express request of 7 December 2004 for additional information on the award of the contract at issue and the rejection of its tender, must be examined.

174 In that regard, the Court finds that the letter of 6 December 2004 informed the applicant that its tender had not been successful at the award stage on the ground that its price/quality ratio was worse than that of the successful tender. In that letter, EMSA also informed the applicant that it could request additional information on the grounds for rejection of its tender, the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract had been awarded, which the applicant did by fax of 7 December 2004.

175 With regard to EMSA's letter of 16 December 2004, it should be observed, at the outset, that the applicant states that it received it only on 7 January 2005, as an annex to the fax sent by EMSA on that date, further to a fax from the applicant of 5 January 2005 in which it complained that it had not received any communication regarding the award of the contract at issue. In that regard, the Court has no reason to doubt that EMSA did in fact send that letter on 16 December 2004 – a fact that, moreover, the applicant does not expressly dispute – and considers that EMSA was not required by any provision governing the procurement procedure at issue to comply with formalities for sending that type of communication which allowed it to check whether it was actually received by tenderers, although it is regrettable that it did not consider it to be appropriate to choose means of communication which might have enabled it to make such a check (see, to that effect, order of 19 October 2007 in Case T-69/05 *Evropaïki Dynamiki* v *EFSA*, not published in the ECR, paragraph 56). In any event, that delay did not limit the applicant's opportunity to assert its rights before the Court and cannot, by itself, lead to the annulment of the contested decision. It is apparent from the file that the applicant made use of all the information contained in that letter in bringing the present action.

176 Next, it must be noted that, in that letter, EMSA indicated the number of points awarded to the applicant's tender for each award criterion and the final result concerning the price/quality ratio of its tender, which was 68.89 points out of 100, while that of the successful tender was 79.33 points out of 100. As regards the successful tender, the letter, the contents of which are cited in paragraph 27 above, includes a detailed analysis of that tender.

177 It is apparent from the file that the information on the methodology to be used for managing the project, the description of the tasks, the number of man-days proposed and the deliverables is related to the evaluation of the successful tender on the basis of the first criterion, while the information on the understanding of the project and the proposed service level agreement is related to the second and third award criteria respectively.

178 Furthermore, that information must be read in the light of point 3 of the tender specifications, which lists a number of items to be detailed in the tender, including, inter alia, the resources allocated, the Gantt diagram, the breakdown of tasks, the number of man-days proposed and the deliverables, defined by type of task (see paragraph 150 above). Since the applicant has an in-depth knowledge of the tender specifications, as the drafting of its tender shows, it was, accordingly, in a position to deduce the relative advantages of the successful tender.

179 In the light of all that information and of the statements on the number of points awarded to its tender for each criterion, the applicant was in a position not only to identify the weak points in its tender and, thereby, the reasons for its rejection, namely that it did not attain the level of quality necessary in respect of two of the award criteria, but also to compare the overall result of the assessment of its tender (68.69 points out of 100) with that of the successful tenderer (79.33 points out of 100) (see, to that effect, *Evropaïki Dynamiki* v *Commission*, paragraph 85 above, paragraph 75, and the case-law cited).

180 In addition, it is clear from all the information provided in that letter that the applicant's tender not only had failed to obtain the minimum number of points required for the first ('proposed methodology for the project') and third ('quality of the operational services') award criteria, but had not even attained the overall minimum required of 70 points out of 100, when, under the tender specifications, only those tenders which attained the minimum threshold of points required were to be taken into account for awarding the contract at issue.

181 In the light of all the foregoing, it must be concluded that that statement of reasons enabled the applicant to assert its rights before the Court and the Court to exercise its review of legality with regard to the decision to reject the tender. Accordingly, the present plea, so far as tendering procedure C-1/01/04 is concerned, must be rejected as unfounded.

The third plea in law, alleging manifest errors of assessment by EMSA

Arguments of the parties

182 In its application, the applicant submits that EMSA made a manifest error of assessment in that it did not correctly and objectively evaluate the quality of the applicant's tender and found that it was inferior to that of the successful tenderer.

183 In addition, it argues that, since EMSA did not follow a predetermined and objective methodology, known to the tenderers, it is obvious that the decision of the evaluation committee was based on incorrect assumptions.

184 At the stage of the reply, the applicant challenges, firstly, EMSA's assertion that defining the methodology of evaluation could have favoured certain tenderers. According to the applicant, a clear methodology does not affect the rights of tenderers but, on the contrary, allows them to produce the best-value-for-money tender and enables the Court to exercise its review. Moreover, the very fact that the evaluation committee subdivided the award criteria into sub-criteria confirms that the criteria were not sufficiently defined.

185 In addition, the applicant raises complaints concerning the evaluation committee documents produced to the Court by EMSA as annexes to its defence.

186 In that regard, it claims, the subdivision of the first award criterion into two sub-criteria by the evaluation committee led that committee to focus on two particular aspects of the call for tenders which were not known to the tenderers before submission of their tenders.

187 With regard to the evaluation report, firstly, the applicant submits that although it is apparent from that report that the successful tender contained 'minor errors', the applicant cannot comment on the importance of those errors since the report did not specify their nature. Secondly, the evaluation of the weak points of the applicant's tender was formulated in vague terms and the comments were too generic.

188 The applicant also criticises certain specific comments in the evaluation sheets completed by each evaluator. With regard to the successful tender, it points out the contradiction between the statement of one of the evaluators that the successful tender contained 'minor errors' in the field of 'the flow of information to be handled by the SafeSeaNet system and … the type of information supported' and the statement that

those errors did not have 'a direct impact on their understanding of the specifications'. It also highlights the fact that, according to one of the evaluators, the successful tenderer had good experience in dealing with maritime projects although experience was not amongst the evaluation criteria.

189 't also challenges certain of the evaluators' comments with regard to the evaluation of its own tender. This relates, more particularly, with regard to award criterion 1(a), to the first evaluator's comment that the figure of 833.5 man-days of work is, excluding the Help Desk, over-estimated, and to the comments of the second and third evaluators relating, respectively, to the lack of clarity of the Gantt diagram, the lack of distinction between phase A and phase B of that diagram and the excessive duration of the analysis and design phase. According to the applicant, its tender stated clearly that, apart from the dedicated resources for the Help Desk, the project team would rely on the services of specialised engineers, included in the 833.5 man-days. Moreover, its tender clearly detailed the operation of the Help Desk, its clear methodology, the IT platform used, the management of cases, and use of the required Service Level Agreement. By failing to take account of that information, the evaluators therefore made a manifest error of assessment.

190 A second manifest error of assessment was made by the evaluators in taking the view that the 'analysis and design' phase described in the applicant's tender was too long. The applicant points out in that regard that, since the tender specifications required a web-orientated application, it was necessary to develop an SSN application based on an iterative model, on the basis of the principles of UML (Unified Modelling Language), in accordance with the methodology followed by all the institutions and the entire market. It therefore devoted 105 pages of its tender to an explanation of the 'software development methodology', of which a large part explained in detail the principles of UML. Accordingly, the evaluators made a further manifest error of assessment, since they did not correctly evaluate the applicant's tender or take into account the fact that the applicable methodology was UML.

191 Furthermore, with regard to the lack of clarity of the Gantt diagram, the applicant points out that the use of UML and an iterative approach for the process explains its Gantt diagram. In particular, as explained in detail in the section of its tender dealing with the 'take-over methodology', the takeover phase was to last one month and the validation task would have started at the same time as the take-over task. Accordingly, three months were more than enough for the validation. During that period, the applicant would also be involved in 'analysis and design' work, taking advantage of the feedback from the validation phase. According to the applicant, the implementation phase would also commence at the same time. During the first two months the applicant's team would have focussed on preparatory work, to organise the implementation environment. That is a standard approach which could not be regarded as abnormal by the evaluators, who therefore made a further manifest error of assessment.

192 Finally, with regard, in the applicant's tender, to the lack of distinction between phases A and B in the Gantt diagram, again noted by the evaluators, the applicant points out that it was the tender specifications which stated that the two phases were connected and were to be regarded as a single project. In that regard also a manifest error of assessment was made by the evaluators.

193 With regard to award criterion 1(b), the applicant challenges the comments of the first, second and third evaluators relating, respectively, to the lack of any concrete methodology, the lack of precision about technical meetings and the lack of clarity on the deliverables. In that regard, it submits that its tender indicated all the meetings which were to take place, gave a clear list of the deliverables and detailed the methodology which it proposed to use for each of the aspects of the call for tenders and the methodology and approach used for each of the projects to be carried out. Accordingly, it is clear that the evaluators made another manifest error of assessment.

194 Finally, with regard to the third award criterion, the applicant points out that, according to the first evaluator, the Help Desk activity was not defined in terms of functionality and there was no concrete proposal on the organisation and management of the

Help Desk, while the second evaluator took the view that the number of man-days for the Help Desk and Member State support was not sufficient and there was no clear methodology for the management of incoming calls or for the procedures to minimise intervention time. In that regard, the applicant argues that it was clear from its tender that the Help Desk service relied on the services of some of the 833.5 man-days – which figure was considered overestimated by the evaluation committee – and that, moreover, the tender contained a clear description of the methodology, based on state-of-the-art procedures and advanced IT tools to handle the process.

195 EMSA disputes the applicant's arguments.

Findings of the Court

196 It is settled case-law that the contracting authority has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following a call for tenders, and that the Court's review must be limited to verifying that there has been no serious and manifest error (Case 56/77 *Agence européenne d'intérims* v *Commission* [1978] ECR 2215, paragraph 20; Case T-148/04 *TQ3 Travel Solutions Belgium* v *Commission* [2005] ECR II-2627, paragraph 47; and *Belfass* v *Council*, paragraph 119 above, paragraph 63).

197 In the present case, the arguments put forward by the applicant in its written submissions, in order to show the existence of manifest errors of assessment, are based, essentially, on three main factors.

198 Firstly, it refers to the lack of predetermined and objective methodology, known to the tenderers, in order to arrive at the final ranking. It also refers to the fact that the

tenderers were not aware of the subdivision of the criteria into sub-criteria and the alleged generic and abstract nature of the award criteria, and concludes that the evaluation of the tenders must have been subjective and based on incorrect assumptions.

199 However, the fact remains that the applicant has merely made general assertions, neither supported nor corroborated by any evidence at all. By that line of argument, the applicant is trying, in essence, to reintroduce in the context of the present plea the arguments already put forward in respect of the second plea, which has been rejected by the Court. Furthermore, the applicant in no way demonstrates how all the alleged failures on the part of the contracting authority to which it refers led that authority to make incorrect assumptions and a subjective evaluation of the tenders. In any event, the methodology used by the evaluation committee for the final ranking of the tenders was predetermined and specified in point IV.2 of the contract notice and point 13 of the tender specifications, in which EMSA indicated the criteria on the basis of which tenders were to be selected, and the weighting to be given to each of those criteria.

200 Accordingly, the conclusion must be that that first category of arguments cannot support the present plea.

201 Secondly, the applicant challenges the assessment of the successful tender made by the evaluation committee in its final report, in that, despite the existence of minor errors found in that tender, the committee did not state the nature of those errors.

202 In that regard, the Court notes that the abovementioned comment of the evaluation committee relates to the second award criterion and is worded as follows: '[p]roposers show a good understanding of the project, despite minor errors in their SafeSeaNet diagram'. Such a comment is not capable, of itself, of revealing an error

or even an inherent contradiction. The contracting authority is fully entitled to take the view that a tender, although containing errors regarded as minor, shows a good understanding of the project. In any event, the applicant has not shown that the comment is incorrect or, even less, that that allegedly incorrect comment led to a manifest error of assessment in the evaluation of the successful tender.

203 Thirdly, the arguments put forward by the applicant to challenge the specific comments on its tender, set out in the technical evaluation sheets completed by each evaluator in respect of award criteria 1(a), 1(b) and 3 of the call for tenders at issue (see paragraphs 188 to 194 above), are ineffective.

204 The evaluation committee, composed of at least three persons, is appointed by the authorising officer and responsible for giving an advisory opinion, in accordance with the second subparagraph of Article 146(1) of the implementing rules. It is the committee which draws up the written record of the evaluation, signed by all its members, which contains, inter alia, the names of the tenderers rejected and the reasons for the rejection of their tenders, and the name of the contractor proposed and the reasons for that choice. The definitive decision on award of the contract is taken subsequently by the contracting authority in accordance with Article 147(3) of the implementing rules.

205 It follows that the technical evaluation sheets, intended to collect evaluations made by various evaluators, whose points of view can, clearly, diverge, do not have any independent legal effect. Consequently, in the present case, those evaluation sheets taken individually cannot be used by the applicant to base arguments on any contradictions between the evaluation contained in one or other of them, since all of those evaluations were consolidated by the tender evaluation committee, which thus adopted its final position, which remains, moreover, an advisory opinion vis-à-vis the contracting authority.

206 The decision of that committee as to the proposal of the future contractor and the reasons for that choice can only be collective, since each committee member's evaluation is absorbed into the final report. Accordingly, it is clear that any argument seeking to prove that there was a manifest error of assessment can, where appropriate, be directed only against the evaluation report adopted by the evaluation committee and only in the event that the final decision of the contracting authority is in fact based on that report.

207 In any event, in the present case, the applicant has not shown whether and in what way those comments made individually by the evaluators in the technical evaluation sheets are reflected in the final report of the evaluation committee and brought about a manifest error of assessment of its tender on the part of the contracting authority. In that regard, it should, at the very least, have explained in what way the allegedly incorrect comments affected the score obtained by its tender in respect of the first and third award criteria, which are those for which its tender did not obtain the minimum number of points required by the tender specifications and the only ones in respect of which it has complained. It is sufficient to note that the applicant has not given such an explanation.

208 In the light of those considerations, that complaint must also be rejected.

209 The conclusion must therefore be that the applicant has failed to show the existence of manifest errors of assessment, supposedly made by the contracting authority, either in the evaluation of the successful tender or in the evaluation of its own tender.

210 The third plea in law, so far as tendering procedure C-1/01/04 is concerned, must therefore be rejected in its entirety as unfounded.

3. *The claim for annulment of EMSA's subsequent decisions*

211 In its second head of claim, the applicant requests that the Court annul all EMSA's subsequent decisions relating to the calls for tender at issue.

212 In that regard, as has already been stated in paragraph 78 above, an application must set out the subject-matter of the proceedings and a summary of the pleas in law on which it is based. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to exercise its review. In order to ensure legal certainty and the sound administration of justice, the essential facts and law on which it is based must be apparent from the text of the application itself, at the very least summarily, provided that the statement is coherent and intelligible.

213 In the present case, the applicant does not state which measures are concerned by its second head of claim and does not put forward any arguments in support of its claim.

214 Consequently, the second head of claim must be dismissed as inadmissible.

The request for measures of inquiry

215 The applicant requests the Court, in essence, to ask EMSA to supply a copy of the report of the evaluation committee and the relevant related documentation.

216 Since EMSA has put before the Court, as annexes to its defence, the documents requested by the applicant and since the applicant has made no other observations in that regard, there is no longer any need to adjudicate on this request.

Costs

217 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs. In the circumstances of the present case, the Court considers, on a fair assessment of the matter, that each party should bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls the decision of the European Maritime Safety Agency (EMSA) to award the contract to the successful tenderer in tendering procedure 'EMSA C-2/06/04';**

2. Dismisses the action as to the remainder;

3. Orders each party to bear its own costs.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 2 March 2010.

[Signatures]

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