JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
26 February 2002 *

In Case T-169/00,

Esedra SPRL, established in Brussels (Belgium), represented by G. Vandersanden, É. Gillet and L. Levi, avocats, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented initially by X. Lewis and L. Parpala, and, subsequently, by H. van Lier and L. Parpala, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION, first, for suspension of operation of the Commission's decision not to award to the applicant the public contract relating to invitation to tender No 99/52/IX.D.1, notified to the applicant by letter of 31 May 2000, and the Commission's decision to award the contract to a group of Italian companies

* Language of the case: French.

represented by Centro Studi Antonio Manieri Srl, notified to the applicant by letter of 9 June 2000, and, second, for compensation for the damage allegedly caused by those decisions,

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

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

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 18 September 2001,

gives the following

Judgment

Legal context

1 The award of public contracts for the supply of services by the Commission is subject to the provisions of Section 1 (Articles 56 to 64b) of Title IV of the

Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), as last amended, at the material time, by Council Regulation (EC, Euratom, ECSC) No 2673/99 of 13 December 1999 (OJ 1999 L 326, p. 1) which entered into force on 1 January 2000 ('the Financial Regulation').

2 Under Article 56 of the Financial Regulation:

'... when concluding contracts for which the amount involved is equal to or greater than the threshold provided for by the Council directives on the coordination of procedures for the award of public works, supplies and services contracts, each institution shall comply with the same obligations as are imposed upon bodies in the Member States by those directives. The implementing measures shall include appropriate provisions to that end'.

3 Article 139 of the Financial Regulation provides that '[in] consultation with the European Parliament and the Council and after the other institutions have given their opinions, the Commission shall adopt implementing measures for this Financial Regulation'.

4 Accordingly, the Commission adopted Regulation (Euratom, ECSC, EC) No 3418/93 of 9 December 1993 laying down detailed rules for the implementation of certain provisions of the Financial Regulation (OJ 1993 L 315, p. 1). Articles 97 to 105 and 126 to 129 of that regulation apply to the award of public contracts for the supply of services. In particular, Article 126 provides as follows:

'The Council directives on public works, supplies and services contracts shall be applicable to the award of contracts by the institutions whenever the amounts

involved are equal to or greater than the amounts provided for in those directives'.

5 In the present case, the relevant directive is 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 by Directive 97/52/EC of 13 October 1997 of the European Parliament and the Council (OJ 1997 L 328, p. 1) ('Directive 92/50'), Article 7(1)(a) of which provides for an application threshold of EUR 200 000 for public service contracts for, in particular, health and social services.

Facts giving rise to the dispute

6 In 1994 the Commission decided to entrust to a private company the management of the Centre de la Petite Enfance Clovis, which is a day nursery and kindergarten for children of the staff of the European institutions situated on its premises in Boulevard Clovis, Brussels ('the CPE Clovis'). The Commission issued an invitation to tender and subsequently awarded the contract to two Italian companies, Aristea and Cooperativa Italiana di Ristorazione. The management of the CPE Clovis was then entrusted to the applicant company, which was set up by the two aforementioned companies. The management contract was concluded for an initial term of two years from 1 August 1995, renewable for three one-year periods.

7 By letter of 15 April 1999, the applicant informed the Commission that it did not intend to seek renewal of the contract for 1999/2000.

8 On 26 May 1999, the Commission, pursuant to Council Directive 92/50, published in the Supplement to the *Official Journal* a first contract notice for the services relating to the management of the CPE Clovis (contract notice No 99/S 100-68878/FR, OJ 1999 S 100, p. 35). Those services are within category 25, 'Health and social services', of Annex I B to Directive 92/50. Three undertakings, among them the applicant and Centro Studi Manieri Srl ('Manieri'), applied to participate.

9 By letter of 2 July 1999, the Commission informed the applicant that it had decided not to award the contract for the management of the CPE Clovis within the framework of the procedure initiated on 26 May 1999 'because the number of candidates was too low to ensure adequate competition'.

10 On 10 July 1999, the Commission published a further contract notice for the management services of the CPE Clovis (contract notice No 99/S 132-97515/FR, OJ 1999 S 132). This notice was worded like the first and stated that the contract would be awarded to 'the economically most advantageous tender taking account of the prices tendered and the quality of the services proposed (details in the contract documents)'. Seven undertakings, including the applicant undertakings and Manieri, applied to participate.

11 The applications were examined on 28 October 1999 by an assessment panel consisting of four Commission officials ('the assessment panel'). The seven applicant undertakings were selected.

12 On 29 October 1999, the Commission sent the contract documents to the seven undertakings. The criteria on which the contract would be awarded were as follows:

'The contract will be awarded to the economically most advantageous tender taking account of:

— the prices tendered and

— the quality of the tender and of the services proposed, evaluated, in descending order of importance, according to:

(a) the quality of the teaching programme (40%)

(b) the measures and resources employed to provide cover for staff absences (30%)

(c) the methodology and monitoring devices proposed for monitoring of: (30%)

— the quality of service and management

— the maintenance of staffing levels

— the implementation of the teaching programme'.

13 The contract documents were supplemented by the report of the site visit and of the mandatory information meeting on 24 and 25 November 1999 ('the contract documents').

14 By 7 February 2000, the final date set for that purpose, four undertakings, including the applicant and Manieri, had submitted tenders.

15 The tenders were opened on 14 February 2000. The Commission then asked for further particulars from the tenderers. The applicant received and replied to three such requests from the Commission, dated 25 and 29 February and 17 March 2000. Manieri received five requests dated 25 (two requests) and 29 February, 3 and 10 March 2000, to which it replied on 10 and 14 March 2000.

16 The tenders were then examined by three assessment panels.

17 First, they were considered from the viewpoint of quality by an assessment panel consisting of six representatives of the Commission and a representative of the parents' association ('the qualitative assessment panel'). That panel delivered its report on 5 April 2000. The report placed Manieri's tender first, before that of Esedra.

18 Secondly, the tenders submitted by the four bidders were assessed from the viewpoint of price by Commission officials ('the price assessment panel'). That panel compiled a financial evaluation table of the tenders, which placed Manieri's tender second, before that of Esedra.

19 Thirdly, the qualitative assessment panel report and the abovementioned table were examined by a panel composed of six persons, of whom five were appointed in their capacity as Commission officials and the sixth in her capacity as representative of the Parents' Association ('the tender assessment panel'). That panel delivered its final assessment on 7 April 2000. The assessment repeats the conclusions of the two previous panels and concludes that Manieri's tender is the first and lowest tender in accordance with the requirements and qualitatively the best.

20 Following that examination, and after the favourable opinion of the Advisory Committee for Purchases and Contracts of 30 May 2000, the Commission awarded the contract in question to a group of Italian companies represented by Manieri, consisting of the latter and six other undertakings.

21 By letter of 31 May 2000, the Commission informed the applicant that it had not been awarded the contract in question ('the refusal decision').

22 By letter of 2 June 2000, the applicant's lawyers asked the Commission to inform them of the reasons for the refusal decision. They also asked the Commission to suspend any measure designed to implement the decision to award the contract to another candidate ('the award') and, consequently, not to conclude the contract referred to in the contract documents.

23 By fax of 9 June 2000, the Commission provided information regarding the reasons for awarding the contract to the Italian group represented by Manieri. Moreover, the Commission refused to suspend the operation of the award.

24 Following the award, the group represented by Manieri decided to entrust the work to a newly formed company incorporated under Belgian law called Sapiens in order to satisfy various obligations laid down by the Member State where the services were to be provided, in relation to employment law, tax law and social law (social insurance contributions and other employees' rights, payment of taxes, availability of a value-added tax (VAT) number, supervision of the management of facilities for small children in Belgium, etc.). The same procedure had been followed on the award of the previous contract.

Procedure and forms of order sought by the parties

25 The applicant brought the present action by application lodged at the Court Registry on 20 June 2000.

26 By separate document lodged at the Registry on the same day, the applicant submitted an application for interim relief in the form of suspension of the operation of the award decision and the refusal decision.

27 By order of 20 July 2000 in Case T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, the President of the Court of First Instance dismissed the application for interim relief.

28 In its application and reply, the applicant asked the Court to request the Commission to produce a number of documents and to allow it to submit its observations on them.

29 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure and, by way of the measures of organisation of procedure under Article 64 of the Rules of Procedure, requested the applicant to reply to a question and the Commission to produce certain documents and also to reply to several questions. The applicant replied to the Court's question by letters of 28 and 29 June 2001 and the Commission produced the documents and replied to the Court's questions by letters of 22 June, 9 and 24 July 2001.

30 The parties presented oral argument and gave their replies to the Court's questions at the hearing on 18 September 2001. At the hearing, the applicant stated that the documents produced by the Commission were sufficient for it to prepare its case properly and therefore it considered that its request for production of the documents had been satisfied.

31 The applicant claims that the Court should:

— rule that the application is admissible and well founded;

— annul the refusal decision;

— annul the award decision;

— order the Commission to pay the applicant damages of EUR 1 001 574.09;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the application for annulment as unfounded;

— dismiss the claim for damages as unfounded;

— order the applicant to pay the costs.

33 By letter of 22 October 2001 the applicant requested the Court to reopen the oral procedure on the ground that the applicant had just become aware of a new fact which justified the reopening of that procedure. By letter of 27 November 2001 the Commission submitted its observations on that request and took the view that it was neither necessary nor justified to reopen the oral procedure.

The claims for annulment

34 The applicant puts forward five pleas in law in support of its application for annulment. The first plea alleges breach of the principle of non-discrimination. The second plea alleges disregard of the contract notice and the contract documents with regard to the evaluation of the successful tenderers' financial and technical standing. The third plea alleges disregard of the contract documents with regard to the appraisal of prices and the quality of the tenders. The fourth plea alleges breach of the obligation to state reasons, and the fifth plea misuse of powers.

The first plea, alleging breach of the principle of non-discrimination

35 The applicant claims that the Commission breached the principle of non-discrimination, which is a fundamental principle in relation to public contracts and is directly referred to in Article 3(2) of Directive 92/50, which provides that 'contracting authorities shall ensure that there is no discrimination between different services providers'. Consequently the applicant contends, first, that the

time it was allowed for submitting its tender was not the same as that allowed to the other applicants; second, that the Commission put questions to the tenderers which went beyond a request for clarification or the correction of obvious clerical errors in the tenders and, third, that the tenderers were not evaluated impartially.

1. *The allegation that the applicant was not allowed the same time as the other tenderers for submitting its tender*

Arguments of the parties

36 The applicant considers that the time it was allowed for submitting its tender was not the same as that allowed to the other tenderers. It observes that the final date for submitting tenders, which, according to the contract documents, was originally 6 January 2000, was postponed to 7 February 2000. The applicant states that it was the only candidate which was not informed of this as the Commission's letter in Italian dated 20 December 1999 stated that the final date had been deferred to 7 January 2000, not 7 February 2000. The applicant points out that the other candidates were informed of the later date by letter or telephone. In particular, the applicant observes that Manieri, which had also received a letter in Italian with the same mistake as to the new final date, was informed of the mistake by telephone. According to the applicant, it was only on 7 January 2000, when its representative went to the Commission's offices to lodge its tender, that he was informed that in fact the final date had been postponed to 7 February 2000.

37 The applicant states that it had made arrangements to meet the final date which it had been given, namely 7 January 2000. Therefore the fact that it could have taken back its tender of 7 January in order to supplement it and lodge it on

7 February did not put the applicant back on an equal footing with the other candidates, who had been able to spread the work over a longer period from the beginning. In this connection the applicant notes that it was not able to start work again on its tender until 24 January, when some of its staff who had taken part in drawing up the tender returned from holiday and the external consultants instructed to prepare it were able to free themselves from other commitments undertaken after 7 January 2000.

38 The Commission disputes the applicant's arguments because in any case the final date for the submission of tenders was the same for all the candidates, namely 7 February 2000 and the applicant was able to lodge its tender after 6 January 2000. According to the Commission, the error as to the date in the latter of 20 December 1999 did not lead to discrimination against the applicant.

Findings of the Court

39 There is no factual support for the applicant's assertion that it was not given the same deadline as the other candidates because its final date for the submission of a tender was deferred to the same date as for the other candidates.

40 It is clear from the facts set out above that the Commission originally set 6 January 2000 as the final date for the submission of bids. That date was shown in paragraph 2 of the terms and conditions in the contract documents which the Commission sent on 29 October 1999 to the seven successful candidates in the selection process.

41 On 20 December 1999 the final date was deferred to 7 February 2000. As a result of a copying error in the Commission's fax to Esedra and Manieri, they

were informed that the final date had been deferred to 7 January, not 7 February, 2000. The mistake was noticed by Manieri, which contacted the Commission for clarification and was informed, by fax of 22 December 1999, that the final date had been deferred to 7 February 2000. Esedra, however, was misled and went to the Commission to lodge its tender on 7 January. Nevertheless, it was able to withdraw the tender and was allowed the extension to 7 February.

42 On this point it must be observed that it was Manieri which sent the Commission a fax on 21 December 1999 to inform it of the error as to the date, which the Commission rectified the next day by returning Manieri's fax with a handwritten note that the final date for the submission of bids had been deferred to 7 February 2000.

43 Although it is regrettable that the Commission, after being informed of the error, did not see fit to check whether the fax to Esedra contained the same error as that to Manieri so as to rectify it by contacting the applicant, nevertheless, if the applicant was unable to revise its tender before 24 January 2000, the reasons it puts forward in this connection are attributable to itself and not to the fact that the Commission was slow in informing it that the final date had been postponed. Moreover, the applicant has produced nothing at all to prove its assertion that it was unable to forewarn in good time the external consultants it used, who are said to have had other commitments from 7 January and would therefore not be free until 24 January.

44 In any case, the applicant does not claim that the fact that it was informed of the postponement of the final date on 7 January 2000, and not on 22 December 1999 like Manieri (or 20 December 1999, like the other candidates) had the consequence that the tender it presented was insufficiently detailed.

45 For those reasons the applicant's complaint of discrimination against it by reason of the postponement of the final date must be rejected.

2. *The allegation that the Commission put questions to the tenderers which went beyond the request for clarification or the correction of obvious clerical errors in the tenders*

Arguments of the parties

46 The applicant claims that the Commission put questions to Manieri which went beyond a request for clarification or the rectification of obvious clerical errors in the wording of Manieri's tender. In doing so, according to the applicant, the Commission infringed the second subparagraph of Article 99(h) of the detailed rules for the implementation of the Financial Regulation, which states that the Commission may not contact a tenderer after tenders have been opened unless some clarification is required or unless obvious clerical errors in the tender must be corrected. The Commission is also said to have breached the principle of non-discrimination underlying that provision.

47 The applicant claims that Manieri received several requests from the Commission, dated 25 and 29 February and 3 March 2000, which enabled it to finalise its bid. Likewise the Commission's requests entailed questions from Manieri, which was a further infringement of the second subparagraph of Article 99(h) of the detailed rules for the implementation of the Financial Regulation.

48 The Commission disputes the applicant's reasoning. According to the Commission, the questions put to all the tenderers on 25 and 29 February 2000 had already been dealt with in the tenders and the replies merely provided

clarification, without which none of the tenderers would have been able to finalise its bid. The Commission adds that Manieri did not finalise its tender, which was lodged within the specified period. The Commission also contends that the three requests for clarification to which the applicant refers are entirely in accordance with the second subparagraph of the said Article 99(h) and, in that connection, cites the judgment in Case T-19/95 *Adia Interim* v *Commission* [1996] ECR II-321. The Commission adds that the only question raised by Manieri concerned the practical arrangements for speaking to the children in a different Community language.

Findings of the Court

49 It should be noted that, according to the second subparagraph of Article 99(h) of the detailed rules for the implementation of the Financial Regulation, any contact between the institution and the tenderer after the tenders have been opened is prohibited save, exceptionally, 'if some clarification is required in connection with a tender, or if obvious clerical errors contained in the tender must be corrected'. In those cases, the institution may take it upon itself to contact the tenderer (see the judgment in *Adia Interim* v *Commission*, cited above, paragraph 43).

50 In this connection, the documents produced by the Commission in response to several measures of organisation of procedure show that Manieri received five requests for clarification from the Commission dated 25 February (two requests), 29 February, and 3 and 10 March 2000, and that it replied to them on 10 and 14 March 2000.

51 In the context of the measures of organisation of procedure, the Commission also produced Manieri's replies to the requests for clarification, and also extracts from Manieri's tender specifically relating to questions 1, 2, 5 and 6 in the first fax of 25 February 2000 and to the questions in the first, third and fourth indents of the

fax of 3 March 2000. In addition, the Commission indicated, for each of the seven aforementioned questions, the parts of the contract documents to which the extracts from Manieri's tender and the requests for clarification relate.

52 For each of the seven questions considered below, it is necessary to determine whether Manieri's replies to the Commission's requests for clarification should be regarded as clarifying the terms of its tender or whether the replies go beyond that and modify the substance of the tender by reference to the requirements of the contract documents. The other questions are not contested by the applicant.

53 In the first question in the first fax of 25 February 2000 the Commission asked Manieri to provide 'very specific examples of a simulated staff training plan (frequency, type of sequence, type of training)'. It is clear from the file that Manieri's tender contained a detailed description of its training plan and that, in reply to the Commission's request, Manieri supplied a simulated training plan accompanied by a table entitled 'staff training plan'.

54 In the light of those documents, it must be noted that the data used by Manieri in its reply had already appeared in the training plan included in its tender, in accordance with the requirements of the contract documents. Therefore Manieri's reply merely clarifies the data given in the tender, without modifying its terms.

55 In the second question in the first fax of 25 February 2000 the Commission asked Manieri to provide a 'description of the psychological and vocational tests (frequency, type of tests)'. The file shows that Manieri's tender contained a list of measures intended to limit staff absenteeism and these included the organisation of regular psychological and vocational tests of staff. In response to the Commission's request, Manieri provided the description required.

56 It must be observed, in the light of those documents, that psychological and vocational tests were not expressly required by the contract documents. However, Manieri's tender tackled the problem of staff absenteeism by envisaging the introduction of such tests and that is why the Commission requested clarification regarding those measures. Consequently Manieri's reply does no more than clarify for the Commission the concept of the psychological and vocational tests mentioned in the tender, without modifying its terms.

57 The fifth question in the first fax of 25 February 2000 was as follows: 'Is the entrance charge for museums and/or the charge for excursions paid by the contractor, with details of the number of excursions planned for each year, frequency and age groups'. The file shows that Manieri's tender described the proposed visits and excursions, without expressly stating that the cost would be borne by the tenderer. In reply to the Commission's request, Manieri stated that it would indeed meet the cost. Manieri also provided information on the number and frequency of excursions and the age groups concerned.

58 In the light of those documents it must be observed, regarding the cost of visits and excursions, that the fact that Manieri's tender did not expressly mention that the cost would be borne by Manieri has no bearing on the present case. The contract documents stated that it could not be otherwise, but they did not require this to be stated in the tender. Therefore a negative response by Manieri to the Commission's request for clarification would have logically entailed the rejection of its tender, whereas a positive response in no way alters the tender. Likewise, with regard to, first, the frequency of excursions and, second, the age groups concerned, it must be observed that Manieri's reply merely repeats the information given in the tender and specifies the age of the children concerned, which does not mean that the tender was modified.

59 The sixth question in the first fax of 25 February 2000 was as follows: 'Stability of groups: is this a part-time staff member in terms of working hours and, if so,

how many hours per week? Or is this a part-time staff member by virtue of function, but with effective full-time presence? Show on the basis of the general organisation chart and in the same structure, numbering each staff member from 1 to 50 paediatric nurses (e.g. P1, P2, P3, P4, etc.) in the division of each room and in the function of each person (A, B, C, part-time) and the same for the teachers'. The file shows that Manieri's tender described the measures envisaged to ensure the stability of groups of pupils and groups of teachers. In particular, the tender stated that part-time teachers would carry out specific tasks or would provide for the presence of a third nurse in certain situations. In response to the Commission's request, Manieri gave the clarification required with regard to the question of part-time staff and supplied the organisation chart sought by the Commission.

60 In the light of those documents it must be observed that, on the question of part-time staff, Manieri's reply merely repeats the terms of its tender without modifying its substance. Moreover, it should be noted that, as regards the organisation chart desired by the Commission, that chart serves merely to illustrate Manieri's reply, without replacing the complete and detailed organisation chart required by the contract documents, which was included in Manieri's tender.

61 The first, third and fourth questions in the fax of 3 March 2000 were as follows: '... please name the theoretical manual [Hazard Analysis Critical Control Point ("HACCP")] applicable on starting-up of the contract and state its period of adaptation.... Please describe the internal checks carried out by your company and what are the external checks made by Laboraco. Please state the types of checks, their frequency and numbers'. It appears from the file that Manieri's tender contained, first, a general and theoretical description of the measures to be taken for health and cleanliness and that it considered health questions as an integral part of a general system of quality control. In addition, in its tender Manieri stated that it undertook to ensure the health quality of its services by using the services of a specialist firm, Laboraco. In response to those requests by the Commission, Manieri gave the clarification required and supplied an organisation chart of the proposed quality and self-regulation system, together with a description of the persons in charge of it, a theoretical list of checks and a theoretical HACCP manual.

62 In the light of those documents it must be observed that Manieri's reply merely clarifies the wording of its tender without modifying it in substance. Manieri's tender meets the requirements of the contract documents, which require each candidate to include with its tender 'a brief note of its own progress in the matter of health, the human resources and qualifications used and, failing that, the measures taken at present to ensure the health quality of its services', and Manieri's reply merely gives details of the proposed internal and external checks for that purpose. Likewise, sending a theoretical HACCP manual in response to a request from the Commission cannot be regarded as a modification of the tender because the latter contained a general and theoretical description of the measures to be taken for health and cleanliness, the HACCP manual being only one means to that end.

63 In conclusion, the foregoing examination of the contract documents, Manieri's tender, the requests for clarification and Manieri's replies show that the Commission did not breach the principle of non-discrimination enshrined in Article 3(2) of Directive 92/50 and the second subparagraph of Article 99(h) of the detailed rules for the implementation of the Financial Regulation. Manieri's replies to the Commission's requests constitute clarification of the terms of its tender and they in no way modify the substance of the tender in relation to the requirements laid down by the contract documents.

64 Consequently the applicant's complaints relating to discrimination against it by reason of Manieri's replies to the Commission's requests for clarification must be rejected.

3. *The applicant's allegation that the assessment of the tenders was not impartial*

65 According to the applicant, the assessment of the tenders was not impartial because the parents' association and the Joint Management Committee of the

Early Childhood Centre ('Cocepe'), two bodies hostile to the applicant for illegitimate reasons, took part in the assessment. The applicant also considers that the Commission wished to make a clean sweep of the past and to exclude the applicant from the CPE Clovis because the applicant managed the CPE when alleged paedophilic acts were committed there in 1997.

66 First, the applicant observes that the deputy chairman of the parents' association took part in the procedure for assessing tenders in the present case. However, the chairman of that association had informed the Commission of her dissatisfaction by sending it a copy of a letter she had written to a member of Cocepe, complaining of the way in which the applicant had managed the CPE Clovis. Moreover, the parents' association had asked the Commission to terminate the contract current at that time.

67 The Court considers that there can be no objection to the participation of a representative of the parents' association in the assessment of tenders in view of the importance of the parents' contribution to the cost of the CPE Clovis and their interest in educational matters connected with the welfare of the children.

68 Similarly, discrimination against the applicant cannot be inferred from the dissatisfaction expressed by the chairman of the parents' association concerning the way in which Esedra managed the CPE Clovis. The letter on which that allegation is based was addressed to a member of Cocepe and a copy was sent to the Commission for information. Examination of the letter shows that it was sent by a parent of pupils in her personal capacity and not on behalf of the parents' association. The writer of the letter never refers to her position as chairman of the parents' association. Furthermore, it appears that in the final analysis she did not wish to damage the applicants' image or its business, as she made clear in response to the action brought against her by Esedra.

69 In addition, the applicant's allegation that the parents' association asked the Commission to terminate the applicant's management contract at the time is based solely on a leaflet of the local staff committee and that document does not justify attributing such a request to the parents' association.

70 Consequently, the applicant's complaint relating to the participation of a representative of the parents' association in the procedure for awarding the contract in question must be rejected.

71 Second, the applicant contends that Cocepe followed the progress of the procedure for awarding the contract and the procedure had been mentioned at the 221st meeting of that body on 24 March 2000. On this point the applicant observes that Cocepe is a joint body consisting of representatives of the staff committees. Like the parents' association, the local staff committee is hostile to the applicant, as shown by its objection to the privatisation of the activities of the CPE Clovis in 1995.

72 The Court observes that it appears from the specifications annexed to the contract documents that Cocepe is a joint body consisting of management representatives and staff committee representatives, with four representatives of the Commission, two of the Council, two of the Economic and Social Committee and of the Committee for the Regions, and two representatives of the Parliament. Within the framework of the CPE Clovis management contract, Cocepe assists the Commission in its task of monitoring, inter-institutional coordination and permanent evaluation. It also helps in observing the functioning of the CPE Clovis, considers requests by parents and delivers opinions on the operation of the Centre.

73 It must be noted that none of the members of Cocepe took part in appraising the tenders within the framework of the procedure for awarding the contract in

question. In particular, the Commission states, without being contradicted by the applicant, that Cocepe cannot have access to tenders, which can only be disclosed to the assessment panels.

74 In addition, there is no basis for the applicant's assertion that the fact that Cocepe followed the procedure for awarding the contract or that it intervened in the preparation of the management contract infringes the principle of non-discrimination. Although Cocepe followed the procedure, this was only by way of a general outline of the progress of the invitation to tender at the 221st meeting, which had no influence on the assessment process.

75 The applicant's complaint that Cocepe took part in the procedure for awarding the contract in question must therefore be rejected.

76 Third, the applicant states that, as a result of alleged paedophilic acts committed in 1997, pressure was brought to bear on the Commission to exclude the applicant from the management of the CPE Clovis and that, in yielding to such pressure, the Commission's intention was to make a clean sweep of the past.

77 The Court observes that the applicant has not adduced the slightest evidence to show that the alleged paedophilic acts in 1997 resulted in any discrimination whatever against the applicant.

78 Accordingly, it must be made clear that it was the applicant, not the Commission, which terminated the contract for the management of the CPE Clovis, which is sufficient proof that the Commission did not regard the applicant as responsible for the events which are said to have occurred in 1997.

79 Likewise, the fact that the local staff committee criticised the way in which the applicant executed the contract and asked the Commission to make other arrangements for the management of the CPE Clovis does not affect the assessment of the applicant's tender because the staff committee did not take part in the assessment process.

80 Therefore the applicant's complaint that the Commission intended to eliminate the applicant because it managed the CPE Clovis at the time of alleged paedophilic acts in 1997 must be rejected.

81 It follows from the foregoing that the applicant is wrong in its submission that the Commission did not carry out an impartial assessment of the tenders.

82 The first plea in law must therefore be dismissed.

The second plea, alleging that the notice of invitation to tender and the contract documents were disregarded in relation to the assessment of the successful tenderer's financial and technical standing

83 The applicant contends that the successful tenderer, namely the group of companies represented by Manieri, does not have the financial and technical standing required by the notice of invitation to tender and the contract documents.

1. *The successful tenderer's financial standing*

Arguments of the parties

84 The applicant contends that the Commission ought to have eliminated Manieri from the procedure for the award of the contract in question because its financial standing and that of the other companies in the group it represents is insufficient. On this point the Commission disregarded the notice of invitation to tender and the contract documents, made a manifestly incorrect assessment and infringed Article 34 of Directive 92/50 and also the principle of non-discrimination.

85 Thus, the applicant notes that on 28 October 1999 the assessment panel decided to select the group represented by Manieri without having in its possession the balance sheets of three of the companies forming the group. Following the Commission's request of 13 October 1999, the balance sheets were received by the Commission only on 3 November 1999. On this point the applicant observes that the absence of the balance sheets could not be made up for by the joint and several undertaking given by the members of the group represented by Manieri because the Commission did not know the financial standing of three of them. Likewise, according to the applicant, the balance sheets supplied at the selection stage did not make it possible to establish that the candidate in question had the requisite financial standing as the annual financial value of the contract, which the applicant estimates at BEF 140 000 000 (EUR 3 470 509.34) was greater than the total turnover of the four members of the group represented by Manieri, whose balance sheet was given to the Commission, which was approximately BEF 60 000 000 (EUR 1 487 361.15) in 1998.

86 The applicant also criticises the assessment panel's preference for analysing technical standing rather than financial standing. The applicant contends that it is

incumbent on the Commission to assess the financial criterion as well as the technical criterion, and not to prefer one to the other. From this viewpoint the applicant contends that, if the financial standing of the group represented by Manieri was not made clear in its application, the Commission ought to have obtained further particulars on that point, in accordance with Article 34 of Directive 92/50. The applicant adds that the different rules in force in the Member States governing the presentation of balance sheets and trading accounts of companies and legal persons cannot, in the absence of complete harmonisation in the matter, justify the abandonment of a criterion intended by the Community legislature. In this connection the applicant sees no reason why the balance sheets or accounts of a legal person should not include the figures requested, in particular the general turnover, the turnover specific to operating in the market in question and government aid, if any.

87 In addition, the applicant observes that the letter of 3 February 2000 from Deutsche Bank makes no significant contribution to the discussion because it was out of time and merely states, firstly, that Manieri can fulfil its financial obligations, but does not mention the amount of the contract in question and, secondly, that Manieri has a good reputation in its field of business, which is not that of the contract in question because it involves secondary education of the second grade.

88 The Commission contests the applicant's arguments and submits that the group represented by Manieri had the requisite financial standing to be selected, as proved by the documents it produced within the framework of the procedure for awarding the contract in question, in accordance with Articles 31 and 34 of Directive 92/50.

Findings of the Court

89 It should be observed that Article 31 of Directive 92/50 provides as follows:

'1. Proof of the service provider's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or evidence of relevant professional risk indemnity insurance;

(b) the presentation of the service provider's balance sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the service provider is established;

(c) a statement of the undertaking's overall turnover and its turnover in respect of the services to which the contract relates for the previous three financial years.

2. The contracting authorities shall specify in the contract notice or in the invitation to tender which reference or references mentioned in paragraph 1 they have chosen and which other references are to be produced.

3. If, for any valid reason, the service provider is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

90 In addition, Article 34 of Directive 92/50 provides that 'within the limits of Articles 29 to 32, contracting authorities may invite the service providers to supplement the certificates and documents submitted or to clarify them'.

91 Therefore, in accordance with Article 31(2) of Directive 92/50, the contract notice is the relevant document for determining whether the Commission made a serious and manifest error in selecting the application from the group of companies represented by Manieri.

92 Paragraph 13 of the contract notice, relating to information on the service provider's own situation and the formalities necessary for appraising the minimum financial and technical standing required, states that candidates must produce, together with their request to participate and mentioning reference 99/52/IX.D.1, the following documents:

'...

(3) copies of the balance sheets and trading accounts for the last three years or if, for any valid reason, the candidate is unable to produce them, any other document proving his financial standing;

(4) a statement of the overall annual turnover in the last three financial years;

(5) a statement of the specific annual turnover in the sector to which the present invitation to tender relates, in the last three financial years;

...'

93 In addition, paragraph 9 of the contract notice states that, if the tender is submitted on behalf of a group of service providers, all the members of the group must be 'jointly and severally' responsible for the performance of the contract, while paragraph 12 states that the successful tenderer will be required to furnish a performance bond in the sum of EUR 400 000 before the contract takes effect.

94 Finally, the contract notice allows the Commission a certain discretion because paragraph 15(2) provides that the Commission may automatically reject an application which does not include all the information required in paragraph 13. Therefore the contract notice does not oblige the Commission to reject an incomplete application.

95 On this point, it must be observed that the Commission has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review must be limited to verifying that there has been no serious and manifest error (see the judgments in Case 56/77 *Agence Européenne d'Intérims* v *Commission* [1978] ECR 2215, paragraph 20; the case of *Adia Intérim* v *Commission*, cited above, paragraph 49, and Case T-139/99 *AICS* v *Parliament* [2000] ECR II-2849, paragraph 39).

96 In the present case, the financial standing of Manieri and the other members of the group represented by it was appraised at two levels: at the time when applications were selected and, at a later stage, before the contract in question was awarded.

97 With regard to the first stage, it appears from the file that, when the selection of applications was carried out, Manieri's application was accompanied, firstly, by copies of the balance sheets and trading accounts for the last three years of four of the seven undertakings forming the group represented by Manieri, together with a 'substitute statement' for the other three members (in accordance with paragraph 13(3) of the contract notice) and, secondly, a statement of the overall annual turnover in the last three financial years of each of the seven undertakings (in accordance with paragraph 13(4) of the contract notice) and a statement of the specific annual turnover in the sector to which the invitation to tender relates, in the last three financial years (in accordance with paragraph 13(5) of the contract notice).

98 Therefore, in view of the discretion granted to the Commission by the contract notice, the Commission cannot be criticised for not having rejected Manieri's application merely on the ground that Manieri gave no reason for the absence of copies of the balance sheets and trading accounts of three of the seven members of the group which it represents.

99 It must be observed that the Commission had other information which enabled it to determine the financial standing of the Manieri group in the absence of the balance sheets and trading accounts in question.

100 For example, the letter of 17 June 1999 from the bank Rolo Banca, which was annexed to Manieri's application, stated that Manieri had sufficient financial resources at its disposal. Such a document could be deemed an 'appropriate

statement from a bank' for the purposes of Article 31(1)(a) of Directive 92/50 which was in itself sufficient to prove the financial standing of a candidate and could be taken into account by the Commission on the basis of its discretion.

101 Manieri's offer of 23 October 1999 to furnish immediately the bank guarantee for EUR 400 000 mentioned in paragraph 12 of the contract notice also enabled the Commission to regard Manieri's financial standing as sufficient.

102 The same applies to the statement annexed to Manieri's letter of 23 October 1999, in which the seven members of the group represented by Manieri undertook 'jointly and severally' to perform the contract in accordance with paragraph 9 of the contract notice.

103 In the present case these factors appear particularly relevant in so far as the financial standing of candidates for a public services contract must be assessed by reference to their ability to pay their staff and creditors if they are awarded the contract in question rather than by reference to the value of the contract. The draft framework contract accompanying the contract documents states accordingly that the Commission undertakes to pay the amounts due within a period of 60 days, which limits most of the risk associated with the candidate's financial standing to the expenses incurred in the two months during which it may have to allow the Commission credit and not, for example, to the annual value of the contract estimated by the Commission at EUR 4 000 000. In those circumstances a bank certificate, an offer of a guarantee or a 'joint and several' undertaking are particularly appropriate for assessing a candidate's financial standing.

104 Furthermore, the priority given to technical standing over financial standing in the selection of candidates does not mean that financial standing was not considered at all. The conclusions of the assessment panel that the candidates'

financial standing was not clear from the turnover figures given because of the different aids and subsidies they had received indicate expressly that a detailed check would have to be made of the proposed tenderer's financial cover before the contract was awarded.

105 In this connection it must be noted that, in conformity with the abovementioned request of the assessment panel, the Commission checked the financial standing of the Manieri group after it had been proposed for receiving the contract.

106 Consequently the balance sheets and the trading accounts of the three members of the group represented by Manieri which were not included with Manieri's application and which the Commission asked for on 13 October 1999 or, at least, the reason for their absence, as required by Article 34 of Directive 92/50, reached the Commission on 3 November 1999, thus completing the application.

107 Subsequently Manieri passed to the Commission a letter dated 3 February 2000 from Deutsche Bank which states that Manieri, taken on its own, 'has the financial resources at its disposal, it can meet its commitments and has a good reputation'. This second letter, in addition to that from Rolo Banca 1473 of 17 June 1999, is further evidence of this applicant's financial standing.

108 It follows from the foregoing that, when considering the financial standing of Manieri and the other members of the group represented by it, the Commission did not disregard the contract notice or the contract documents, nor was there a manifest error of assessment on the Commission's part, nor did it infringe Article 34 of Directive 92/50 or the principle of non-discrimination.

109 Therefore the applicant's complaints relating to the successful tenderer's inadequate financial standing must be dismissed.

2. The successful tenderer's technical standing

Arguments of the parties

110 The applicant contends that the Commission ought to have eliminated Manieri from the procedure for the award of the contract in question by reason of its inadequate technical standing. On this point, the Commission disregarded the contract notice and erred manifestly in its assessment.

111 With regard to the technical standing of the successful tenderer, the applicant observes that Manieri's company object has no connection with the management of day nurseries because it relates to secondary education of the second grade. The applicant goes on to observe that, of all the companies in the group represented by Manieri, only the company Garden Bimbo, which has a staff of only 11 persons, has activities connected with very young children and a company object defined in relation to the nature of the market concerned. The applicant adds that the company object does not indicate the appropriate technical standing for fulfilling the contract in question because it also relates to sets of children under the age of one year.

112 Furthermore, the applicant observes that the contract in question was entrusted by the Manieri group to a company incorporated under Belgian law, Sapiens. However, the latter did not have the standing required to fulfil the contract because its only shareholders were a natural person and Manieri, none of the

shares being held by other members of the group, particularly Garden Bimbo. Likewise, the applicant contends that the staff recruited by Sapiens are insufficiently qualified and do not have the requisite seniority, which was borne out by the negative reactions of which the applicant had heard regarding the fulfilment of the contract in question.

113 The Commission confirms that the successful tenderer meets the technical criteria required by the contract notice and that it has sufficient technical standing.

Findings of the Court

114 As a preliminary point, it must be observed that, with regard to the question under consideration, the Commission has a broad discretion and the Court's review must be limited to verifying that there has been no serious and manifest error (see paragraph 95 above).

115 On this point, it should be noted that paragraph 13 of the contract notice lists the particulars which are necessary for appraising candidates' minimum technical standing as follows:

'...

(6) a statement of the candidate's annual average work force and the number of managerial staff in the last three years;

(7) a list of the main contracts in the field of the present invitation to tender carried out in the last three years, showing the amounts, dates and names and addresses of the persons receiving the services;

(8) a full description of the various measures taken by the candidate for quality control of the services;

(9) details of the part [of the] contract which the candidate intends, if necessary, to sub-contract, and the arrangements for quality control and supervision of the proposed sub-contract.'

116 As in the case of information on financial standing, a tender which gives no or only incomplete information on technical standing may be automatically eliminated by the Commission in accordance with paragraph 15(2) of the contract notice.

117 With regard to the applicant's argument concerning the company objects of the members of the group represented by Manieri, it must be observed that the company object is not one of the criteria listed in the contract notice which may be taken into account for assessing a candidate's technical standing. Moreover, such a criterion could be misleading in so far as a company object may be worded in very broad terms and may be altered.

118 Moreover, there is no factual foundation for this argument in relation to Manieri. I In fact, examination of its company object shows that it relates not only to secondary education of the second grade but also, and in particular, to nursery school and kindergarten, which therefore includes activities connected with very young children.

119 With regard to the applicant's criticism of Sapiens, it must be observed that, firstly, the formation of that company in June 2000 occurred after the selection of candidates and the award of the contract in question and such criticism therefore is irrelevant for assessing the Manieri group's technical standing and, secondly, the Commission maintains, without being contradicted, that most of the staff employed by Sapiens were previously employed by the applicant.

120 In addition, as the Commission pointed out in its note of 10 May 2000 to the Advisory Committee on Procurements and Contracts, the formation of a company under Belgian law such as Sapiens is a means of fulfilling a number of obligations laid down by the Member State where the services are provided, in relation to employment law, tax law and social law (social insurance contributions and other employees' rights, payment of taxes, availability of a VAT number, supervision of management of facilities for small children in Belgium, etc.).

121 Moreover, when the selection of candidates was carried out, the Manieri group's application included a statement of the average workforce and the number of managerial staff in the last three years, in accordance with paragraph 13(6) of the contract notice.

122 Nevertheless, with regard to the figures for the workforce, it appears from the findings of the assessment panel that those figures were not reliable and conclusive as the contract would not have been carried out by the applicants directly, but by a company incorporated under Belgian law which they were to form and most of the staff were to be recruited on the spot.

123 Consequently the technical standing of the candidates was assessed on the basis of the other criteria laid down by the contract notice, namely the list of the main contracts in the field of the present invitation to tender carried out in the last

three years (paragraph 13(7) of the contract notice), the measures taken for quality control (paragraph 13(8) of the contract notice) and the part of the contract which was subcontracted, if any, and the arrangements for the quality control of the sub-contract (paragraph 13(9) of the contract notice).

124 In the present case, the assessment panel took the view that Manieri's application, like that of the other six candidates, was satisfactory. In particular, it is clear from the panel's findings that Manieri, like the other six candidates, fulfilled the conditions laid down in paragraph 13(7) to (9) of the contract notice by furnishing all the information requested.

125 The applicant is therefore wrong in claiming that the Commission disregarded the contract notice and manifestly erred in its assessment when examining the technical standing of Manieri or the other members of the group which it represents. Accordingly the applicant's complaints concerning the successful tenderer's inadequate technical standing must be rejected.

126 Consequently the second plea in law must be dismissed.

The third plea, alleging that the contract documents were disregarded in relation to the evaluation of prices and the quality of the tenders

127 The applicant claims that Manieri's tender cannot be better than its own with respect to the price and quality criteria laid down by the contract documents.

128 In this connection, it should be observed that the criteria for awarding the contract in question, as set out in the contract documents, are as follows:

'The contract will be awarded to the economically most advantageous tender taking account of:

— the prices tendered and

— the quality of the tender and of the services proposed, evaluated, in descending order of importance, according to:

(a) the quality of the teaching programme (40%)

(b) the measures and resources implemented to provide cover for staff absences (30%)

(c) the methodology and monitoring devices proposed for monitoring: (30%)

— the quality of service and management

— the maintenance of staffing levels

— the implementation of the teaching programme.'

1. *Evaluation of the prices offered by the tenderers*

129 The following facts are common ground between the parties.

130 The starting point for the evaluation of the prices offered by the tenderers consists of the information supplied in accordance with the instructions in the 'tender schedule 2 of 3' ('the schedule') annexed to the contract documents. This schedule required the tender of an 'overall fixed monthly price including all constraints of performance for the complete administrative and teaching management of the CPE Clovis' on the basis of a distinction between the day nursery and the kindergarten. The schedule distinguished between five categories of prices:

— the price 'per child enrolled at the CPE Clovis' (in EUR/month);

— the price 'per place reserved for a maximum of four months without attendance by the child at the CPE Clovis day nursery' (in EUR/month);

— the price 'per child enrolled at the CPE Clovis kindergarten' (in EUR/month);

— the price 'per place reserved for a maximum of four months without attendance by the child at the CPE Clovis kindergarten' (in EUR/month);

— the price 'supplement beyond a quarter of an hour or part thereof outside the normal opening hours of the CPE [Clovis]' (in EUR/quarter of an hour).

131 The tender prices were evaluated by the Commission on the basis of the information supplied in accordance with the instructions in the schedule (i.e. the price relating to each of the five categories mentioned above), by reference to three hypotheses regarding attendance at the CPE Clovis:

— hypothesis A: average number of children actually present in 1999;

— hypothesis B: number of children, forecast average occupation of rooms;

— hypothesis C: number of children, maximum occupation of rooms.

132 According to the applicant, the Commission failed to comply with the contract documents and therefore acted unlawfully in considering three attendance

hypotheses and not just the information required by the schedule. The applicant observed during the hearing that an evaluation in conformity with the requirements of the contract documents, i.e. on the basis of an aggregate of the price offered for each of the five categories mentioned in the schedule, would have led the Commission to find that the applicant's tender was lower than Manieri's.

133 Alternatively, the applicant notes that, even if the Commission had been entitled to disregard the tender schedules, it would also have been necessary for it to state the reason. However, the reason given, namely that 'direct comparison of the different price components given in the tender schedule was not possible', does not entitle the Commission to disregard the contract documents.

134 The Commission contends, on the contrary, that the prices were evaluated in strict accordance with the criteria laid down beforehand in the contract documents.

135 As a preliminary point, the Court observes that, with regard to the question before it, the Commission has a broad discretion and the Court's review must be limited to verifying that there has been no serious and manifest error (see paragraph 95 above).

136 As stated above, the starting point for the method of evaluating the tender prices was the price offered by each tenderer for each of the five categories shown in the schedule. The prices offered by Esedra and Manieri were as follows:

— Esedra: EUR 1 090 per child enrolled at the day nursery; EUR 430 per place reserved in the day nursery; EUR 965 per child enrolled at the kindergarten; EUR 300 per place reserved in the kindergarten and EUR 5 for each additional quarter of an hour;

— Manieri: EUR 1 050 per child enrolled at the day nursery; EUR 880.64 per place reserved in the day nursery; EUR 940 per child enrolled at the kindergarten; EUR 788.37 per place reserved in the kindergarten and EUR 6 for each additional quarter of an hour.

137 It should be added that the prices tendered for each of the abovementioned categories are unit prices (for each child enrolled at the day nursery or the kindergarten, for each place reserved in the day nursery or the kindergarten or for each quarter of an hour).

138 Each of those prices was then multiplied by the corresponding number of children enrolled in the day nursery or the kindergarten, reserved places in the day nursery or kindergarten or quarters of an hour envisaged by the Commission for each of the three hypotheses for attendance at the CPE Clovis. Those figures were as follows:

— hypothesis A (average number of children actually present in 1999): 211.08 children enrolled in the day nursery; 2 places reserved in the day nursery; 60.33 children enrolled in the kindergarten; 2 places reserved in the kindergarten and 12.5 additional quarters of an hour;

— hypothesis B (number of children, forecast average occupation of rooms): 253 children enrolled in the day nursery; 2 places reserved in the day nursery; 55 children enrolled in the kindergarten; 2 places reserved in the kindergarten and 12.5 additional quarters of an hour;

— hypothesis C (number of children, maximum occupation of rooms): 270 children enrolled in the day nursery; 0 places reserved in the day nursery; 108 children enrolled in the kindergarten; 0 places reserved in the kindergarten and 12.5 additional quarters of an hour.

139 With regard to hypothesis A (average number of children actually present in 1999), the results of the evaluation were as follows:

— Esedra: for each category, the monthly price was EUR 230 080.83, i.e. EUR 1 090 × 211.08 (children enrolled in the day nursery); EUR 860, i.e. EUR 430 × 2 (places reserved in the day nursery); EUR 58 221.67, i.e. EUR 965 × 60.33 (children enrolled in the kindergarten); EUR 600, i.e. EUR 300 × 2 (places reserved in the kindergarten) and EUR 62.50, i.e. EUR 5 × 12.5 (additional quarters of an hour). The average monthly total was therefore EUR 289 825.

— Manieri: for each category, the monthly price was EUR 221 637.50, i.e. EUR 1 050 × 211.08 (children enrolled in the day nursery); EUR 1 761.28, i.e. EUR 880.64 × 2 (places reserved in the day nursery); EUR 56 713.33, i.e. EUR 940 × 60.33 (children enrolled in the kindergarten); EUR 1 576.74, i.e. EUR 788.37 × 2 (places reserved in the kindergarten) and EUR 75, i.e. EUR 6 × 12.5 (additional quarters of an hour). The average monthly total was therefore EUR 281 763.85.

140 With regard to hypothesis B (number of children, forecast average occupation of rooms), the results of the evaluation were as follows:

— Esedra: for each category, the monthly price was EUR 275 770, i.e. EUR 1 090 × 253 (children enrolled in the day nursery); EUR 860, i.e. EUR 430 × 2

(places reserved in the day nursery); EUR 53 075, i.e. EUR 965 × 55 (children enrolled in the kindergarten); EUR 600, i.e. EUR 300 × 2 (places reserved in the kindergarten) and EUR 62.50, i.e. EUR 5 × 12.5 (additional quarters of an hour). The average monthly total was therefore EUR 330 367.50.

— Manieri: for each category, the monthly price was EUR 265 650, i.e. EUR 1 050 × 253 (children enrolled in the day nursery); EUR 1 761.28, i.e EUR 880.64 × 2 (places reserved in the day nursery); EUR 51 700, i.e. EUR 940 × 55 (children enrolled in the kindergarten); EUR 1 576.74, i.e. EUR 788.37 × 2 (places reserved in the kindergarten) and EUR 75, i.e. EUR 6 × 12.5 (additional quarters of an hour). The average monthly total was therefore EUR 320 763.02.

141 With regard to hypothesis C (number of children, maximum occupation of rooms), the results of the evaluation were as follows (NB: this hypothesis does not envisage any reserved places in the day nursery or the kindergarten):

— Esedra: for each category, the monthly price was EUR 294 300, i.e. EUR 1 090 × 270 (children enrolled in the day nursery); EUR 104 220, i.e. EUR 965 × 108 (children enrolled in the kindergarten) and EUR 62.50, i.e. EUR 5 × 12.5 (additional quarters of an hour). The average monthly total was therefore EUR 398 582.50.

— Manieri: for each category, the monthly price was EUR 283 500, i.e. EUR 1 050 × 270 (children enrolled in the day nursery); EUR 101 520, i.e EUR 940 × 108 (children enrolled in the kindergarten) and EUR 75, i.e. EUR 6 × 12.5 (additional quarters of an hour). The average monthly total was therefore EUR 385 095.

142 The results of the Commission's evaluation of the tender prices on the basis of the method described above show that, on each of the three hypotheses in question, Manieri's tender is more favourable than that of Esedra.

143 It cannot be denied that the unit prices per child are multiplied by the total number of units (children enrolled in the day nursery or the kindergarten, places reserved in the day nursery or the kindergarten, or additional quarters of an hour) so as to make it possible to evaluate the prices of the different tenders.

144 The applicant's position in this respect is wholly illogical. To take account only of the unit prices per child does not make it possible to determine the total monthly price which the Commission must pay the service provider for managing the CPE Clovis because that total must necessarily take account of the number of children enrolled in the day nursery and the kindergarten, places reserved in the day nursery and the kindergarten, and additional quarters of an hour. The total price of the tenders can be determined and the tenders can be compared only by multiplying each unit price per child by the anticipated total number of children, reserved places and quarters of an hour.

145 Moreover, it must be observed that the three hypotheses regarding attendance envisaged by the Commission are based on reasonable data, namely the actual average attendance at the CPE Clovis during one reference year, 1999, the average attendance anticipated and the maximum possible attendance, and that most of those figures were known to the applicant. For example, with regard to hypothesis B, the contract documents state the average number of children enrolled in the day nursery (253). The contract documents also state, with regard to hypothesis C, the maximum number which can be enrolled at the day nursery (270) and the kindergarten (108). The figures for the numbers of children

enrolled in the day nursery and the kindergarten are the most important for evaluating the tender prices under consideration on the three hypotheses envisaged by the Commission, taking account of their respective amounts (253 or 270 children enrolled in the day nursery, 55 or 108 children enrolled in the kindergarten) compared with the figures for the other three categories (2 or 0 places reserved in the day nursery or the kindergarten, 12.5 additional quarters of an hour). Finally, the applicant cannot pretend to be unaware of the figures relating to hypothesis A because the applicant itself provided the services in question in 1999, which was chosen as the reference year for determining historic attendance.

146 It follows from the foregoing that there was no manifest error by the Commission in its assessment of Manieri's and Esedra's tenders with regard to the criterion of prices. Consequently the applicant's arguments concerning the evaluation of the tender prices must be rejected.

2. *Evaluation of the quality of the tenders*

(a) Evaluation of the quality of tenders in general

Arguments of the parties

147 The applicant contends that there was a manifest error of assessment on the Commission's part in deciding that Manieri's tender was better than the applicant's with regard to the criterion of quality.

148 The applicant points out that it has obtained the quality certificate ISO 9001:94 and is therefore subject to regular and exacting internal and external checks. The applicant adds that its tender included different initiatives intended to improve the quality of its services, such as special programmes for handicapped children and the establishment of a five-year plan for each of its services.

149 The applicant questions the competence of the members of the qualitative assessment panel and notes that they did not go to the places where the tenderers provided their services, unlike what happened in the case of the preceding procedure for the award of a contract, which would have shown them that none of the companies in the group represented by Manieri — with the partial exception of Garden Bimbo, which works with children aged 12 months and above, whereas the contract in question also relates to children of under 12 months — provides services of the nature of those referred to by the invitation to tender, as demonstrated by the objects of those companies.

150 The Commission challenges that submission and observes that the qualitative assessment of tenders was carried out on the basis of the qualitative criteria announced beforehand in the contract documents and pursuant to a method laid down on 9 February 2000, i.e. between the date of the submission of tenders (7 February 2000) and the date when they were opened (14 February 2000). On this point, the Commission observes that the summary drawn up on the final assessment of tenders shows that there was a significant difference in quality between Manieri, which was placed first, and Esedra, which was second.

151 The Commission adds that the report of the qualitative assessment panel and the annexes thereto show that Esedra received fewer points than Manieri in relation to two of the three qualitative criteria.

Findings of the Court

152 As a preliminary point, it must be observed that, with regard to the question under consideration, the Commission has a broad discretion and the Court's review must be limited to verifying that there has been no serious and manifest error (see paragraph 95 above).

153 Before examining the results of the Commission's assessment, mention should be made of the qualitative criteria used by the Commission for assessing the tenders.

154 In the present case, the contract documents stated that the contract was to be awarded to the economically most advantageous tender taking account of:

'the quality of the tender and of the services proposed, evaluated, in descending order of importance, according to:

(a) the quality of the teaching programme (40%)

(b) the measures and resources implemented to provide cover for staff absences (30%)

(c) the methodology and monitoring devices proposed for monitoring: (30%)

— the quality of service and management

— the maintenance of staffing levels

— the implementation of the teaching programme'.

155 In this connection, it is clear from the final table compiled by the qualitative assessment panel that:

— Manieri's tender received 27.6 points in respect of the quality of the teaching programme, 21.6 points in respect of the measures and resources implemented to provide cover for staff absences and 21 points in respect of the methodology and devices for monitoring, i.e. a total of 70.2 points, which corresponds to the index 100, which meant that it was the best tender in terms of quality;

— Esedra's tender received 21.1 points in respect of the quality of the teaching programme, 13.2 points in respect of the measures and resources implemented to provide cover for staff absences, 22.2 points in respect of the methodology and devices for monitoring, i.e. a total of 56.5 points, which corresponds to the index 80.4, which meant that it was the second best tender in terms of quality.

156 It must be observed that the applicant has not adduced the slightest evidence to show that there was a serious and manifest error of assessment on the Commission's part when appraising the tenders in general.

157 For example, neither the fact that the applicant has obtained the quality certificate ISO 9001:94 and that it is subject to regular and exacting internal and external checks, nor the fact that its tender included different initiatives intended to improve the quality of its services are factors demonstrating that the quality of its tender exceeds that of Manieri's.

158 With regard to the applicant's submission that the members of the group represented by Manieri do not provide or provide hardly at all the services required by the contract in question, it must be observed that, apart from the fact that that argument does not apply in the present case (see paragraphs 117 and 118 above), the quality of the tenders must be assessed on the basis of the tenders themselves and not on that of the experience acquired by the tenderers with the contracting authority in connection with previous contracts or on the basis of the selection criteria (such as the technical standing of candidates) which were checked at the stage of selecting applications and which cannot be taken into account again for the purpose of comparing the tenders (see, to that effect, judgment in Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 15).

159 So far as concerns the applicant's doubts regarding the competence of the members of the qualitative assessment panel and the absence of on-the-spot inspections of the premises where the tenderers provide their services, it must be observed that the applicant has not adduced any arguments capable of casting doubt on the competence of those persons who have, by virtue of their functions within the Commission, sufficient experience to evaluate tenders from the qualitative point of view, and that such inspections were not required in connection with the procedure for awarding the contract in question.

160 Consequently the applicant's submissions concerning the qualitative evaluation of its tender and that of the successful tenderer in general must be rejected.

(b) The qualitative evaluation of certain parameters of the tenders

161 The applicant also submits that the qualitative evaluation of certain parameters of its tender and that of the successful tenderer reveals a manifest error of assessment.

162 It must be observed that, with regard to the question under consideration, the Commission has a broad discretion and the Court's review must be limited to verifying that there has been no serious and manifest error (see paragraph 95 above).

163 The Court finds that the applicant has not adduced the slightest evidence to show that there was a serious and manifest error of assessment on the Commission's part when appraising certain parameters of the tenders. The applicant's submissions concerning each parameter are examined below.

(i) Parameters A.2 'level of the continuous training plan for teachers' and B.1 'level of training of replacement staff'

164 The applicant observes that it received a poor mark (2 points) and the comment 'information and not training, confusion between the roles of educational psychologist and instructor', whereas Manieri received an excellent mark (10 points). The applicant contends that the word 'confusion' is mistaken because one of the main functions of an educational psychologist is to instruct adults who work with children and not to be in contact with children, which is the teacher's

role. Likewise the finding 'information and not training' is incorrect because Esedra's quality assurance system provides for setting up and complying with different training organisation and identification procedures. Furthermore, the quality of the training provided by the applicant has been praised by a study carried out by two students of the Catholic University of Louvain and a report of the Institut d'Enseignement De Mot-Couvreur on the courses attended by trainee paediatric nurses.

165 According to the applicant, such remarks also apply with regard to parameter B.1 'level of training of replacement staff', for which it received 1 point as against 4 for Manieri.

166 The Court points out, as does the Commission, that that institution has sufficient knowledge to assess the quality of the training plan and the role of a team of educational psychologists in the light of the experience acquired in the contractual supervision and management of a group of three day nurseries with more than 600 children.

167 On this point, it should be observed that, although the teaching team may, in addition to its advisory role in the teaching and teacher-training fields, also play a part as instructor, nevertheless, firstly, the team inevitably needs external support and expertise (consultants, specialist organisers, etc.) in the various fields appertaining to early childhood and, secondly, that the training it provides internally or externally must be the subject of a general scheme within the framework of a training plan in correlation with the principles laid down in the teaching programme.

168 However, the Commission can make comparisons between tenders in that field only if the tenderers provide training plans that are as detailed as possible. From this viewpoint, the checks carried out as part of the Esedra quality assurance

system, the assessments by the students of the Catholic University of Louvain and the results of training courses at the CPE Clovis during the period of the applicant's management are not factors which reveal that the quality of the applicant's tender is superior to that of Manieri's tender.

169 The applicant's complaint in respect of the evaluation of parameters A.2 and B.1 must therefore be rejected.

(ii) Parameter A.4 'quality and quantity of teaching aids (toys, equipment, etc.) for children'

170 The applicant states that it was awarded the same mark (4 points) as the successful tenderer. However, the applicant points out that its equipment, of which a complete inventory was provided with the tender, was bought by Sapiens. Therefore the applicant is uncertain what equipment was described by Manieri in its tender if Manieri had subsequently to purchase from it the equipment required by the contract documents.

171 The Court observes, as does the Commission, that, since Manieri supplied an inventory of teaching aids in accordance with the requirements of the contract documents, it is immaterial whether Sapiens purchased some of the equipment from the applicant or acquired it from another supplier.

172 Consequently the applicant's complaint in respect of the evaluation of parameter A.4 must be rejected.

(iii) Parameter A.7 'possibility of expression of the pace suitable for each child...'

173 The applicant questions whether Manieri's teaching programme for children aged two or under exists because the only company in its group which had experience in that field (Garden Bimbo) only accepts children from the age of one year.

174 The Court observes that, as stated in paragraphs 114 to 126 above, the Commission could properly decide that Manieri had the technical standing necessary for its application to be selected and that this question did not have to be considered in connection with the award of the contract in question.

175 Furthermore, it appears from the file that the Commission considered that the teaching programme and activities offered by Manieri were suited to the different age groups covered by the contract in question.

176 The applicant's complaint in respect of the evaluation of parameter A.7 must therefore be rejected.

(iv) Parameters C.1.1 'quality level of means of supervision and proposed actions' and C.1.2 'quality of management staff'

177 The applicant observes that it has the quality certificate ISO 9001:94 and that it therefore undergoes half-yearly external checks. The applicant also provided a

complete organisation chart going beyond the requirements of the contract documents and including, in particular, a quality assurance function coordinated by two persons working full-time. However, that function is not provided for within Sapiens and consequently the latter company did not take on the person responsible for the quality assurance function in Esedra on 31 July 2000. In this connection, the applicant considers that the award of equal points (8 points for parameter C.1.1 and 3 points for parameter C.1.2) to its own tender and to that of Manieri is manifestly erroneous. The applicant adds that, to its knowledge, the qualifications and length of service of the staff employed by Sapiens did not meet the requirements of the contract documents as only 10 of the 20 contracts of employment expiring on 31 July 2000 were renewed by Sapiens.

178 The Court observes that the applicant's remarks concerning Sapiens are not relevant because that company was formed after the tenders were evaluated by the Commission. Similarly, the fact that the applicant has the quality certificate ISO 9001:94 and that it therefore undergoes half-yearly external checks does not show that there was a serious and manifest error of assessment on the Commission's part in awarding the same marks to the applicant and to Manieri.

179 In addition, it must be observed that the Commission's analysis rests on the presentation of specific training plans and not on the results of checks carried out in the past.

180 The applicant's complaint in respect of the evaluation of parameters C.1.1 and C.1.2 must therefore be rejected.

181 It follows from the foregoing that it has not been shown that there was a serious and manifest error of assessment on the Commission's part in concluding that Manieri's tender was qualitatively superior to that of Esedra.

182 Consequently the third plea in law must be dismissed.

Fourth plea, breach of the obligation to state reasons

Arguments of the parties

183 The applicant contends that the Commission failed in its obligation to state reasons under Article 253 EC, and infringed the principle of transparency which is given the status of a general principle of law by Article 255 EC, and also infringed Article 12 of Directive 92/50 as interpreted by the judgment in the case of *Adia Interim* v *Commission*, cited above, because the Commission's letter of 9 June 2000 in reply to the applicant's request for information on the reasons for which the contract in question was not awarded to it does not make it possible to assess the legality of the contested decisions.

184 In this connection, the applicant contends that the statement of reasons is insufficient because it merely discloses the marks awarded to the applicant and to Manieri for each of the award criteria referred to by the contract documents, without giving details of the evaluation method used and of the practical application of that method to the respective tenders. In particular, the applicant states that it does not understand how the different factors used for setting the prices required by the contract documents could have been evaluated globally by the Commission.

185 The applicant adds that it was given no information (making due allowance for the legitimate commercial interests of the successful tenderer) concerning Manieri's tender which would have enabled it to examine the legality of the

contested decisions. The applicant is also unaware of the identity of the Italian companies forming the group represented by Manieri and the corporate ties between them and with Sapiens, which is described as the company formed by Manieri to carry out the contract in question.

186 The Commission points out that, with a view to transparency, in its letter of 9 June 2000 it informed the applicant of the characteristics and the advantages of the selected tender and the name of the successful tenderer in accordance with the requirements of Article 12(1) of Directive 92/50. The Commission adds that the applicant, which received the abovementioned reply in good time (by fax of 9 June), did not request any further information. In particular, the Commission notes that the applicant did not ask for the 'evaluation method used' or 'information concerning the successful tenderer's tender' mentioned in the application.

Findings of the Court

187 First of all, it is necessary to establish what is the Commission's obligation to state reasons in relation to a tenderer who was not successful in the procedure for the award of the contract in question.

188 Article 12(1) of Directive 92/50 provides as follows:

'The contracting authority shall, within 15 days of the date on which a written request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his application or his tender, and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.

However, contracting authorities may decide that certain information on the contract award, referred to in the first subparagraph, be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between service providers.'

189 Pursuant to the abovementioned provision, the Commission must, within 15 days of receipt of his request, inform an unsuccessful tenderer of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer, except for information described as confidential.

190 This manner of proceedings satisfies the purpose of the obligation 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 defend their rights; and, on the other, to enable the Court to exercise its power of review (see judgments in Case T-166/94 *Koyo Seiko* v *Council* [1995] ECR II-2129, paragraph 103, and in *Adia Interim* v *Commission*, cited above, paragraph 32).

191 In the present case, the Commission's letter of 9 June 2000 contained the following information:

'1. Seven firms were invited to submit a tender, following the stage of selection of applications provided for in the contract notice.

2. Of the seven, four sent in a tender, two withdrew in writing and one did not reply.

3. The successful tenderer is a group of Italian firms represented by Centro Studi Antonio Manieri SRL (Via Faleria 21, I-00183 Rome).

4. Esedra's tender compares as follows with the successful tender with regard to the two criteria for the award of the contract (price and quality) laid down in paragraph 7 of the terms and conditions of the contract documents:

	ESEDRA	SUCCESSFUL TENDER
Price index (1)	102.9	100
Quality index (2)	80.4	100

(1) Compared with the lowest tender in accordance with the requirements, on the basis of forecast attendance (minimum index: 100)
(2) Compared with the tender which received the best appraisal (maximum index: 100)

Esedra's tender is therefore 2.9% more expensive than that of the proposed successful tenderer (which is the lowest of all the tenders meeting the requirements).

In addition, the tenders assessment panel considered that the quality of Esedra's offer was inferior (index 80.4) to that of the successful tenderer (which submitted the best tender, with an index of 100).

5. The ratings received by Esedra and by the successful tenderer for each of the three qualitative sub-criteria are as follows:

SUB-CRITERIA	WEIGHTING	ESEDRA	SUCCESSFUL TENDERER
Teaching programme	40%	21.1/40	27.6/40
Cover for staff absences	30%	13.2/30	21.6/30
Monitoring/method and devices	30%	22.2/30	21/30
TOTAL QUALITY	100%	56.5/100	70.2/100
Relative total/best tender	—	80.4/100	100/100

6. It may be concluded from the foregoing points that the successful tenderer has presented the economically most advantageous tender, [namely] the lowest tender in accordance with the requirements and receiving the best rating with respect to the criterion of quality.

...'

192 It must be found that, in the letter of 9 June 2000, the Commission gave a sufficiently detailed explanation of the reasons for which it rejected the applicant's tender by giving the name of the successful tenderer and the relative advantages of the tender selected by comparison with the applicant's tender with respect to the criteria laid down by the contract documents. That statement of reasons also has enabled the applicant to assert its rights and the Court to exercise its power of review.

193 It follows from the foregoing that the plea of breach of the obligation to state reasons must be dismissed.

Fifth plea, misuse of powers

Arguments of the parties

194 The applicant contends that the Commission misused its powers in failing to award it the contract in question on the ground that alleged paedophilic acts were committed on the premises of the CPE Clovis and that the parents' association and the bodies representing the staff were hostile to the applicant.

195 In addition, the applicant considers that the Commission's decision to close the first invitation to tender issued by the contract notice of 26 May 1999 amounts to a misuse of powers because the Commission had a suitable number of applications (three) for genuine competition in the matter of public contracts. In this connection the applicant cites the judgment in Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697 and adds that, if Manieri's application to participate in the first invitation to tender was irregular, that was evidence of misuse of powers, like the other irregularities of which it complains in its action.

196 The Commission denies those allegations. It claims that the only reason for which it withdrew the first invitation to tender was to enlarge competition in accordance with Article 27(2) of Directive 92/50 and adds that this succeeded because seven candidates, not three, replied to the second invitation to tender.

197 The Commission also observes that the applicant has not adduced the slightest evidence to show that the first invitation to tender was closed for a reason other than that given above. The Commission contends that the applicant's allegations are invalidated by the fact that Manieri also submitted its application in response to the first invitation to tender and that it was the applicant which did not wish to extend its contract.

Findings of the Court

198 The concept of misuse of powers has a precisely defined scope in Community law and refers to cases where an administrative authority exercises its powers for a purpose other than that for which they were conferred. In that respect, it has been consistently held that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated (see, for example, the judgment in Joined Cases T-149/94 and T-181/94 *Kernkraftwerke Lippe-Ems* v *Commission* [1997] ECR II-161, paragraphs 53 and 149, upheld on appeal by judgment of the Court of Justice in Case C-161/97 P *Kernkraftwerke Lippe-Ems* v *Commission* [1999] ECR I-2057).

199 In the present case, the matters raised by the applicant do not show that the Commission pursued any object other than that of awarding the contract to the lowest and economically most advantageous bid, taking account of the criteria laid down in the contract notice and the contract documents.

200 Accordingly, the applicant has not adduced objective, relevant and consistent evidence, within the meaning of the judgment cited above, to show that the

Commission exercised its powers to eliminate the applicant from the contract in question by reason of the allegations that paedophilic acts were committed at the CPE Clovis when it was under the applicant's management and by reason of the alleged hostility to the applicant on the part of the parents' association and the bodies representing the staff.

201 Similarly, the fact that only three candidates, of which Esedra and Manieri were two, responded to the first invitation to tender cannot justify the claim that the Commission misused the powers conferred upon it by the Financial Regulation and Directive 92/50 in deciding to close the invitation to tender so as not to award the contract in question to the applicant.

202 In that connection the judgment in the case of *Fracasso and Leitschutz*, cited above, offers no support for the applicant's argument. In that case, a national court referred to the Court of Justice a question as to whether Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by Directive 97/52, must be interpreted as meaning that the contracting authority must award the contract to the only candidate deemed suitable for participation. The Court's reply was in the negative, observing in particular that, in order to meet the objective of the development of genuine competition in the field of public works contracts, Article 22(2) of Directive 93/37 (which is in similar terms to Article 27(2) of Directive 92/50) provides that, where the contracting authorities award a contract by restricted procedure, the number of candidates invited to tender must in any event be sufficient to ensure genuine competition (see the judgment in *Fracasso and Leitschutz*, cited above, paragraph 27).

203 The Commission could therefore properly decide to close the first invitation to tender issued by the contract notice of 26 May 1999 on the ground that it did not have a sufficient number of applications to ensure genuine competition.

204 The plea alleging misuse of powers must therefore be dismissed.

205 Consequently it follows from the foregoing that all the claims for annulment must be dismissed.

The claim for damages

206 The applicant seeks damages of EUR 1 001 574.09 on the ground that the Commission acted unlawfully in the procedure for the award of the contract in question.

207 It is settled case-law that, in order for the Community to incur non-contractual liability, a number of conditions must be satisfied concerning the illegality of the conduct alleged against the Community institutions, the fact of the damage and the existence of a causal link between that conduct and the damage complained of (see the judgments in Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 16, and Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraph 68).

208 The examination of the claims for annulment has shown that, in the course of the procedure for the award of the contract in question, there was no irregularity in the Commission's conduct which might have given rise to its liability *vis-à-vis* the applicant.

209 Consequently, as the condition relating to unlawful conduct on the part of the institution concerned is not satisfied, the applicant's claim for damages must be dismissed and it is unnecessary to examine whether the other conditions governing liability on the part of the Community are satisfied.

The application for the reopening of the oral procedure

210 In its letter of 22 October 2001, the applicant claims that, in connection with another action against the Commission for payment of the price in respect of a day's strike by the staff of Esedra on 22 June 2000, the Commission attempted, in supplementary pleadings lodged at the registry of the Court of First Instance, Brussels, on 9 August 2001, to refute the submission that the strike was a case of *force majeure* and to show that the strike was not unforeseeable by arguing that 'on 2 July 1999 the problem of the contractual transfer of the undertaking was raised and the participation [of Esedra] in the procedure for the invitation to tender did not affect the certainty that the [existing] contract would come to an end on 31 July 2000 and the [new] contract would most probably be awarded to another tenderer'. According to the applicant, that statement is a clear indication that the Commission did not intend in July 1999 to award the contract to the applicant, that is to say, from the opening of the procedure for the invitation to tender. The applicant therefore submits that it did not receive equal and impartial treatment and that the procedure for the invitation to tender was flawed, and it seeks the reopening of the oral procedure.

211 In its letter of 27 November 2001, the Commission observes that the sentence singled out by the applicant was taken out of its context and that, when put back

into the context of the national proceedings and their purpose, it cannot amount to an admission in relation to points of law raised in the proceedings before the Court of First Instance. In any case, and regardless of the perhaps somewhat elliptical terms used by the Commission's lawyer, the statement in question does not, having regard to the already lengthy discussion of this matter and the Commission's arguments to show that the procedure was properly conducted, constitute sufficiently objective, relevant and consistent evidence to justify reopening the oral procedure.

212 In assessing the implications of the sentence in question, it must be observed that it was written in the context of national proceedings the object of which was not to determine whether the procedure for the award of the contract was impartial, but to ascertain whether Esedra's failure to fulfil its contractual obligations could be justified by a strike within the CPE Clovis. It must also be noted that the strike took place on 22 June 2000, that is to say, after the contract was awarded to Manieri, and the matters to which the sentence quoted relate arose in July 1999, namely more than two years before the supplementary pleadings were lodged. Finally, it must be found that it is clear from the foregoing analysis that the procedure for the award of the contract took place without the slightest irregularity, discrimination or misuse of powers. In those circumstances, the statement in question does not contribute relevant evidence such as to cast doubt on the award procedure and justifying the reopening of the oral procedure.

213 The Court therefore finds that there are no grounds for reopening the oral procedure.

Costs

214 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, and the Commission has applied for costs, the applicant must be ordered to pay the costs, including those incurred in the proceedings for interim relief.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and pay those of the Commission, including the costs incurred in the proceedings for interim relief.**

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 26 February 2002.

H. Jung

Registrar

J.D. Cooke

President

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