JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

20 September 2011 *

In Case T-461/08,

Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis and P. Katsimani, lawyers,

applicant,

v

European Investment Bank (EIB), represented by C. Gómez de la Cruz and T. Pietilä, acting as Agents, and J. Stuyck, lawyer,

defendant,

APPLICATION, first, for annulment of the EIB's decision of 31 January 2008 not to accept the tender submitted by the applicant in connection with an open call for tenders for the provision of services in the form of assistance in the maintenance, support and development of an information technology system and to award the

* Language of the case: English.

contract to another tenderer, on the basis of Articles 225 EC and 230 EC, and, second, for damages, on the basis of Articles 225 EC, 235 EC and 288 EC,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and M. van der Woude, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 17 November 2010,

gives the following

Judgment

Background to the dispute

1 The applicant, Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, is a company governed by Greek law operating in the field of information technology and communications.

2 By a contract notice of 13 September 2007, published in the Supplement to the *Official Journal of the European Union* (OJ 2007 S 176) under reference 2007/S 176-215155, the European Investment Bank (EIB) launched a call for tenders relating to the provision of services in the form of '[a]ssistance in the maintenance, support and development of the Loans Front Office system (Serapis)'. According to the description in the contract notice and the terms of reference relating to the call for tenders, the 'Système efficace et rapide d'accès aux prêts et aux informations de support' (Serapis) is the hyperlink of the EIB's Front Office application in the lending area. It is designed as an all-in-one information management portal in the lending area for the EIB's relevant departments, which include the 'Directorate for Finance within Europe', the 'Directorate for Finance outside Europe', the 'Risk Management Directorate', the 'Projects Directorate' and the Legal Service. It provides support to the internal lending process, from the creation of an operation, through its appraisal until the submission of the 'Note conjointe' (signature), which then triggers the process dealt with by the part of the EIB's software known as 'Force prêts', which enables those responsible for the system to administer and manage the loan (Back Office).

3 The contract notice envisaged that a framework agreement would be concluded with the successful tenderer for a period of four years and that that tenderer would be awarded contracts based on the framework agreement corresponding to individual work orders for specific projects. The contract notice and the terms of reference stated that the contract would be awarded to the tenderer submitting the most economically advantageous tender, evaluated in accordance with the award criteria set out in the terms of reference. The latter set out the weightings to be applied to the award criteria, namely 75 % for technical criteria, made up of 15 % for the 'quality management process' criterion, 45 % for the 'level of conformity of the skills and qualifications of the staff proposed' criterion and 15 % for the 'ability to provide a pool of staff from own resources' criterion, and 25 % for the financial criterion.

4 By letter of 31 October 2007, the EIB sent to all the tenderers who had submitted requests for clarification concerning the tendering procedure a list of 'Questions and Answers' relating to the tendering procedure in question.

5 On 9 November 2007, the closing date for receipt of tenders (point IV.3.4 of the contract notice), the applicant submitted a tender.

6 A total of seven tenders were received by the EIB and examined by the evaluation committee. During the first two stages of the procedure, namely the exclusion phase (section 6.1 of the terms of reference) and the selection phase (section 6.2 of the terms of reference), all the tenderers were retained. During the last stage, the comparative evaluation of tenders and award of the contract phase (section 7 of the terms of reference), at which the bids of the retained tenderers were first examined in the light of the technical criteria alone, those not reaching the minimum threshold defined in the terms of reference being rejected, the bids which had not been rejected during the technical evaluation then being examined in the light of the financial criterion, only five tenders, including the applicant's, were examined in the light of that criterion, the two other tenders having failed to reach the minimum thresholds defined in the terms of reference during the technical evaluation. Following the comparative evaluation of the tenders, the evaluation committee gave the best overall score to Sybase BVBA ('the successful tenderer'), while the applicant's tender was placed second. On the basis of the evaluation carried out by the evaluation committee, the EIB decided on 31 January 2008 not to accept the applicant's tender and to award the contract to the successful tenderer ('the contested decision'), after discussing certain aspects of the latter's tender with it at a meeting held on 29 January 2008.

7 On 18 February 2008, the EIB wrote to all the tenderers, with the exception of the applicant, informing them that the contract had been awarded to the successful tenderer.

8 On 12 and 17 June 2008 respectively, the framework agreement was signed by the EIB and the successful tenderer and took effect on 16 June 2008.

9 By letter of 31 June 2008, after having learnt of the notice of the award of contract published in the Supplement to the Official Journal (OJ 2008 S 144) under reference 2008/S 144-192307, the applicant complained to the EIB that there had been a breach of the tender specifications and the law applicable to tendering procedures in that it had not been informed in a timely manner of the contested decision. The applicant requested the EIB to suspend the award procedure and the signature of the framework agreement or, if necessary, to cancel that agreement. The applicant also requested information relating to the tendering procedure and, in particular, the name of the successful tenderer, the names of its consortium partners and subcontractors (if any), the scores given, for each award criterion, to the applicant's tender and that of the successful tenderer, the factors for comparison between the applicant's tender and that of the successful tenderer, in particular the financial factors, and a detailed copy of the evaluation committee's reports relating to its tender and that of the successful tenderer.

10 In a letter of 1 August 2008, the EIB provided the applicant with information concerning the weighting applied to the award criteria. It also stated that the contract had been awarded to the successful tenderer and, for each of the award criteria, gave a breakdown of the points awarded to the applicant's tender and those awarded to that of the successful tenderer. It indicated that the applicant's tender had received 22.03 points (out of 35), while the successful tenderer's bid had received 29.36 points (out of 35).

11 On the same date, the applicant, being of the view that it had received only a small part of the information requested, wrote to the EIB again, requesting it to answer all the questions raised in its letter of 31 July, to provide it with the reasons for the contested decision and to inform it whether the framework agreement had already been signed with the successful tenderer. If it had not, the applicant requested the EIB to suspend the signature of the contract pending a detailed examination of its action.

12 The EIB acknowledged receipt of the applicant's letter on 6 August 2008. By letter of 14 August 2008, it acknowledged that the failure to send the applicant an official letter informing it of the results of the comparative evaluation of the tenders was an 'administrative error', and offered its apologies. The EIB added that the tendering procedure as a whole was valid and that the administrative error did not constitute a substantial irregularity that would justify the suspension or cancellation of the framework agreement concluded with the successful tenderer.

13 On 1 September 2008, the applicant again wrote to the EIB, pointing out a number of irregularities which, in its view, vitiated the tendering procedure. The applicant maintained that the EIB had confused the criteria for the selection of tenderers and the criteria for the award of the contract. Moreover, it claimed that the EIB had used discriminatory or imprecise award criteria, failed to fulfil its obligation to inform tenderers in good time of the decision to award the contract and to offer them a 'standstill' period in which to exercise their right of appeal, failed to follow a sufficiently transparent procedure, infringed the principle of equal treatment, failed to state the reasons on which the contested decision was based and used a formula in the comparative evaluation of the tenders which had the effect of neutralising the principle of the 'best value for money', giving preference to the highest-priced tenders.

14 On 10 September 2008, the EIB acknowledged receipt of the applicant's letter of 1 September 2008, informing it that its letter had been forwarded to the EIB's complaints office for review and that a reply would be given by no later than 27 October 2008.

15 On 27 October 2008, the EIB wrote to the applicant and informed it that the EIB was no longer in a position to deal with the complaint as the applicant had initiated proceedings before this Court on 6 October 2008.

Procedure and forms of order sought by the parties

16 By application lodged at the Court Registry on 6 October 2008, the applicant brought the present action.

17 The EIB lodged its defence on 30 January 2009.

18 The reply and the rejoinder were lodged on 15 April and 15 June 2009 respectively.

19 Acting on a proposal from the Judge-Rapporteur, the General Court (Second Chamber), by way of measures of organisation of procedure provided for in Article 64 of its Rules of Procedure, invited the EIB to specify which authority within the EIB had adopted the contested decision and to provide the Court with a copy of that decision or any other document in lieu thereof.

20 The EIB complied with that request within the prescribed period. By letter lodged on 15 December 2009, it stated that, in accordance with its internal rules and the practices prevailing at the material time, the contested decision had been adopted by the Director of the Information and Technology Department, which has since been incorporated within the Directorate-General for Strategy, and then confirmed by the President of the EIB before the framework agreement with the successful tenderer was signed. In addition, the EIB produced a 'Note to File' dated 31 January 2008, bearing the reference SCC/IT/FLA/2008-015/kr ('the note of 31 January 2008') and containing the decision of that director to award the contract to the successful tenderer and also the consolidated evaluation sheet of the evaluation committee annexed to that note.

21 By letter lodged on 8 January 2010, the applicant submitted its observations on the note of 31 January 2008. In the light of the information in that note, the applicant raised a new plea.

22 By letter lodged on 26 January 2010, the EIB submitted its observations on the new plea raised by the applicant in its letter lodged on 8 January 2010.

23 Owing to a change in the composition of the chambers of the Court, the Judge-Rapporteur was assigned to the Fourth Chamber, to which, in consequence, the present case was assigned.

24 Upon hearing the Judge-Rapporteur, the General Court (Fourth Chamber) decided to open the oral procedure.

25 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 17 November 2010.

26 The applicant claims that the Court should:

— annul the contested decision;

— order the EIB to pay compensation for the damage suffered in the tendering procedure as a result of the unlawful nature of the contested decision, assessed at EUR 1 940 000;

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

27 The EIB contends that the Court should:

— declare that the application for annulment is unfounded;

— declare that the claim for damages is inadmissible or, in the alternative, unfounded;

— order the applicant to pay the costs.

Law

1. *Admissibility of the action*

28 First, it should be noted that, as regards the specific question of the temporal application of the rules laying down the conditions of admissibility of an action, it is settled case-law, first, that in accordance with the maxim *tempus regit actum*, the question of the admissibility of an action must be resolved on the basis of the rules in force at the date on which it was brought (Case 60/72 *Campogrande* v *Commission* [1973] ECR 489, paragraph 4; see also, to that effect and by analogy, order of the President of the Court of Justice of 22 February 2008 in Case C-66/08 *Kozlowski*, not published in

the ECR, paragraph 7) and, second, that the conditions of admissibility of an action are judged at the time of bringing the action, that is, the lodging of the application (Joined Cases C-61/96, C-132/97, C-45/98, C-27/99, C-81/00 and C-22/01 *Spain* v *Council* [2002] ECR I-3439, paragraph 23; Case T-131/99 *Shaw and Falla* v *Commission* [2002] ECR II-2023, paragraph 29; and Case T-301/01 *Alitalia* v *Commission* [2008] ECR II-1753, paragraph 37).

29 Since the present action was brought on 6 October 2008, the questions pertaining to its admissibility must be considered in the light of the provisions in force at that date, namely those of the EC Treaty and not the new corresponding provisions of the FEU Treaty, which entered into force on 1 December 2009.

Whether the General Court has jurisdiction

Arguments of the parties

30 The applicant submits that the application for annulment of the contested decision, brought on the basis of Article 230 EC, is admissible. The Protocol on the Statute of the EIB annexed to the EC Treaty ('the Statute') does not provide any comprehensive mechanism for reviewing the legality of the acts of the EIB. However, that does not mean that such review is not possible. In Case 294/83 *Les Verts* v *European Parliament* [1986] ECR 1339, paragraphs 23 to 25, the Court of Justice declared that, as the European Community is a community based on the rule of law, the acts of all its bodies must be amenable to judicial review where they produce legal effects vis-à-vis third parties. Under the EC Treaty and the Statute, the EIB is a body, indeed an institution, of the Community and, where they produce legal effects vis-à-vis third parties,

its acts must be amenable to judicial review by the Court of Justice. The fact that the acts of the EIB are not expressly referred to in Article 230 EC is not an obstacle in that regard. The Court of Justice has established a dual test to be applied for the purpose of determining whether Article 230 EC is applicable to the acts of Community authorities and agencies, namely whether or not the authority in question is referred to in Article 230 EC and whether or not its acts are amenable to adequate judicial review.

31 The EIB is also of the view that the applicant's application for annulment is admissible. It invites the Court to state clearly that it has jurisdiction to hear an application for annulment of a decision of the EIB rejecting a tender submitted by a person and awarding the public contract in question to another person and to hear the claim for compensation for the loss alleged to have been sustained as a result of that decision, since, in Luxembourg, the Tribunal administratif was wrong to assert that it had jurisdiction in such a matter, by judgment of 26 September 2007 (registered as Case No 22447), confirmed on appeal by judgment of the Cour administrative (Administrative Appeal Court) of 21 February 2008 (registered as Case No 23620C). In Case C-370/89 *SGEEM and Etroy* v *EIB* [1992] ECR I-6211, the Court of Justice confirmed that it had jurisdiction to adjudicate on an action for damages brought by a company on the basis of the purported unlawfulness of the EIB's decision not to award it a public works contract. Moreover, in Case T-411/06 *Sogelma* v *EAR* [2008] ECR II-2771, paragraphs 42 and 43, this Court held, referring to the decision in *Les Verts* v *European Parliament* (see paragraph 30 above), that, where they produce legal effects vis-à-vis third parties, the decisions taken by a Community body, in that case the European Agency for Reconstruction (EAR), are open to challenge before the General Court. According to the EIB, as a Community administrative body, it should therefore be treated in the same way when it adopts decisions producing legal effects vis-à-vis third parties in the context of public procurement procedures or requests for access to its documents. Conversely, the EIB maintains that it does not come within the jurisdiction of the General Court where it exercises its lending activities, namely

where it intervenes on the financial markets in the same way as any other bank (order in Case T-460/93 *Tête and Others* v *EIB* [1993] ECR II-1257, paragraph 20).

Findings of the Court

32 The parties to the present proceedings agree, in the circumstances of the case, that this Court has jurisdiction to hear the present action for annulment. However, as the jurisdiction of the General Court is an issue involving an absolute bar to proceedings, the matter may be examined by the Court of its own motion (see Case T-29/02 *GEF* v *Commission* [2005] ECR II-835, paragraphs 72 to 74 and the case-law cited; see also, to that effect, Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraphs 21 and 22). The General Court is therefore not bound by the parties' position as regards its jurisdiction to hear the present action and, after hearing the parties, it must consider whether it is required to raise of its own motion the issue of inadmissibility based on its lack of jurisdiction to hear, in whole or in part, the action. That is particularly necessary in the circumstances of this case because a national court has asserted that it has jurisdiction to adjudicate on the lawfulness of a decision of the EIB rejecting a tender submitted by a person and awarding to another person the public contract in question, entered into by the EIB for its own account.

33 Under Articles 5 EC, 10 EC, 297 EC, the first paragraph of Article 307 EC and the EU Treaty, in particular Article 5 EU, the Court of Justice exercises its powers under the conditions and for the purposes provided for by the provisions of the EC and EU Treaties. The jurisdiction of the General Court is set out in Articles 225 EC and Article 140a EA, as specified in Article 51 of the Statute of the Court of Justice.

34 The question whether this Court has jurisdiction to hear an action covering both an application for annulment of an act of the EIB adversely affecting a third party and a claim for damages for the loss sustained by that party as a result of the EIB's alleged unlawful conduct must be resolved by reference to the Statute, in the version applicable at the material time, in particular the first paragraph of Article 29 of the Statute and Article 225(1) EC, Article 235 EC, Article 237 EC and the second paragraph of Article 288 EC and, where appropriate, Article 230 EC.

35 The first paragraph of Article 29 of the Statute provides that '[d]isputes between the [EIB] on the one hand, and its creditors, debtors or any other person on the other, shall be decided by the competent national courts, save where jurisdiction has been conferred on the Court of Justice'. Moreover, the Court of Justice has recognised that neither the EC Treaty nor Article 29 of the Statute constitute a restriction on the jurisdiction of that Court to hear disputes concerning the EIB and that the latter provision makes an express exception for the jurisdiction conferred on it by the EC Treaty (see, to that effect, *SGEEM and Etroy* v *EIB*, paragraph 31 above, paragraphs 17 and 18).

36 The present dispute is between the EIB and a company governed by Greek law which is not subject to its control and must therefore be regarded as another person within the meaning of the first paragraph of Article 29 of the Statute. According to the wording of that provision, in order to determine whether a dispute such as the present comes within the jurisdiction of the Court of Justice or the national courts and, where appropriate, whether it comes within the jurisdiction of the Court of Justice or the General Court, it is necessary to refer to the provisions of the EC Treaty.

37 As regards, first, the action for annulment of the contested decision, whether the General Court has jurisdiction to hear it is, first and foremost and to the extent that it is a special provision, a matter of interpretation of Article 237 EC, read in conjunction with Article 225(1) EC.

38 Article 237 EC is worded as follows:

'The Court of Justice shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning:

(a) the fulfilment by Member States of obligations under the [Statute]. In this connection, the Board of Directors of the [EIB] shall enjoy the powers conferred upon the Commission by Article 226 [EC relating to failure by a Member State to fulfil one of its obligations under the EC Treaty];

(b) measures adopted by the Board of Governors of the [EIB]. In this connection, any Member State, the Commission or the Board of Directors of the [EIB] may institute proceedings under the conditions laid down in Article 230 [EC];

(c) measures adopted by the Board of Directors of the [EIB]. Proceedings against such measures may be instituted only by Member States or by the Commission, under the conditions laid down in Article 230 [EC], and solely on the grounds of non-compliance with the procedure provided for in Article 21(2), (5), (6) and (7) of the [Statute];

…'

39 It is also apparent from Article 225(1) EC that only the Court of Justice has jurisdiction to hear and determine actions or proceedings referred to in Article 237 EC.

40 In order to determine whether the contested decision falls within the scope of Article 237 EC, it is necessary to refer to the powers of the various bodies of the EIB.

41 Article 8 of the Statute provides that the EIB is to be directed and managed by a Board of Governors, a Board of Directors and a Management Committee.

42 Under Article 9 of the Statute, the Board of Governors is to lay down general directives for the credit policy of the EIB and, inter alia, decide whether to increase the subscribed capital of the EIB, approve the annual report of the Board of Directors and the annul balance sheet and profit and loss account and approve the Rules of Procedure of the Bank, so that it alone has the power to organise the internal operation of the services in the interests of good administration (Case C-15/00 *Commission* v *EIB* [2003] ECR I-7281, paragraph 67 et seq.). Under Article 11 of the Statute, the Board of Directors has power to take decisions in respect of granting loans and guarantees and raising loans, fix the interest rates on loans granted and the commission on guarantees, see that the EIB is properly run and ensure that the EIB is managed in accordance with the EC Treaty and the Statute and with the general directives laid down by the Board of Governors. The seventh subparagraph of Article 11(2) of the Statute provides that the President of the EIB or, in his absence, one of the Vice-Presidents of the Management Committee, is to preside over meetings of the Board of Directors but cannot vote. In accordance with Article 13 of the Statute, the Management Committee is the permanent executive collegiate body of the EIB. Acting under the authority of the President and the supervision of the Board of Directors, it is responsible for the current business of the EIB and prepares the decisions of the Board of Directors, subsequently ensuring that such decisions are implemented. The President of the EIB is to preside over meetings of the Management Committee. The members of the Management Committee are responsible only to the EIB. They are appointed by the Board of Governors on a proposal from the Board of Directors for a period of six years, which is renewable.

43 It is clear from the EIB's reply to the question put by the Court and from the note of 31 January 2008 that the contested decision was taken by the Director of the Information and Technology Department, which has since been incorporated within the EIB's Directorate-General for Strategy. According to the EIB, the decision was subsequently confirmed by the President of the EIB, prior to the signature of the framework agreement with the successful tenderer on 12 and 17 June 2008 (see paragraph 20 above). Although there is no evidence on the file that the President of the EIB confirmed the contested decision, it must be assumed to be an established fact for the purposes of these proceedings, since it is not disputed by the applicant. While the contested decision was thus adopted 'under the authority' of the President of the EIB, it can be inferred from this that the decision forms part of the 'current business' of the EIB within the meaning of Article 13(3) of the Statute and, therefore, falls within the ambit of the competences of the Management Committee (see, to that effect, *Commission* v *EIB*, paragraph 42 above, paragraph 66), whose task is specifically to manage the current business of the EIB, under the authority of its President. There is no reason to doubt in the present case that the award of a public contract entered into for its own account forms part of the 'current business' of the EIB.

44 Accordingly, it must be concluded that the contested decision did not fall within the ambit of competence of the Board of Governors or that of the Board of Directors, cannot therefore be attributed to either of those EIB bodies and is thus not covered by the special provisions in Article 237 EC.

45 It therefore remains to be considered whether the General Court can hear an action for annulment of a definitive act of the EIB which produces legal effects vis-à-vis third parties, on the basis of Articles 225 EC and 230 EC.

46 It should be recalled, first, that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies

and procedures designed to enable the Court of Justice to review the legality of measures adopted by the institutions (see *Commission* v *EIB*, paragraph 42 above, paragraph 75 and the case-law cited). That is also consistent with the objective pursued by Article 47 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) ('the Charter'), which, although it did not have legally binding force until the entry into force of the Treaty of Lisbon on 1 December 2009, does show the importance of the rights it sets out in the Community legal order (Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International and Others* v *Commission* [2003] ECR II-1, paragraph 122). Under that provision, any person whose rights and freedoms guaranteed by Community law are infringed has the right to an effective remedy and to a fair trial. Although it is not a Community institution, the EIB is none the less a Community body established and endowed with legal personality by the EC Treaty, and it is on that account that it is subject to judicial review by the Court of Justice, in particular as provided for in Article 237(b) EC (see *Commission* v *EIB*, paragraph 42 above, paragraph 75 and the case-law cited).

47 Second, account must be taken of the fact that Article 237 EC contains a special provision which relates only to certain disputes involving the EIB and whose scope is therefore limited and supplementary vis-à-vis other articles of the EC Treaty, such as Article 236 EC (Case 110/75 *Mills* v *EIB* [1976] ECR 955, paragraphs 16 and 17, and *SGEEM and Etroy* v *EIB*, paragraph 31 above, paragraph 17). Moreover, Article 237 EC and the first paragraph of Article 29 of the Statute are to be understood in the light of Article 267 EC, which provides that the task of the EIB is 'to contribute, by having recourse to the capital market and utilising its own resources, to the balanced and steady development of the common market in the interests of the Community' and, 'operating on a non-profit basis, grant loans and give guarantees which facilitate the financing of … projects in all sectors of the economy', as well as the provisions of the Statute cited at paragraph 37 above, from which it is apparent that the essential task of the Management Committee is to prepare and implement decisions concerning granting loans and guarantees and raising loans which are adopted by the Board of Directors in accordance with the general directives of the Board of Governors (see,

to that effect and by analogy, the Opinion of Advocate General Jacobs in *Commission* v *EIB*, paragraph 42 above, points 75 to 78). While the Statute does not entirely preclude the possibility that the Management Committee might, as part of the management of the current business of the EIB, take legally binding decisions with effect for third parties, it is nevertheless clear from its provisions that such decisions are adopted or should normally be adopted by either the Board of Governors or the Board of Directors.

48 The absence of a reference in Article 237 EC to the Management Committee reflects this division of competence within the EIB. In so far as the Management Committee is as a general rule supposed to prepare — rather than adopt — legally binding decisions with effect for third parties for the purpose of the first paragraph of Article 29 of the Statute, the draftsmen of the EC Treaty did not take the view that judicial scrutiny of Management Committee action was necessary. A parallel may be drawn here with Article 230 EC, which provides for review of final and legally binding acts with effect for third parties of the institutions and the ECB, not of steps which merely prepare for the adoption of such acts. To that effect, the General Court stated, at paragraph 18 of the order in *Tête and Others* v *EIB*, paragraph 31 above, that 'the EIB has retained its original role, which is to grant loans and guarantees (see Articles 129 and 130 [EEC] and Article 198d and 198e [EC])', and that, '[t]he EIB therefore does not adopt decisions having legal effects vis-à-vis third parties who are not in receipt of EIB loans or guarantees'. However, that reasoning can be applied only if, as in the present case, the Management Committee has in fact adopted a decision which has definitive legal effects vis-à-vis a third party. In a community based on the rule of law, such as the European Community, it must be possible for the person concerned to be able to challenge such a decision.

49 To that extent, the general provision constituted by Article 230 EC must be regarded as being supplemented by the special provision in Article 237 EC, which has only limited application and does not cover acts producing definitive legal effects vis-à-vis

a third party which the Management Committee finds it necessary to adopt as part of the management of the current business of the EIB, in accordance with Article 13(3) of the Statute, such as the contested decision or a decision refusing access to the EIB's administrative documents.

50 Third, it would be unacceptable if the EIB were able — by a creative organisation of its internal decision-making process — to evade the judicial scrutiny intended by Article 237 EC as regards the acts of the institutions or any Community body which, like the EIB, was established and endowed with legal personality by the EC Treaty (see, to that effect and by analogy, the Opinion of Advocate General Jacobs in *Commission* v *EIB,* paragraph 42 above, point 71). Acts formally adopted within the EIB by bodies other than those referred to in Article 237(b) and (c) EC, namely bodies other than the Board of Governors or the Board of Directors, must therefore be amenable to judicial review if they are final and produce legally binding effects vis-à-vis third parties. Under Articles 225 EC, 230 EC and 237 EC, jurisdiction is conferred on the Court of Justice and, in the present case, the General Court inter alia to review the lawfulness of any administrative decision taken by the EIB, that is any unilateral measure adopted by the EIB which produces definitive legally binding effects vis-à-vis third parties.

51 Fourth, it is imperative that the EIB's operational and institutional autonomy and its reputation as an independent body on the financial markets, as provided for by the EC Treaty, should not be undermined (Case 85/86 *Commission* v *EIB* [1988] ECR 1281, paragraphs 27 to 30, and Case C-15/00 *Commission* v *EIB*, paragraph 42 above, paragraph 101 et seq.). However, the adoption of the contested decision is connected with the pursuit by the EIB of activities which form part of the Community administration and relate, in particular, to that administration's activities as a contracting authority, not the pursuit by the EIB of its activities or operations in the financial domain or on the financial markets. The power of the General Court to review the legality of a measure on the basis of Article 225(1) EC and Article 230 EC, albeit a priori more extensive than that exercised by the Court of Justice over decisions adopted by the EIB's Board of Directors on the basis of Article 237(c) EC, cannot in any event be regarded as being capable of adversely affecting the operational and institutional

autonomy enjoyed by the EIB for the purpose of granting loans and guarantees and financing these, inter alia by having recourse to the capital market, or of affecting the EIB's reputation or its credibility as an independent body on the financial markets. Moreover, it should be noted that the EIB itself maintains that the General Court has jurisdiction to hear the present action for annulment on the basis of Article 225(1) EC and Article 230 EC. It does not therefore take the view that the General Court's power of judicial review in such a context might undermine the operational and institutional autonomy which the EIB enjoys under the EC Treaty and the Statute.

52 Accordingly, the need for full judicial review of Community acts dictates that Article 225(1) EC and Article 230 EC are to be interpreted as not precluding the General Court from hearing an action for annulment of an act connected with the management of the EIB's current business by the Management Committee which has definitive legally binding effects vis-à-vis third parties.

53 On the other hand, as regards the present claim for damages, it should be noted that no specific answer is to be found in the texts as to whether the judicature of the European Union, in this case the General Court, has jurisdiction to hear an action based on non-contractual liability brought against the EIB. In the absence of specific provisions, the question whether the Court of Justice and, in the present case, the General Court has jurisdiction to hear the present claim for damages brought against the EIB is a matter of interpretation of Article 225(1) EC, Article 235 EC and the second paragraph of Article 288 EC.

54 It should be noted, first, that the Court of Justice has already recognised that it has jurisdiction to determine an action for damages brought against the EIB on the basis of Article 178 of the EEC Treaty and the second paragraph of Article 215 of the EEC Treaty (now Article 235 EC and the second paragraph of Article 288 EC). It established

its jurisdiction on the basis of the fact that the purportedly unlawful act was the result of the implementation of a financing contract concluded by the EIB acting as the authorised agent and on behalf of the Community in the exercise of powers conferred upon it by certain provisions concerning the granting and management of risk capital financed by the Community budget, that the EIB was itself a body which, by virtue of the EC Treaty, formed part of the framework of the Community and that the acts and omissions of the EIB in the implementation of the financing contract were attributable to the Community (see, to that effect, judgment of 2 December 1992 in *SGEEM and Etroy* v *EIB*, paragraph 31 above, paragraphs 4 to 12 and 15, and Case C-370/89 *SGEEM and Etroy* v *EIB* [1993] ECR I-2583, paragraph 24). In that context, the Court of Justice has observed that the 'the term 'institution' employed in the second paragraph of Article 215 of the [EEC] Treaty must … not be understood as referring only to the institutions of the Community listed in Article 4(1) of the [EEC] Treaty but as also covering, with regard to the system of non-contractual liability established by the [EEC] Treaty, Community bodies such as the [EIB] (judgment of 2 December 1992 in *SGEEM and Etroy* v *EIB*, paragraph 31 above, paragraph 16).

55 Second, account should be taken of the fact that while, under the system of legal remedies established by the EC Treaty, an action for damages constitutes an autonomous remedy, separate from the action for annulment, the fact nevertheless remains that there is in the present case a direct link between the action for damages and the action for annulment of the contested decision, in so far as the application states that 'the … request for damages is based on Articles 235 and 288 [EC] on account of the contested illegal decision', so that the action for damages appears to be ancillary to the action for annulment. Moreover, it is apparent from the application that the action for damages seeks payment of a sum corresponding exactly to the applicant's 'estimated gross profit … should the contract have been awarded to the applicant', namely the rights which the applicant claims to have been deprived of as a result of the contested decision. The action for damages therefore, in actual fact, seeks to set aside the legal effects of the contested decision on the applicant and, if granted, would thus have the effect of neutralising those legal effects.

56 It is settled case-law (Case 175/84 *Krohn Import-Export* v *Commission* [1986] ECR 753, paragraphs 32 and 33; Case T-514/93 *Cobrecaf and Others* v *Commission* [1995] ECR II-621, paragraph 59; and Case T-180/00 *Astipesca* v *Commission* [2002] ECR II-3985, paragraph 139) that account must be taken of the 'direct link' or 'complementarity' which exists, in the present case, between the action for annulment and the action for damages, as well as the extent to which the latter is ancillary to the former, at the stage at which it is decided whether those actions are admissible, in order to avoid the outcome of the action for damages being artificially separated from that of the action for annulment, to which it is nevertheless merely ancillary or complementary.

57 Third, in so far as the damage alleged to have been caused to the applicant by the EIB originates in the pursuit by the EIB of activities which are integral to the performance of the Community administration's duties and relate, in particular, to action taken by that administration as a contracting authority and that damage is not therefore the result of the EIB's pursuit of its activities or operations in the financial domain or on the financial markets, it cannot be held that any review which this Court may find it necessary to carry out on the basis of Article 225(1) EC, Article 235 EC and the second paragraph of Article 288 EC is liable to affect the EIB's operational and institutional autonomy or harm its reputation as an independent body on the financial markets. Moreover, the EIB itself maintains that this Court has jurisdiction to rule on the present action for damages brought against it, on the basis of Article 225(1) EC, Article 235 EC and Article 288 EC, and has not in any way claimed that review by this Court might have the effect of undermining its operational and institutional autonomy.

58 This Court therefore has jurisdiction to adjudicate also on the claim for damages brought against the EIB, on the basis of Article 225(1) EC, Article 235 EC and the second paragraph of Article 288 EC, if that claim is ancillary to an admissible action

for annulment of an EIB act having definitive legally binding effects vis-à-vis a third person.

59 It follows that the General Court has jurisdiction to hear the present action in its entirety.

The applicant's interest in bringing proceedings for annulment of the contested decision

Arguments of the parties

60 Questioned on this point at the hearing, the EIB confirmed that the contested decision had been implemented, since the framework agreement had been concluded with the successful tenderer and, in part, implemented. It therefore considered that it was no longer in a position to give any effect to any annulment of the contested decision, such as reopening the tendering procedure. However, it also made it clear that it did not intend to claim that the present action is inadmissible on the ground that the applicant does not have an interest in bringing proceedings for annulment of the contested decision. Moreover, it stated that, while it was possible in theory to envisage restoring the unsuccessful tenderer which brought the action sufficiently to its original position by paying compensation, the conditions for payment of such compensation were not met in the present case, since the applicant has suffered no actual loss as a result of the contested decision.

61 At the hearing, the applicant submitted that it had brought a number of successful actions for annulment, either in part or in full, of decisions awarding contracts but that the institutions which adopted those decisions had not responded in a satisfactory

manner to the annulments. It also stated that it has a dual interest in bringing proceedings for annulment of the contested decision. First, in so far as it participates in public procurement procedures, it claims to have an interest in it being established that the acts which vitiate the contested decision are unlawful, in order to prevent a recurrence of such acts. Second, it claims that it has an interest in establishing that those acts are unlawful in order to obtain compensation.

Findings of the Court

62 According to settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure. In order for such an interest to be present, the annulment of the contested measure must of itself be capable of having legal consequences and the action must be likely, if successful, to procure an advantage for the party who has brought it (Case T-195/08 *Antwerpse Bouwwerken* v *Commission* [2009] ECR II-4439, paragraph 33). Since the conditions of admissibility of an action, in particular whether there is a legal interest in bringing proceedings, concern an absolute bar to proceedings, it is for the Court to consider of its own motion whether the applicants have an interest in obtaining annulment of the contested decision (see order in Case T-228/00 *Gruppo ormeggiatori del porto di Venezia* v *Commission* [2005] ECR II-787, paragraph 22 and the case-law cited). That case-law is applicable, by analogy, to applications for annulment brought in an action which includes an ancillary claim for damages.

63 In the present case, the Court must ascertain of its own motion whether annulment of the contested decision is likely to procure an advantage for the applicant, even though the tendering procedure cannot be reopened and, in the present circumstances, the

parties agree that, since the contract has been signed and implemented in part, there is no longer any chance that the applicant may be awarded the contract in question by the EIB.

64 It is settled case-law that, even where a decision to award a contract has been fully implemented for the benefit of other competitors, a tenderer retains an interest in the annulment of such a decision; such interest consists either in the tenderer's being properly restored by the contracting authority to his original position or in prompting that authority to make suitable amendments in the future to the tendering procedure if that procedure is found to be incompatible with certain legal requirements (see, to that effect, *Simmenthal* v *Commission*, paragraph 32 above, paragraph 32, and Joined Cases T-191/96 and T-106/97 *CAS Succhi di Frutta* v *Commission* [1999] ECR II-3181, paragraph 63).

65 The fact that the agreement for the execution of a public contract has been signed and indeed implemented before a decision is delivered concluding the main proceedings brought by an unsuccessful tenderer against the decision awarding that contract and that there is a contractual relationship between the contracting authority and the successful tenderer does not remove the requirement under Article 223 EC, if the main action is successful, for the contracting authority to take the measures necessary to ensure appropriate protection of the unsuccessful tenderer's interests (see, to that effect, order of the President of the General Court in Case T-303/04 R *European Dynamics* v *Commission* [2004] ECR II-3889, paragraph 83).

66 Where, following an action brought by an unsuccessful tenderer for a public contract, the decision awarding the contract is annulled but the contracting authority is no longer able to reopen the tendering procedure for the public contract in question, the interests of that tenderer may be protected, for example, by pecuniary compensation corresponding to the loss of the chance of securing the contract or, if it can be definitively established that the tenderer should have been awarded the contract, the loss

of profit (see, to that effect, the orders of the President of the General Court in Case T-108/94 R *Candiotte* v *Council* [1994] ECR II-249, paragraph 27; Case T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 51; and *European Dynamics* v *Commission*, paragraph 65 above, paragraph 83). In fact, according to the most recent case-law, an economic value can be attributed to the loss of chance of securing a contract suffered by an unsuccessful tenderer for the contract as a result of an unlawful decision (see, to that effect, orders of the President of the General Court of 25 April 2008 in Case T-41/08 R *Vakakis* v *Commission*, not published in the ECR, paragraphs 66 and 67 and the case-law cited, and of 20 January 2010 in Case T-443/09 R *Agriconsulting Europe* v *Commission*, not published in the ECR, paragraphs 32 to 34 and the case-law cited).

67 In the present case, the applicant has an interest in bringing proceedings for annulment of the contested decision in order to be restored sufficiently to its original position by the EIB, in accordance with the obligation laid down in the first paragraph of Article 233 EC, which can be brought about, where appropriate, by pecuniary compensation corresponding to its loss of chance of securing the contract. While the applicant has brought a claim for damages which could result in payment of a sum of money, in the form of damages, that claim does not relate to the loss of the chance of securing the contract but to the loss of income corresponding to the profit it would have made if it had performed the contract (see paragraph 210 below). If follows that that claim for damages could be dismissed without thereby precluding the possibility for the applicant of obtaining, if appropriate, pecuniary compensation for the loss of the chance of securing the contract by way of restoring it sufficiently to its original situation, in accordance with the second paragraph of Article 266 TFEU.

68 It follows from the foregoing that the action for annulment can, if successful, procure a benefit for the applicant and it therefore has an interest in bringing proceedings for annulment of the contested decision.

The lack of any challenge to the formula used in the comparative evaluation of the tenders during the tendering procedure

Arguments of the parties

69 The EIB maintains that the applicant is barred from challenging the formula used during the comparative evaluation of the tenders since it failed to do so in due time, namely before the closing date for submission of tenders.

70 The applicant claims that the Court should reject the objection of inadmissibility raised by the EIB in this regard.

Findings of the Court

71 The present objection of inadmissibility relates, in fact, to the third and fourth pleas in the application for annulment, by which the applicant claims that the 'ability to provide a pool of staff from own resources' award criterion is unlawful, and the fifth plea in the application for annulment, by which the applicant claims that the weighting applied to the award criteria, namely 75 % for the technical criteria and 25 % for the financial criterion, is unlawful.

72 It is correct that, in claiming that the formula used during the comparative evaluation of the tenders is unlawful, the applicant is disputing, as an ancillary point, the lawfulness of the terms of reference. The question which therefore arises, in the present case, is whether a document relating to a call for tenders, such as terms of reference,

is an act which is capable of being the subject of a direct action under the fourth paragraph of Article 230 EC and, accordingly, whether the applicant should have brought proceedings to challenge the terms of reference on the basis of that provision within the two-month period laid down under the fifth paragraph of Article 230 EC.

73 The terms of reference cannot be regarded as a measure which concerns each tenderer individually. Like each of the other documents relating to the call for tenders issued by the contracting authority, the terms of reference apply to objectively determined situations and produce legal effects with respect to categories of persons envisaged generally and in the abstract. They are therefore of a general nature and the fact that they are sent individually to the tenderers by the contracting authority cannot distinguish each tenderer individually from any other person for the purposes of the fourth paragraph of Article 230 EC (Case T-495/04 *Belfass* v *Council* [2008] ECR II-781, paragraphs 36 to 42).

74 In the present case, the contested decision was therefore the first measure which the applicant could challenge and thus the first measure entitling it to dispute, indirectly, the lawfulness of the formula used in the comparative evaluation of the tenders which was set out by the EIB in the terms of reference.

75 The EIB is therefore incorrect in claiming that the challenge made by the applicant, as an incidental plea, in the present action — to the effect that the formula used in the comparative evaluation of the tenders, as set out by the EIB in the terms of reference, was unlawful — is out of time.

76 Consequently, the third, fourth and fifth pleas in the application for annulment are admissible and the plea of inadmissibility raised by the EIB in that regard must be rejected.

The assertion that the claim for damages lacks clarity

Arguments of the parties

77 The EIB submits that it follows from the requirements under Article 44(1)(c) of the Rules of Procedure that the claim for damages is inadmissible, since the three conditions laid down in the second paragraph of Article 288 EC that must be satisfied for the Community to incur non-contractual liability are not referred to, in the present case, in the application and the applicant fails to assert that those conditions are met. In the view of the EIB, there is a lack of precision in the application with regard to the purported unlawful acts vitiating the tendering procedure, the causal link between those unlawful acts and the loss alleged by the applicant and the nature and precise amount of damages claimed. Accordingly, in the light of the case-law applicable (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, and Case T-461/93 *An Taisce and WWF UK* v *Commission* [1994] ECR II-733, paragraphs 42 and 43), such a claim should be rejected as inadmissible.

78 The applicant argues essentially that there has been no infringement of Article 44(1)(c) of the Rules of Procedure and that evidence from which it is possible to identify the three conditions laid down in the second paragraph of Article 288 EC that must be satisfied in order for the Community's non-contractual liability to be incurred is set out in the application.

Findings of the Court

79 It must be borne in mind that, under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure, every application must state

the subject-matter of the proceedings and contain a summary of the pleas in law on which it is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information. In order to guarantee legal certainty and sound administration of justice, it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (see Case T-19/01 *Chiquita Brands and Others* v *Commission* [2005] ECR II-315, paragraph 64 and the case-law cited).

80 In order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution or any other Community body or agency must state the evidence from which the conduct which the applicant alleges against the institution, body or agency can be identified, the reasons for which the applicant considers that there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage (see Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 107; Case T-38/96 *Guérin automobiles* v *Commission* [1997] ECR II-1223, paragraph 42; and *Chiquita Brands and Others* v *Commission*, paragraph 79 above, paragraph 65 and the case-law cited).

81 The application states that 'the request for damages is based on Articles 235 and 288 [EC] on account of the contested illegal decision … attacked by the present application'. It follows that that claim is based on the alleged unlawful acts referred to in the application for annulment. The application also states that 'the applicant … requests monetary compensation equal to 50 % of EUR 3.88 million = EUR 1.94 million from the EIB, corresponding to its estimated gross profit from the … public procurement procedure, should the contract have been awarded to the applicant'. It follows that the application sets out the evidence from which the nature and extent of the loss alleged can be identified. Moreover, in the application, the applicant provides explanations of how that sum was calculated. Therefore, even though the applicant does not devote a specific part of the application to the issue of the causal link between the alleged

unlawful acts and the loss pleaded, the application sets out the evidence from which it is possible to identify the reasons why the applicant considers there to be a causal link between the unlawful conduct and the loss it claims to have suffered, namely that in the present case the causal link arises, in its view, from the fact that the contested decision prevented it from being awarded the contract and concluding a framework agreement with the EIB for the implementation of the contract.

82 In those circumstances, the Court finds that the claim for damages is admissible and therefore rejects the objection of inadmissibility raised in that regard by the EIB.

2. *Substance*

The applicable law

Arguments of the parties

83 The applicant is of the view that, as a contracting authority, the EIB is required to act in accordance with the provisions of the 'Guide to Procurement — Guide for the procurement of services, supplies and works by the EIB for its own account', in the version applicable at the material time ('the Guide'), and to comply with general principles and law applicable to procurement procedures. Moreover, while Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply

contracts and public service contracts (OJ 2004 L 134, p. 114) is not applicable as such to the EIB's tendering procedures, it is apparent from the introduction to the Guide that that directive provides an appropriate reference for the purpose of assessing the provisions of the Guide, from which it derived inspiration. Furthermore, the General Court has already accepted that it can review the lawfulness of a Commission decision awarding a public contract, in the light of 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 European Parliament and Council Directive 97/52/EC of 13 October 1997, which also amends Directives 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1) (Case T-345/03 *Evropaïki Dynamiki* v *Commission* [2008] ECR II-341, paragraph 206).

84 The EIB objects that Directive 2004/18 does not apply to it and adds that the case-law applicable to procurement procedures concerns it only in so far as it interprets provisions which are themselves applicable. It is clear from the case-law (*Sogelma* v *EAR*, paragraph 31 above, paragraph 115, and the judgment of 10 September 2008 in Case T-59/05 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraphs 46 and 47) that Directive 2004/18, as well as Directive 92/50, which it repeals and replaces, are not applicable to public contracts concluded for its own account by a Community institution, body or agency unless the provisions therein are expressly stated to be applicable to those institutions, bodies or agencies.

Findings of the Court

85 The parties' arguments raise the question as to which rules govern the award of public works contract, supply contracts and services contracts concluded by the EIB for its own account for consideration and utilising its own resources.

86 The EIB has financial autonomy in that it operates, in accordance with Article 267 EC, 'by having recourse to the capital market and utilising its own resources' (see, to that effect, *Commission* v *EIB*, paragraph 42 above, paragraphs 101 and 128), not the Community budget, even though it is required to manage funds from that budget acting as the authorised agent and on behalf of the Community and, therefore, part of its activities are carried out using Community funds. In the present case, however, the action concerns a tendering procedure financed by EIB own resources.

87 Such a procedure is not governed either by the provisions in Title IV of Part 2 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), as amended ('the Financial Regulation'), or, a fortiori, the provisions in Title III of Part 2 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Regulation No 1605/2002 (OJ 2002 L357, p. 1), as amended ('the Implementing Rules'). Those provisions are in fact applicable only to 'the general budget of the European Communities' and, as is apparent from Article 88(1) of the Financial Regulation, the only public contracts governed by that regulation are contracts which are financed, entirely or in part, by the Community general budget (Case T-271/04 *Citymo* v *Commission* [2007] ECR II-1375, paragraph 121).

88 The fact nevertheless remains that the EIB's public procurement procedures must comply with the fundamental rules of the EC Treaty and the general principles of law concerning, in particular, the free movement of goods (Article 28 EC), the right of establishment (Article 43 EC), freedom to provide services (Article 49 EC), non-discrimination and equal treatment, transparency and proportionality. According to well established case-law on Community public procurement procedures, the

contracting authority is subject to the fundamental rules of the EC Treaty, the general principles of law and the objectives of the Charter.

89 Moreover, even though the directives concerning the award of public works contracts, public supply contracts and public service contracts govern only contracts concluded by the bodies or contracting authorities of the Member States and are not directly applicable to public contracts concluded by the Community administration, the rules or principles laid down in or derived from those directives can be relied on against that administration when they themselves simply appear to be the specific expression of fundamental rules of the EC Treaty and of general principles of law which are directly applicable to the Community administration (see, to that effect, Case C-25/02 *Rinke* [2003] ECR I-8349, paragraphs 25 to 28). In a community based on the rule of law, the uniform application of the law is a fundamental requirement (Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 104) and any person is required to comply with the principle of respect for legality. Thus, the institutions are required to comply with the rules of the EC Treaty and the general principles of law that are applicable to them, in the same way as any other person (see, to that effect, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 18 to 21, and *Antwerpse Bouwwerken* v *Commission*, paragraph 62 above, paragraph 55). Moreover, the rules or principles laid down in or derived from those directives may be relied on against the Community administration if, in the exercise of its operational and institutional autonomy and within the limits of the powers conferred on it by the EC Treaty, it adopts a measure which expressly refers, for the purpose of governing the public contracts which it concludes for its own account, to certain rules or principles laid down in the directives, the effect of which is that those rules and principles are applicable in accordance with the principle *patere legem quam ipse fecisti* (see, to that effect, Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others* v *Commission and Council* [1985] ECR 2523, paragraphs 52, 56 and 57, and Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraphs 113 to 115). Where it is necessary to interpret the measure in question, it must be interpreted, in so far as possible, with a view to uniform application of Community law and compliance with the provisions of

the EC Treaty and the general principles of law (see Case C-314/89 *Rauh* [1991] ECR I-1647, paragraph 17 and the case-law cited, and Case C-135/93 *Spain* v *Commission* [1991] ECR I-1651, paragraph 37).

90 The Guide states that it is in order to respect 'the fundamental EU principles regarding public procurement, such as the principles of equal treatment, non-discrimination and transparency' that the EIB decided to implement tendering procedures allowing for 'competition among qualified tenderers and … selection based both on cost and quality considerations'. Accordingly, the EIB considered that '[e]ven though [Directive 2004/18] [was] not applicable as such to the [EIB], it provide[d] an appropriate reference of establishing the [EIB's] procedures". Section 2.1 of the Guide states inter alia that "[t]he [EIB] follows the procedures described in [Directive 2004/18] for the award of contracts which are not excluded from the application of [Directive 2004/18] in accordance with its provisions and which have a total value exclusive of value added tax (VAT) estimated to be equal to or greater than the following thresholds: (a) EUR 206 000 for service … contracts …'. The Guide also makes numerous other references to Directive 2004/18.

91 Sections 2.4 and 2.5 of the Guide set out in detail the various stages of the tendering procedure referred to at Section 2.2.1 of the Guide.

92 The Guide sets out in that regard rules of general application which produce legal effects in relation to third parties, in particular those who decide to bid for a public contract financed entirely or in part by the EIB's own resources, and binds the EIB in law when it decides to conclude a public contract for its own account (see, to that effect and by analogy, *Citymo* v *Commission*, paragraph 87 above, paragraph 122).

93 It follows from the foregoing considerations that, when the EIB takes steps by having recourse to the capital market or its own resources, in particular when it concludes public contracts for its own account, it is subject to both the principles referred to at paragraph 88 above and the provisions of the Guide, especially those set out at paragraph 91 above, as interpreted in the light of the principles which those provisions are intended to put into effect and, where appropriate, the provisions of Directive 2004/18 to which those provisions refer.

The application for annulment

94 The applicant puts forward five pleas in law in support of its application for annulment. The first plea alleges, in essence, infringement of Section 2.5.2 of the Guide, the principles of transparency and equal treatment and the right to an effective remedy. The second plea alleges, in essence, infringement of the principles of transparency and sound administration, of the duty to state reasons for decisions adversely affecting a third party and of the right to an effective remedy. The third plea alleges, in essence, infringement of the principle of proportionality and the obligation to choose award criteria which allow an objective comparative evaluation of the tenders. The fourth plea alleges infringement of the principle of equal treatment and the obligation to use, for the purpose of the comparative evaluation of the tenders, award criteria which are not confused with the selection criteria. The fifth plea alleges infringement of the law applicable to tendering procedures, on account of the fact that the weightings applied to the award criteria resulted in the neutralisation or minimisation of the 'price effect' in the contested decision.

95 By letter lodged on 8 January 2010 (see paragraph 21 above), the applicant raised a sixth plea for annulment of the contested decision, alleging infringement of Article 99 of the Financial Regulation and Article 148(1) and (2) of the Implementing Rules, which prohibit any discussion between the contracting authority and the candidates

or tenderers leading to amendment of the conditions of the contract or the terms of the original tender, and infringement of the principles of equal treatment, transparency and non-discrimination, as enshrined in Article 89 of the Financial Regulation, read in conjunction with recital 18 in the preamble thereto.

96 First, it is necessary to examine together the first and second pleas, since they overlap in part. Next, it is appropriate to address the third and fourth pleas, which appear to be complementary, together. Lastly, for reasons of expediency, the sixth plea should be considered next, before going on to consider the fifth plea.

The first and second pleas

— Arguments of the parties

97 By the first and second pleas, the applicant submits that the EIB infringed Section 2.5.2 of the Guide, the principles of transparency, equal treatment and sound administration, its right to an effective remedy and the obligation to state reasons for decisions adversely affecting a third party. First of all, it claims that the EIB should have notified it as soon as possible, in writing, of the contested decision and sent on its own initiative the same information to all the tenderers without exception, giving them the time necessary to exercise their legitimate rights. Next, the EIB should have sent to it, within 15 days of being requested, the name of the successful tenderer and stated the reasons for rejecting its own tender and the reasons for the contested decision in its regard by providing it with the element of comparison contained in

the evaluation report between the characteristics and advantages of the applicant's own bid and those of the successful tenderer's bid. Finally, the EIB should, at the very least, have provided to the applicant the reasons for the contested decision before the present action was brought, in order to enable it to secure its right to an effective legal remedy.

98 The EIB contends that the first plea should be rejected. In its view, the publication of the contract award notice in the Official Journal was an officially recognised means, in the Community legal order, of communicating the contested decision to the applicant. The fact that it did not notify the applicant individually of the contested decision is an administrative error on the part of the EIB's own services. However, the EIB replied promptly, on 1 August 2008, to the applicant's request for explanations of 31 July 2008. In any event, according to case-law, the complaint alleging failure to provide information cannot succeed, since on the date on which it brought the present action, namely 6 October 2008, the applicant was aware of the reasons on which the contested decision was based. Similarly, nor can any breach of the principle of equal treatment be established, since the alleged illegality had no influence on the contested decision, in view of the fact that, on the basis of the award criteria chosen, the evaluation committee had clearly come to the view that the successful tenderer's bid was much better than the applicant's.

99 The EIB contends that the second plea should also be rejected. It claims that it stated the reasons on which the contested decision was based to the requisite legal standard and followed a procedure consistent with the provisions of the Guide and the case-law applicable to tendering procedures. In accordance with case-law and Section 2.5.2 of the Guide, the applicant received, by letter of 1 August 2008, a reasoned explanation of the characteristics and relative advantages of the successful tender as well as the name of the successful tenderer, so that the contested decision contained a sufficient statement of reasons to enable the applicant to assert its rights and the Court to exercise its power of review, in the light of the particular circumstances of the case. That letter clearly shows that, for each award criterion with the exception

of the financial criterion, the successful tenderer's bid received a score twice as high as the applicant's. Even if the applicant had obtained a higher score than the successful tenderer for the technical criterion, that would not have been decisive, since the financial criterion accounted for only 25 % of the overall score.

— Findings of the Court

100 Where the Community administration enjoys a wide power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of fundamental importance. Those guarantees include in particular the requirement that the Community administration should give adequate reasons for its decisions. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14, and Case T-241/00 *Le Canne* v *Commission* [2002] ECR II-1251, paragraph 53). According to established case-law, the Community administration enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender (Case T-211/02 *Tideland Signal* v *Commission* [2002] ECR II-3781, paragraph 33, and Case T-148/04 *TQ3 Travel Solutions Belgium* v *Commission* [2005] ECR II-2627, paragraph 47; see also, to that effect, Case 56/77 *Agence européenne d'interims* v *Commission* [1978] ECR 2215, paragraph 20).

101 It is necessary to examine, first, the applicant's complaints alleging infringement of the provisions of Section 2.5.2 of the Guide, in that the EIB failed to inform it as soon as possible of the adoption of the contested decision.

102 Section 2.5.2 of the Guide, relating to '[c]ontacts between the [EIB] and candidates and tenderers', states that '[o]nce it has reached a decision regarding the tendering procedure, the [EIB] shall inform all parties concerned of the decision reached as soon as possible'.

103 The EIB acknowledged before the Court and in its letter to the applicant of 14 August 2008 that 'the applicant did not receive an official letter in due time informing it of the outcome of the tendering procedure' and explained that, 'after detailed research following the applicant's complaint, it found that its failure was due to an administrative error'. The EIB also acknowledged that all the tenderers 'with the unfortunate exception of the applicant', were informed of the adoption of the contested decision by letter of 18 February 2008. It is not disputed that the applicant became aware of the existence of the contested decision only when the award notice was published in the Supplement to the Official Journal on 26 July 2008, that is more than one month after the signature of the framework agreement, on 12 and 17 June 2008, and the date when it took effect, on 16 June 2008.

104 In the circumstances, the EIB therefore infringed the provisions of Section 2.5.2 of the Guide, in that it failed to inform the applicant, as soon as possible, of the adoption of the contested decision.

105 It is necessary to examine, second, the applicant's complaints alleging infringement of the provisions of Section 2.5.2 of the Guide and the obligation to state reasons for decisions adversely affecting a third party, stemming from the fact that the EIB failed to provide to it the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer within 15 days following receipt of its written request or, at the latest, before it brought its action.

106 Section 2.5.2 of the Guide provides, inter alia, that '[o]n request from the party concerned, the [EIB] will, within 15 days from receipt of the written request, inform: … 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 or the parties to the framework agreement'.

107 Such a manner of proceeding satisfies the purpose of the obligation to state reasons laid down in Article 253 EC, according to which the statement of the reasons on which a decision adversely affecting a third party are based must be such as to enable the Court to exercise its power of review as to the legality of the decision and to enable the person concerned to ascertain the matters justifying the measure adopted, so that he can defend his rights and verify whether the decision is well founded (see, by analogy, Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 42 and the case-law cited; Case T-19/95 *Adia Interim* v *Commission* [1996] ECR II-321, paragraph 32; and judgment of 12 July 2007 in Case T-250/05 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraphs 68 and 69). In tendering procedures, the fact that interested tenderers receive a reasoned decision only if they make an express request to that effect does not restrict their ability to assert their rights before the Court. The period for bringing proceedings laid down in the fifth paragraph of Article 230 EC does not begin to run until the reasoned decision is notified, subject to the tenderer having made his request for a reasoned decision within a reasonable time after he was apprised of the rejection of his tender (*Adia Interim* v *Commission*, paragraph 33 and the case-law cited).

108 In view of the wide power of appraisal it enjoys in tendering procedures, the contracting authority is required to provide an adequate statement of reasons to unsuccessful tenderers who so request, which presupposes that it will take particular care to ensure that the grounds communicated by it set out all the factors on which its decision is based (see, to that effect, Case T-59/05 *Evropaïki Dynamiki* v *Commission*, cited in paragraph 84 above, paragraph 134).

109 The duty to state reasons must be assessed in the light of the information available to the applicant at the time the application was brought (Case T-183/00 *Strabag Benelux* v *Council* [2003] ECR II-135, paragraph 58, and Case T-4/01 *Renco* v *Council* [2003] ECR II-171, paragraph 96). On the other hand, it is settled case-law that the reasons for a decision cannot be explained for the first time ex post facto before the Court, save in exceptional circumstances (see Case T-89/07 *VIP Car Solutions* v *Parliament* [2009] ECR I-1403, paragraph 76 and the case-law cited).

110 It is not disputed that, by the letter of 31 July 2008, the applicant submitted a request to ascertain the characteristics and relative advantages of the successful tender as well as the name of the tenderer selected. The EIB states that it replied to that request in its letter of 1 August 2008. While, following that letter, the applicant once again sought clarifications by letter of 1 August 2008, the EIB replied, in its letter of 14 August 2008, that it had already provided the applicant with the fullest response possible and suggested that it refer to the award decision published in the Official Journal. It is not apparent from the case-file or the parties' arguments that the grounds for the contested decision could have been communicated to the applicant by the EIB by means other than those set out above before the present action was brought.

111 It follows that the reasons for the contested decision given to the applicant by the EIB before it brought its action and in response to its request of 31 July 2008 must be found in the wording of the EIB's letter of 1 August 2008, the context of the decision and all the legal rules governing the matter in question, since that decision was sent within 15 days of receipt of the applicant's request.

112 It is apparent from the letter of 1 August 2008 that the EIB communicated to the applicant the name of the successful tenderer, the weighting applied to the award criteria and the breakdown of the points awarded to the applicant's tender and that of the successful tenderer respectively following the comparative evaluation of the tenders. That letter stated that the applicant's tender had received 22.03 points (out of 35), broken down as follows: 8.75 points (out of 8.75) for the financial criterion, 2.85 points (out of 5.25) for the 'quality management process' technical criterion, 7.43 points (out of 15.75) for the 'level of the conformity of the skills and qualifications of the staff proposed' technical criterion and 3 points (out of 5.25) for the 'ability to provide a pool of staff from own resources' technical criterion, whereas the successful tenderer's bid had received 29.36 points (out of 35), broken down as follows: 5.29 (out

of 8.75) for the financial criterion, 4.12 (out of 5.25) for the 'quality management process' technical criterion, 15.3 points (out of 15.75) for the 'level of the conformity of the skills and qualifications of the staff proposed' technical criterion and 4.12 points (out of 5.25) for the 'ability to provide a pool of staff from own resources' technical criterion.

113 The information provided by the EIB, in the form of the points awarded, enabled the applicant to compare directly, for each award criterion, the points obtained by its bid and those obtained by the successful tenderer's bid, since the EIB did not simply communicate to the applicant the overall mark awarded to each of the tenders concerned. In particular, that information enabled the applicant to identify immediately the precise reasons why its tender had not been chosen, namely that, following the comparative evaluation of the tenders, the overall mark obtained by its bid was lower than that obtained by the successful tenderer's bid, given that, even though it had obtained the best score for the financial criterion, that had not been sufficient, in view of the weighting applied to the award criteria adopted by the EIB, to counterbalance the score obtained by its bid for each of the three technical award criteria, which were lower than those obtained by the successful tenderer's bid.

114 As regards a tendering procedure in which the applicant submitted the most competitive tender, in that it submitted the cheapest tender of all the tenders compared and its tender was therefore rejected only on the ground that the technical merit of its tender was considered to be inferior to that of the successful tenderer's bid, it should be noted that, while it might amount to an attempt to explain, such reasoning cannot, in any event, be regarded as sufficient in the light of the requirement that the reasoning followed by the authority which adopted the measure in question must be disclosed in a clear and unequivocal fashion (see, to that effect, *VIP Car Solutions* v *Parliament*, paragraph 109 above, paragraphs 75 and 76). The letter of 1 August 2008 does not contain any information on the reasons which, according to the EIB, justified the scores given for the technical criteria to the applicant's tender and to that of the successful tenderer, respectively. Moreover, the scores contained in that letter were

not supplemented by any general comments setting out the specific reasons which led the EIB to award more points to the successful tenderer's bid than to that of the applicant, for each of the technical criteria, which would have made it possible to regard the reasoning of the contested decision as adequate (see, to that effect, Case T-59/05 *Evropaïki Dynamiki* v *Commission*, paragraph 84 above, paragraph 129, and Case T-437/05 *Brink's Security Luxembourg* v *Commission* [2009] ECR II-3233, paragraph 169).

115 It is true that the EIB explained, during the proceedings, the reasons which led it to adopt the contested decision, in particular the fact that, as regards the 'level of the conformity of the skills and qualifications of the staff proposed' technical criterion and the 'ability to provide a pool of staff from own resources' technical criterion, 'the main problem [was] the experience (or rather lack of experience) of the applicant's consultants in the banking/financial sector' and that, as regards the 'quality management process' technical criterion, the successful tenderer's bid 'was more specific' than that of the applicant, which 'appeared to cover all the necessary aspects but … was described in rather general and complex terms'. However, that cannot compensate for the inadequacy of the initial reasoning for the contested decision. Indeed, the EIB referred to no exceptional circumstances which would have justified a failure to provide to the applicant an adequate statement of reasons within 15 days of receipt of its request or, in any event, before it initiated proceedings.

116 It follows from all the foregoing that the contested decision is vitiated by a failure to state adequate reasons and therefore infringes the provisions of section 2.5.2 of the Guide and, more generally, the obligation to state reasons laid down in Article 253 EC.

117 In third place, it is necessary to examine the applicant's claims alleging infringement of the right to an effective remedy and infringement of the principles of equal treatment, transparency and sound administration.

118 As regards, first of all, the purported infringement of the principle of the right to an effective remedy, it should be borne in mind that access to the courts is one of the essential elements of a community based on the rule of law and is guaranteed in the legal order based on the EC Treaty, inasmuch as the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of acts of the Community administration (*Les Verts* v *Parliament*, paragraph 30 above, paragraph 23). Moreover, the Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States and on Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; Joined Cases C-23/04 to C-25/04 *Skafianakis* [2006] ECR I-1265, paragraph 28; and *Philip Morris International* v *Commission*, paragraph 46 above, paragraph 121). Lastly, the right to an effective remedy for every person whose rights and freedoms guaranteed by the law of the European Union are infringed has also been reaffirmed by Article 47 of the Charter.

119 Moreover, in tendering procedures, tenderers must be protected against arbitrary decisions by the contracting authority by ensuring that unlawful decisions taken by that authority may be reviewed effectively and as rapidly as possible (see, to that effect and by analogy, the judgment of 23 December 2009 in Case C-455/08 *Commission* v *Ireland*, not published in the ECR, paragraph 26).

120 Full legal protection against arbitrary decisions on the part of the contracting authority therefore presupposes, first, the obligation to inform all the tenderers of the decision to award the contract before the contract is concluded, so that they may have a real possibility of initiating proceedings for annulment of that decision, where the requisite conditions are met.

121 Such full legal protection requires, next, that the unsuccessful tenderer should have the opportunity to examine in sufficient time the validity of the award decision, which means that there must be a reasonable period of time between communication of

the award decision to the unsuccessful tenderers and the signature of the contract, in order inter alia to enable the latter to lodge an application for interim measures, under Articles 242 EC and 243 EC in conjunction with Article 225(1) EC, so that the judge hearing the application for interim measures may order suspension of the operation of the contested decision until the court adjudicating on the substance rules on the main action for annulment of that decision (see, to that effect and by analogy, the judgment of 24 June 2004 in Case C-212/02 *Commission* v *Austria*, not published in the ECR, paragraphs 21 and 23 and the case-law cited, and *Commission* v *Ireland*, paragraph 119 above, paragraphs 27 and 28 and the case-law cited). The right to full and effective judicial protection means that individuals must be granted interim protection if this is necessary to ensure the full effectiveness of the judgment to be given in the main proceedings, in order to prevent a lacuna in the legal protection afforded by the courts having jurisdiction (see orders of the President of the Court of Justice in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraph 46 and the case-law cited, and Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 111 and the case-law cited).

122 Lastly, in order to ensure that the requirement of effective judicial protection is satisfied, the contracting authority must comply with its duty to give reasons (see paragraph 108 above) by providing an adequate statement of reasons to any unsuccessful tenderer who so requests, in order to ensure that the latter may rely on that right under the best possible conditions and have the possibility of deciding, with full knowledge of the facts, if there is any point in his applying to the court having jurisdiction. The duty to state reasons for a contested decision is an essential procedural requirement, intended inter alia to ensure that the person adversely affected by the measure in question has the right to an effective remedy (see, to that effect, Case 36/75 *Rutili* [1975] ECR 1219, paragraphs 37 to 39, and Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraphs 15 and 16).

123 In the present case, the tendering procedure failed to satisfy those requirements. First, the contested decision was not notified to the applicant, who became aware of it after it had, in principle, been implemented, since the framework agreement had been signed and had entered into force. While the EIB maintained at the hearing that the applicant was still in a position to bring an application for suspension of the operation of the contested decision after the signature of the framework agreement,

it was unable to answer the applicant's arguments, also put forward at the hearing, to the effect that such an application could no longer be of any practical effect after the framework agreement had been signed and its implementation begun. Furthermore, account should be taken of the fact that the EIB itself recognised that the implementation of the contested decision, through the signature and subsequent implementation of the framework agreement, precluded it from being able to give full effect to any annulment of the contested decision, in particular by reopening the tendering procedure (see paragraph 60 above). Thus, in the present case, it was necessary for the applicant to be in a position to bring such an application for suspension even before the signature and entry into force of the framework agreement, in order to render effective its substantive application, which sought review of the impartiality of the tendering procedure and the preservation of its chance of concluding the contract with the EIB at the end of that procedure. Second, as has already been found (see paragraph 116 above), the EIB failed to provide to the applicant an adequate statement of reasons for the contested decision before it brought its main action seeking, inter alia, annulment of the decision.

124 It follows that, in the present case, the EIB infringed the applicant's right to an effective remedy.

125 As regards, next, the purported infringement of the principles of equal treatment and transparency, it is well established case-law on tendering procedures that the contracting authority is required to comply with the principle of equal treatment as between tenderers, which is simply a specific expression of the principle of equal treatment (see, to that effect, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraphs 46 and 48 and the case-law cited). It has been consistently held that the contracting authority is required, at each stage of the tendering procedure, to act in accordance with the principle that tenderers should be treated equally (*Commission* v *CAS Succhi di Frutta*, paragraph 89 above, paragraph 108, and Case T-203/96 *Embassy Limousines*

& Services v *Parliament* [1998] ECR II-4239, paragraph 85) and, as a consequence, ensure that all tenderers have an equal chance (Case T-250/05 *Evropaïki Dynamiki* v *Commission*, paragraph 107 above, paragraph 45). According to case-law, the principles of equal treatment and non-discrimination on grounds of nationality also imply a duty of transparency, which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the public contract to be opened up to competition and the impartiality of procurement procedures to be reviewed (Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 62, and *Parking Brixen*, paragraph 49).

126 In the present case, it is not disputed that the EIB communicated the contested decision to the other unsuccessful tenderers immediately and long before the signature of the framework agreement, thus affording them the opportunity, of which the applicant was unlawfully deprived (see paragraph 123 above), of bringing before the judge hearing applications for interim measures an application for suspension of the implementation of the contested decision up to the time of the signature of the framework agreement, in order to ensure that any substantive action for review of the impartiality of the tendering procedure remained effective.

127 It follows that, in the present case, the EIB infringed the principles of equal treatment and transparency by depriving the applicant of its right to an effective remedy against the contested decision, whereas the other unsuccessful tenderers had such a right.

128 With regard, finally, to the purported infringement of the principle of sound administration, according to case-law that principle may constitute a rule of law whose purpose is to confer rights on individuals where it constitutes the expression of specific rights (judgment of 13 November 2008 in Case T-128/05 *SPM* v *Council and Commission*, not published in the ECR, paragraph 127).

129 Since it is apparent from the above reasoning that the EIB infringed the applicant's protected rights by failing to communicate to it the contested decision as soon as possible and failing to communicate to it, within 15 days of receipt of its request and before it brought its action, an adequate statement of reasons for that decision, it also acted in breach of the principle of sound administration by adversely affecting the applicant's right to an effective remedy against the contested decision.

130 According to the case-law of the Court of Justice, where intended to ensure that the measures concerned are formulated with all due care and prudence, procedural requirements may be regarded as essential (Case 6/54 *Netherlands* v *High Authority* [1955] ECR 103). In public procurement procedures, the right of an unsuccessful tenderer to an effective remedy against the decision awarding the public contract to another tenderer and the corresponding obligation on the contracting authority to communicate to the unsuccessful tenderer, upon request, the grounds of the decision must be regarded as essential procedural requirements within the meaning of the case-law cited above, in so far as those requirements dictate that safeguards be attached to the award decision so as to enable the impartiality of the tendering procedure which resulted in the decision to be effectively reviewed.

131 In accordance with the case-law concerning infringement of essential procedural requirements, it must be found that the EIB's failure to have regard for the essential procedural requirements pertaining to the contested decision must lead to the annulment of that decision (see, to that effect, Case C-65/93 *Parliament* v *Council* [1995] ECR I-643, paragraph 21).

132 In view of the foregoing considerations, the first and second pleas must be upheld.

The third and fourth pleas

— Arguments of the parties

133 By the third plea, the applicant submits that, by using an award criterion referred to as 'ability to provide a pool of staff from own resources', the EIB infringed the principle of proportionality and the obligation to choose award criteria that allow an objective comparative evaluation of the tenders. That award criterion prevented the tenderers from exercising their legitimate right to use subcontractors. Moreover, the formulation of the criterion was too imprecise to enable tenderers to know the optimum capacity that they should offer in order to obtain the maximum score. In the list of 'Questions and Answers', the question on the maximum level of 'ability to provide a pool of staff' and the EIB's answer to that question to the effect that it 'ha[d] not defined the optimal number' show that tenderers could not know and did not know what they must or could do to submit the best tender from the point of view of that criterion and that the 'optimal number' was determined by the evaluation committee at the comparative tender evaluation stage. Such a process had the effect of distorting competition between tenderers to the advantage of the successful tenderer, namely the incumbent contractor, which had the specific IT tools used by the EIB, or tenderers with sufficient capacity not to have recourse to a pool of outside experts who could be mobilised should the contract be awarded to them. Contrary to the EIB's contention, the specific IT tools held by the successful tenderer are not particularly widespread, since they have only a 3% market share and are considered to be in decline. Moreover, the applicant claims that it had numerous experts who satisfied the EIB's needs, as the EIB itself recognised and a table inserted in the reply showed. The applicant also invites the EIB to disclose the anonymous curricula vitae of the staff

submitted by the successful tenderer so that their qualifications can be compared with those of its own experts.

134 The EIB submits that the third plea should be rejected. Sections 6.4 and 6.5 of the terms of reference clearly stipulated that subcontracting and group tenders were acceptable, and that included the use of independent experts. That was also confirmed in the list of 'Questions and Answers', which made it clear that subcontractor resources were to be treated as own resources of the tenderer concerned for the purpose of the call for tenders. The only condition set out at section 1.3 of the terms of reference was that tenderers must demonstrate their willingness to recruit a team having the appropriate skills. Moreover, the successful tenderer was not the only one able to meet the 'ability to provide a pool of staff from own resources' criterion by having recourse to its 'own staff', since it did not own all the IT tools used in the Serapis application. The programming language of the application, namely Java, and the tools developed by the successful tenderer, including the 'Sybase server suite' software and the database management system, are widely known on the market and many persons are competent in that respect. That is evidenced by the curricula vitae provided by the applicant, in particular by a curriculum vitae which refers to experience in the whole 'Sybase server suite' software and also to extensive knowledge of 'Java'. Furthermore, the applicant has contradicted itself in its arguments or through the documents which it has produced.

135 By the fourth plea, the applicant submits that, by using the 'ability to provide a pool of staff from own resources' award criterion, the EIB infringed the principle of equal treatment and the obligation to use, for the purpose of the comparative evaluation of the tenders during the contract award stage, only criteria which are not applicable at the selection stage. As the EIB recognised at paragraph 89 of its defence, that criterion had no purpose other than to check 'the capacity of the tenderers' manpower'

by studying their curricula vitae and had already been quite properly used during the selection stage. It could not therefore be used during the stage of comparative evaluation of the tenders and award of the contract, under the rule that the selection procedure and the award procedure must be clearly separate. Moreover, the EIB infringed the principle of equal treatment in that, by applying that criterion twice, it favoured the successful tender, which was in the best position to 'provide a pool of staff' since it was also the incumbent contractor and had the specific IT tools used by the EIB and since it had more potentially available experts.

136 The EIB contends that the fourth plea should be rejected. It refers to the wide discretion which it enjoyed at the stage of selecting the award criteria. The selection criteria, which required that tenderers should have at least 15 employees who had been working for them for at least 2 years in their IT department and 3 verifiable references, could not be confused with the 'ability to provide a pool of staff from own resources' award criterion, as those criteria correspond to different sections in the terms of reference. The criterion mentioned in section 6.2.2 of the terms of reference, in accordance with section 2.5.1.1 of the Guide, as a selection criterion was intended to verify that the tenderers satisfied the minimum requirements in terms of staff and the capacity of their IT service, while the criterion mentioned at section 7.1.1 of the terms of reference, in accordance with section 2.5.1.2 of the Guide, as an award criterion was intended to evaluate the competences and relevant experience of the staff proposed by the tenderers, on the basis of their curricula vitae and the tables of competences submitted, and the capacity of tenderers to address the specific requirements of the public contract. The EIB also submits that the applicant demonstrates bad faith when it claims that the EIB admitted that its acts were contrary to the law applicable to tendering procedures.

— Findings of the Court

137 In the same way that the EIB has a broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a public contract following an invitation to tender, it also has a broad discretion in determining both the content and the application of the rules applicable to the award of a contract, for its own account, following a call for tenders (see, to that effect and by analogy, Joined Cases T-376/05 and T-383/05 *TEA-CEGOS and Others* v *Commission* [2006] ECR II-205, paragraphs 50 and 51). The EIB's power to freely choose the award criteria on the basis of which it intends to award the public contracts which it enters into, for its own account, enables it to take account of the nature, subject-matter and specific features particular to each contract.

138 However, the provisions of the Guide should also be taken into account. Section 2.5 of the Guide sets out the rules applicable to the 'conduct of the procedure'. In particular, section 2.5.1 deals with the '[v]erification of the suitability and choice of participants' and the 'award of contracts'. It is apparent in particular from that section that 'the [EIB] shall award its contracts on the basis of selection and award criteria announced in the contract notice and/or in the tender specifications, after first having assessed the eligibility of the economic operators to take part in the procedure'.

139 Section 2.5.1.1 of the Guide, concerning '[s]election criteria', provides that '[t]he purpose of these criteria is to determine whether an operator has the necessary economic and financial standing and technical and professional ability to perform the contract'. It also provides that '[t]he [EIB] shall define these criteria in accordance with Articles 47 and 48 of … Directive [2004/18] taking into account, where appropriate, the provisions of Articles 49 and 50'. In addition, it states that '[t]he [EIB] may lay down minimum capacity levels below which it will not select tenderers or candidates' and that '[t]hese minimum levels shall be indicated in the contract notice'.

140 Section 2.5.1.2 of the Guide, concerning '[a]ward criteria', provides inter alia as follows:

'The purpose of these criteria is to choose between tenderers who have not been disqualified [at the end of the selection procedure] and who otherwise meet the selection criteria set out in the contract notice or in the specifications.

The criteria on which the [EIB] bases the award of contracts are either:

(a) … when the award is made to the tender most economically advantageous (best price-quality ratio) from the point of view of the [EIB], various criteria linked to the subject-mater of the contract in question, for example quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion;

…

In the case referred to in (a) above, the [EIB] specifies in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. …'

141 The provisions of the Guide referred to at paragraph 140 above are designed to ensure that the discretion enjoyed by the EIB as to the choice of award criteria is exercised in accordance with the principles of equal treatment and transparency during the stage at which the tenders are evaluated for the purpose of awarding the contract (see, to that effect and by analogy, Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 21 and 22, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 90 to 92). The purpose of those provisions is to enable all reasonably well-informed and normally diligent tenderers to interpret the award criteria in the same way and, as a consequence, to have an equal chance in the formulation of the terms of their tender (see, by analogy, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 42).

142 In addition, those provisions are intended to ensure compliance with the principle of proportionality, which requires that measures adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued, it being understood that, where there is a choice between several appropriate measures, recourse must be had to the least onerous and that the disadvantages caused must not be disproportionate to the aims pursued (*Antwerpse Bouwwerken* v *Commission*, paragraph 62 above, paragraph 57). While section 2.5.1.2 of the Guide does not set out an exhaustive list of the criteria which may be chosen by the contracting authority when awarding the contract to the most economically advantageous tender, and leaves it open to the contracting authority to choose the award criteria which it considers most appropriate, that choice is limited to criteria aimed at identifying the tender which is economically the most advantageous (see, to that effect and by analogy, Case C-532/06 *Lianakis and Others* [2008] ECR I-251, paragraph 29 and the case-law cited; *Renco* v *Council*, paragraph 109 above, paragraph 66; and *Strabag Benelux* v *Council*, paragraph 109 above, paragraphs 73 and 74). Therefore, 'award criteria' do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' ability to perform the contract in question (see, to that effect and by analogy, *Beentjes*, paragraph 141 above, paragraphs 15 to 19; Case C-315/01 *GAT* [2003] ECR I-6379, paragraphs 59 to 67; and *Lianakis and Others*, paragraphs 30 to 32). The quality of tenders must be evaluated 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 criteria, such as

the tenderers' ability to perform the contract, which are applicable at the stage of selecting tenderers and cannot be taken into account for the purpose of the comparative evaluation of the tenders (*Beentjes*, paragraph 141 above, paragraph 15, and *TQ3 Travel Solutions Belgium* v *Commission*, paragraph 100 above, paragraph 86).

143 By the third and fourth pleas, the applicant maintains, in essence, that the 'ability to provide a pool of staff from own resources' award criterion was imprecise, discriminatory and disproportionate to the objective pursued, which was to identify the most economically advantageous tender, so that the choice of such an award criterion was inconsistent with the obligations arising, for the EIB, under the general principles of law applicable to tendering procedures, as set out at section 2.5.1.2 of the Guide.

144 It should be noted that the 'ability to provide a pool of staff from own resources' award criterion was set out at section 7.1.1 of the terms of reference, concerning '[t]echnical criteria', which also stated that '[t]he tenderer's ability to provide a pool of staff with the required competences [would] be assessed on the basis of the information provided in the Table of Staff Profiles and [curricula vitae]'. It is apparent from the list of 'Questions and Answers' that, by means of that technical criterion, 'the [EIB] wish[ed] to ensure that the [successful tenderer] not only [had] a sufficient number of competent and experienced staff to constitute a core team but also [had] an adequate pool of suitably competent and experienced resources at its disposal to respond to additional needs'. In that regard, the EIB stated that 'the table of staff profiles [would] provide an indication of the depth and breadth of competence and experience at the tenderer's disposal which the [EIB] could call upon'. That is consistent with the content of section 4.2 of the terms of reference, which stated that the tenderers were required to describe the staff proposed in the table of staff profiles annexed to the terms of reference and that their proposals in that regard would be evaluated on the basis of the experience and number of staff with the relevant competences. Moreover, the EIB indicated that it would 'examine the table of staff profiles … to assess whether

the tenderer appear[ed] to have a sufficient number of staff with the relevant competences and with adequate experience to cover [its] needs' and that '[that] assessment [would] apply to two of the technical award criteria: level of conformity of the skills and qualifications of the staff proposed and ability to provide a pool of staff from own resources'. Furthermore, the EIB also stated that it had not 'defined an optimal number' as regards the pool of staff to be provided, in particular the staff from own resources to be provided to meet the additional needs of the contracting authority. Lastly, the EIB indicated that 'the phrase "own resources" means staff currently employed by the tenderer … or named subcontractors'.

145 First, there is no basis for the applicant's claim that the 'ability to provide a pool of staff from own resources' award criterion was discriminatory in that it prevented it from using subcontractors for the purpose of meeting all the needs specified by the EIB. It is apparent from the terms of reference and the list of 'Questions and Answers' that use of subcontractors was permitted, on condition that they were clearly identified as such in the tenders and that the tenderers were duly notified that clearly identified subcontractors would be taken into account for the purpose of the application of that award criterion.

146 Next, there is no basis for the applicant's claim that the 'ability to provide a pool of staff from own resources' award criterion was used at the selection stage. It is clear from the terms of reference that, in accordance with the selection criteria set out at section 6.2.2 of the terms of reference, the tenderers were simply required to provide 'three relevant verifiable references of assignments carried out within the last two years in the domain covered by this call for tenders' and '[a] signed declaration that [the tenderers had] at least 15 employees in information technology (not administrative support staff) working for them for at least 2 years'. That selection criterion,

concerning the minimum number of persons necessarily having experience and competences in the field covered by the contract, was different from the award criterion in question, which concerned the tenderer's ability to mobilise sufficient experienced and competent staff to meet any additional needs of the contracting authority.

147 Lastly, as regards the choice itself of the 'ability to provide a pool of staff from own resources' award criterion, it should be noted that neither section 2.5.1.2 of the Guide nor the general principles of law may be interpreted as meaning that each of the award criteria used by the EIB to identify the most economically advantageous tender was necessarily required to be quantitative or solely related to price (see, by analogy, *Renco* v *Council*, paragraph 109 above, paragraphs 67 and 68). Various factors which are not purely quantitative, such as the calibre of the staff employed or, more generally, the technical merit of the tender, may affect the performance of a contract for the provision of services in terms of quality and, as result, the economic value of a tenderer's bid for such a contract (see, to that effect, *Beentjes*, paragraph 141 above, paragraph 18, and Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697, paragraph 30).

148 However, it is apparent from the documents relating to the call for tenders referred to at paragraph 144 above that the 'ability to provide a pool of staff from own resources' award criterion relates in particular to the ability of the staff employed by the tenderer and by his identified subcontractors, as described in the table of staff profiles, to respond to any additional needs identified by the contracting authority, in terms of experience, qualifications and number. It is therefore a criterion which concerns, at least in part, the tenderers' suitability to perform the whole contract, including the ability to provide additional services. To that extent, such a criterion does not have the status of an 'award criterion' within the meaning of section 2.5.1.2 of the Guide, which relates only to the quality of the additional services which each tender is capable of providing from the tenderer's own resources, and, therefore, to the relative economic advantage of each tender as regards such services (see, to that effect and

by analogy, *Lianakis and Others*, paragraph 142 above, paragraph 31; the judgment of 1 July 2008 in Case T-211/07 *AWWW* v *Eurofound*, not published in the ECR, paragraph 60; and the judgment of 10 September 2008 in Case T-465/04 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 65).

149 Furthermore, while the 'ability to provide a pool of staff from own resources' award criterion was intended inter alia to make it possible to determine whether the tenderer had staff with the relevant competences and experience 'in sufficient number' to respond to the EIB's requirements for additional services, it was formulated in a vague and imprecise manner, since, as is apparent from section 4.2 of the terms of reference in particular, no 'optimal number' had been predefined with regard to that staff and the EIB failed to give the tenderers any precise figures in that regard. It is true that section 1.2 of the terms of reference, concerning the '[d]escription of domain' covered by the contract, stated that 10 persons external to the staff of the EIB were employed on project activities relating to the IT application in question and that there were at that time 10 ongoing projects. It also stated that it was anticipated that in the coming years the volume of project work in particular should decrease, so that the figures set out in the terms of reference were to be regarded as maximum figures by potential tenderers. However, it immediately went on to state that it could not be excluded that new lending mandates or specific operations approved by the EIB could lead to new peaks in project work.

150 Since the successful tenderer was also the incumbent service provider responsible for development, maintenance and support and project activities relating to the IT application in question, it was also in the best position, as a result of its experience, to assess what the real needs of the EIB might be in terms of capacity to provide a pool of staff from own resources to respond to any requirements for additional services which the EIB might have in the course of the performance of the contract. It follows

that the lack of precision as regards the 'ability to provide a pool of staff from own resources' award criterion could, in practice, have favoured the incumbent contractor, to the detriment of the other tenderers, in particular the applicant, in breach of the principle of equal treatment, under which tenderers must have equality of opportunity in formulating the terms of their bids.

151 It must therefore be found that the principles of proportionality and equal treatment and section 2.5.1.2 of the Guide, which implements those principles, precluded the EIB, in the tendering procedure at issue, from taking account of the tenderers' ability to provide all the services anticipated in connection with the contract, not for the purpose of the 'selection criterion' but for the purpose of the 'award criterion', and from relying in that regard on an imprecise criterion capable of favouring, in practice, the successful tenderer, who was also the incumbent contractor having previously provided the services in question.

152 In the light of the foregoing considerations, the third and fourth pleas must be upheld.

The sixth plea

— Arguments of the parties

153 The applicant submits that the EIB infringed Article 99 of the Financial Regulation and Article 148(1) and (2) of the Implementing Rules and also acted in breach of the principles of equal treatment, transparency and non-discrimination, as enshrined in Article 89 of the Financial Regulation, read in conjunction with recital 18 in the

preamble thereto, and as enshrined in the case-law, the Commission's practice or legal writing, in that it awarded the contract to the successful tenderer after the latter, following secret contacts with the EIB, substantially altered the terms of its tender, with respect to both price and quality. It is apparent from the note of 31 January 2008 that, following the opening and evaluation of the tenders, the evaluation committee recommended the bid submitted by the successful tenderer. However, after finding that that bid was the most expensive of all the bids submitted, the evaluation committee decided to hold a meeting with the successful tenderer in order to clarify some outstanding points, including the financial aspect of the bid, before proceeding. During that meeting, the successful tenderer substantially altered the terms of its bid in order to reduce the price for the service, while at the same time reducing the quality of the service accordingly. In particular, the successful tenderer promised to reduce the price of its bid by altering, in particular, the staff responsible for the contract in order to arrive at a more balanced composition and, accordingly, providing a smaller number of experienced consultants. It was following those unlawful negotiations that the EIB decided to award the contract to the successful tenderer. It follows that the tender finally selected by the EIB was substantially different from and, what is more important from the aspect of the weighting to be applied to the award criteria specified in the terms of reference, of lower quality than that evaluated by the evaluation committee. However, that lower quality of the 'final tender' submitted by the successful tenderer, by comparison with its 'initial tender', was not taken into account in the comparative evaluation of the tenders made by the evaluation committee.

154 The applicant requests the Court to compare the experience of the staff mentioned in the successful tenderer's bid with that of the staff finally offered by that tenderer and to find that, in the absence of the negotiations illegally held with the EIB and also the manifest errors of assessment that vitiate the contested decision, the contract would have been awarded to the applicant. In any event, the applicant submits that, if the tendering procedure had observed the principle of equal treatment and had been transparent, it would also have been in a position to improve its 'initial tender'

considerably by reference to the award criteria adopted, which would also have enabled it to win the contract.

155 The EIB rejects the applicant's arguments and submits that the sixth plea should be rejected. It observes that neither the Financial Regulation nor the Implementing Rules govern the tendering procedure. Furthermore, the applicant has no interest in raising the present plea. According to the EIB, the discussions with the successful tenderer took place only after the closure of the comparative evaluation of the tenders stage, which placed the successful tenderer's bid in first place, while the applicant's bid was only in second place, and therefore at a time when the successful tenderer had already won the contract. Those contacts should therefore not be considered to have taken place during the contract award procedure, within the meaning of section 2.5.2 of the Guide or even Article 99 of the Financial Regulation, on which the applicant relies. In any event, those contacts did not concern the alteration of the successful tenderer's bid, which was placed first following the comparative evaluation of the tenders, nor did they bring about such a result. They merely related to the modalities of the performance of the contract by the successful tenderer, in accordance with the terms of its bid, or in any event were not capable of altering the classification adopted following the comparative evaluation of the tenders. From a financial point of view, the reduction in the daily rates of the 'senior software developers' and those of 'intermediate software developers', as well as the replacement of certain 'senior software developers' of the core team proposed by 'more junior' staff could not have had the effect of altering the classification of the successful tenderer's bid in relation to that of the bids submitted by the other tenderers, including the applicant, and did not therefore harm them. From a technical point of view, the replacement of certain 'senior software developers' of the principal team proposed by the successful tenderer by members of 'more junior' staff did not give rise to a relative deterioration in the technical merit of the latter's bid, since the staff substituted were mentioned in the table of staff profiles annexed to that bid and the technical merit of the bid was evaluated by taking account not only of the qualifications set out in the curricula vitae of the principal team proposed but also the qualifications of the persons included in the table

of staff profiles in question. The reference to a 'more balanced team composition' did not mean that the principal staff proposed in the successful tenderer's bid to make up the team responsible for performing the contract would be altered but only that that staff would make it possible to compose a 'more balanced' team than the team which that tenderer had put in place for the performance of the preceding contract relating to the IT application in question. Thus, the applicable case-law does not permit the conclusion that the contacts between the EIB and the successful tenderer after the comparative tender evaluation stage affected the validity of the contested decision and the applicant cannot rely in the present case on a breach of the principle of equal treatment or the principle of transparency.

— Findings of the Court

156 There is no basis for the applicant's claim alleging breach of Articles 89 and 99 of the Financial Regulation and of Article 148(1) and (2) of the Implementing Rules, since the tendering procedure and the contested decision are not governed by either the Financial Regulation or, a fortiori, its Implementing Rules (see paragraph 87 above). The sixth plea must therefore be rejected as unfounded, in so far as it is based on such a breach.

157 However, the sixth plea must be examined in so far as it raises a plea alleging breach of the principles of equal treatment, non-discrimination and transparency, which are applicable to tendering procedures and the contested decision on the grounds set out at paragraph 88 above. In view of their significance, objective and effectiveness, those principles must also be observed in the case of a special tendering procedure such as that at issue, while at the same time any special features peculiar to that procedure should be taken into account, where appropriate.

158 Since the present case involves a service contract entered into for its own account, with a total value exclusive of value added tax (VAT) estimated at between EUR 3 500 000 and EUR 7 000 000, the EIB decided, in accordance with the provisions of the Guide, that it was necessary to award the contract by following the open procedure, to publish a contract notice in the Official Journal, to establish the terms of reference, which defined the terms and conditions of the contract, including the award criteria, and to invite all economic operators who had applied to tender on that basis.

159 In those circumstances, the provisions of the Guide and, where appropriate, those of Directive 2004/18 to which the Guide refers, must be regarded as constituting the legal framework within which the tendering procedure was to be conducted and it was for the EIB, in its capacity as contracting authority, strictly to comply with the criteria which it had itself adopted not only during the tendering procedure per se, which is concerned with the comparative evaluation of the tenders and the selection of the contractor, but also, more generally, up to the end of the stage during which the relevant contract was to be performed (see, to that effect, *Commission* v *CAS Succhi di Frutta*, paragraph 89 above, paragraph 115).

160 If the bid of a tenderer who has not been excluded from the tendering procedure and satisfies the selection criteria set out in the contract notice or the terms of reference does not appear, from the contracting authority's point of view, to be the most economically advantageous, in the light of the award criteria set out in the contract notice or the terms of reference, it must be rejected by the contracting authority, although the latter has no authority to alter the general scheme of the contract by changing one of the essential conditions on which it is to be awarded. If, during the tendering procedure, the contracting authority was authorised to amend at will the very conditions of the invitation to tender, where there was no express authorisation to that effect in the relevant provisions, the terms governing the award of the contract, as originally laid down, would be distorted (see *Commission* v *CAS Succhi di Frutta*, paragraph 89 above, paragraph 120). Furthermore, a practice of that kind would inevitably lead to infringement of the principles of transparency and equal treatment as between tenderers, since the uniform application of the conditions of the invitation to tender and

the objectivity of the procedure would no longer be guaranteed (*Commission* v *CAS Succhi di Frutta*, paragraph 89 above, paragraph 121).

161 Moreover, those principles are reflected in section 2.5.2 of the Guide, which states inter alia that: '[d]uring a tendering procedure, the [EIB] does not accept to enter into any discussion with candidates or tenderers that could compromise the objectivity of the procedure or the equal treatment of economic operators' and that, while '[t]he [EIB] may, however, contact candidates or tenderers in writing to obtain clarification on specific points, respectively, on their request to participate or tender', '[s]uch contacts cannot lead to modifications being made to the terms of the requests to participate or tenders'.

162 In the present case, section 1.2 of the terms of reference, relating to the 'description of domain', stated that the IT application at issue was used by approximately 600 persons, that a team of 10 persons external to the EIB staff was employed to handle maintenance or support and project activities (4 persons being dedicated to maintenance and 6 to projects) and that there were approximately 10 ongoing projects. It also stated that four internal EIB staff members played a supervisory or project management role but were also increasingly involved in technical activities, such as architectural discussions. It was also planned to put in place code review procedures in the near future. Finally, it was anticipated that in the coming years the volume of project work would decrease, so that the figures referred to by the EIB were to be regarded as maximum figures by potential tenderers, even though the possibility could not be ruled out that new lending mandates or specific operations approved by the EIB could lead to new peaks in project work.

163 Section 6.5 of the terms of reference, concerning 'the [s]taff profile', provided that the tenderer was to provide a clear profile of the competences of all available staff by completing the table of staff profiles. In that table, the same staff member was

not to be counted in more than one profile. Furthermore, tenderers were to provide anonymous curricula vitae of 'a core pool of available resources' corresponding to the various profiles identified in the table of staff profiles ('the core team'). The current employer (the relevant member of the tendering organisation in the case of group tenders or subcontracting) of each of the members of the core team was to be indicated on each curriculum vitae. In accordance with the information given at section 1.2 of the terms of reference, the minimum number of curricula vitae required for each of the five profiles identified in the table of staff profiles was as follows: two curricula vitae for 'business analysts', two curricula vitae for 'technical architects', two curricula vitae for 'junior software developers', six curricula vitae for 'intermediate software developers' and two curricula vitae for 'senior software developers'. Moreover, the same curriculum vitae was not to be proposed for more than one profile.

164 Section 6.8 of the terms of reference, concerning the '[c]osts profile', stated inter alia that prices were to be quoted in euros, exclusive of VAT. They were to include all expenses, which would not be reimbursed separately by the EIB. The tenderer was required to complete the table of cost profiles provided in an appendix to the terms of reference. The costs were to be quoted in the form of daily rates for 'continuous services' and 'discrete services'. If the tenderer or service provider intended to charge different rates for 'out of hours work', that is, after 19.00 and before 8.00, and for weekend or holiday work, those rates were also to be clearly indicated in the table. Those rates were also to apply to services provided to deal with any new peaks in project work (see paragraph 162 above).

165 Section 7.1 of the terms of reference, relating to the '[a]ward criteria', stated that the contract would be awarded to the most economically advantageous tender, as determined by the award criteria and the weightings to be applied to them (see paragraph 3

above). As regards the technical criteria, section 7.1.1 of the terms of reference stated that 'the level of conformity of the skills and qualification of the staff proposed' and the 'ability to provide a pool of staff from own resources', that is, two criteria which together represented 60 % of the total score, would be evaluated and ranked on the basis of the completed table of staff profiles and the core team proposed, in the form of curricula vitae, by the tenderers, in accordance with section 6.5 of the terms of reference. That point was confirmed to the tenderers in the list of 'Questions and Answers'. As regards the financial criterion, section 7.1.2 of the terms of reference indicated that the cost profiles for each tenderer would be evaluated and ranked on the basis of a weighted average daily rate, calculated for each tenderer. The sub-weighting, which took into account the profiles of the persons most likely to be deployed for the implementation of the contract, was set out in the table of cost profiles. Finally, sections 7.1.1 and 7.1.2 of the terms of reference provided that the EIB could invite tenderers for interview but that, in any event, tenderers would not be permitted to modify the terms of their written tender once it had been submitted.

166 From the technical point of view, in the table of staff profiles it was necessary to specify, for each of the five profiles, in general and for each of the competences associated with each profile, the number of staff available, distinguishing among those 'the members of staff with total experience of less than 3 years', 'the members of staff with total experience of more than 3 years' and 'the members of staff with total experience of more than 2 years working for the service provider'.

167 From the financial point of view, in the table of cost profiles it was necessary to state, for each profile and each type of service, an average daily rate. The weighting to be applied to the average daily rate for each type of service was given as follows: 45 % of the points for the cost of 'continuous service', 45 % of the points for the cost of 'discrete service', 5 % of the points for the cost of services provided 'out of hours' and 5 % of the points for the cost of services provided during the 'weekend/holidays'. The weighting to be applied to the average daily rate for each of the profiles, in accordance with

section 7.1.2 of the terms of reference and taking into account the 'profiles most likely to be deployed' on the basis of section 6.5 of the terms of reference, was as follows: 15 % of the points for the 'business analyst' profile, 15 % of the points for the 'technical architect' profile, 15 % of the points for the 'junior software developer' profile, 40 % of the points for the 'intermediate software developer' profile and 15 % of the points for 'senior software developer' profile.

168 In the present case, it is apparent from the note of 31 January 2008 and the explanations provided by the EIB in its letter of 15 December 2009 that, after the comparative evaluation of the tenders stage, the EIB was concerned by the fact that the successful tenderer's bid, ranked in first place, was the costliest and that, as a consequence, it decided to organise a meeting with the successful tenderer to clarify with it the outstanding points, in particular the financial aspects of its bid, before proceeding. Moreover, it is apparent from the note of 31 January 2008 that that meeting took place on 29 January 2008 and that during that meeting the successful tenderer told the contracting authority that it could aim for 'a more balanced team composition' (at that time composed almost entirely of senior consultants) and reduce the daily rate of the staff corresponding to the profile of 'senior software developer' from EUR 750 to EUR 720 and the daily rate of the staff corresponding to the profile of 'intermediate software developer' from EUR 665 to EUR 650. It is only following that meeting and taking account of the proposals thus put forward by the successful tenderer that, on 31 January 2008, the Director of the EIB's Information and Technology Department, acting on the favourable opinion of the evaluation committee, decided to award the contract to the successful tenderer, a decision that was subsequently confirmed by the President of the EIB (see paragraphs 20 and 43 above). On 12 and 17 June 2008, the contract was signed by the successful tenderer and the EIB respectively (see paragraph 8 above). In accordance with section 2.4.1 of the Guide, relating to '[p]ublication of notices', which provides that the date of closure of the procedure is the date on which the contract is signed, the tendering procedure closed on 17 June 2008, namely the date on which the framework agreement was signed. It follows that there

is no basis for the EIB's claim that, on 29 January 2008, the contract had already been awarded to the successful tenderer and that the tendering procedure had already closed when the meeting took place.

169 Moreover, it is apparent from the documents produced by the EIB that, following the comparative evaluation of the tenders, the EIB was not totally satisfied with the outcome of the weightings applied to the award criteria, namely 75 % of the points for the technical criteria and 25 % for the financial criterion, as a result of which it had been possible to select a bid for a service offering great technical merit but at an overall price higher than that of the other bids, which is why it decided in particular to organise the meeting of 29 January 2008. It is also apparent from those documents that that meeting enabled the successful tenderer to address the concerns as to the overall price of its bid expressed by the contracting authority and that that meeting was thus decisive for the purpose of the award of the contract. At the meeting, the successful tenderer agreed to lower the overall price of its bid by reducing the daily rate for the staff corresponding to the profiles of 'senior software developer' and 'intermediate software developer', as identified in the table of staff profiles, and by proposing 'a more balanced team composition (currently almost entirely composed of senior consultants)'. From that perspective, the statement that, after the meeting of 29 January 2008, the committee members maintained their recommendation to award the contract to the successful tenderer, set out in the note of 31 January 2008, cannot be regarded as evidence of a new comparative evaluation of the tenders but as the simple repetition by the evaluation committee of its earlier opinion, in view of the fact that the successful tenderer had met the financial concerns expressed by the appointing authority.

170 The reduction in the daily rates set out in the table of cost profiles which the successful tenderer completed and annexed to its bid amounts to an a posteriori change in the terms on the basis of which the successful tenderer's bid had been evaluated from a financial point of view by the evaluation committee.

171 As regards the argument that the successful tenderer would ensure 'a more balanced composition of the team (currently almost entirely composed of senior consultants)', the EIB itself explained, in its observations of 26 February 2010, that that related to the fact that 'during the meeting (of 29 January 2008) [the successful tenderer] proposed to replace some of these consultants (senior software developers) by more junior staff'. In the context of the case, in which the EIB was seeking, in practice, to obtain from the successful tenderer a reduction in the overall cost of its bid, in order to bring it closer to that proposed by the other tenderers in their bids, the only credible explanation for such an argument is that the successful tenderer was in actual fact going to replace some of the 'senior software developers' of the core team proposed with more junior staff members. Since the overall price for the service was directly dependent on the weighted average daily rate of the core team, defined as the team most likely to be deployed if the tenderer was awarded the contract, that price could in fact be lowered by altering the composition of the core team proposed in the tender, replacing the staff who were the most expensive, because the most highly qualified, namely 'senior consultants' corresponding to the profile of 'senior software developer', with staff who were less costly, because less qualified, namely 'more junior consultants', who could correspond to the profile of 'intermediate software developer', and 'junior software developer', as is apparent from the EIB's observations of 26 February 2006.

172 The EIB has not put forward any evidence to show that, in spite of the provisions adopted at the meeting of 29 January 2008, the persons actually deployed by the successful tenderer for the implementation of the contract corresponded to those making up the core team proposed, in the form of curricula vitae, in its tender and on the basis of which that tender was evaluated from a technical and financial perspective by the evaluation committee. Furthermore, in its observations of 26 February 2010, the EIB does not claim that the composition of the core team proposed, in the form of curricula vitae, in the successful tenderer's bid was not altered following the meeting of 29 January 2008 but simply that that alteration could not be regarded as a real

alteration of the bid, in so far as the 'more junior staff' substituted for 'senior consultants' of the core team were already included in the table of staff profiles which the successful tenderer had completed and annexed to the bid. However, in so far as the comparative evaluation of the tenders from the technical point of view was based in particular on whether the persons making up the core team proposed by the tenderer were qualified, as evidenced by the curricula vitae of those persons annexed to the tenders, the composition of a more balanced core team, obtained by replacing certain 'senior software developers' with 'more junior' staff members, albeit through the inclusion of persons already mentioned in the table of staff profiles which the successful tenderer had annexed to his bid, could only result in an a posteriori alteration of the terms on the basis of which that bid was evaluated by the evaluation committee, both from a technical and financial point of view.

173 Moreover, it appears that the EIB seeks to justify the proposal made by the successful tenderer at the meeting of 29 January 2008 by the fact that, as stated in the terms of reference, it may not be necessary for the team actually deployed in the implementation of the contract to be as qualified as the team which, until then, had been responsible for the maintenance, support and development of the IT application at issue (see paragraph 162 above) and had served as a reference for the purpose of defining, in the terms of reference, the composition of the core team on the basis of which, inter alia, the tenderers' bids were to be evaluated from both the technical and financial point of view (see paragraph 163 above). Even if the contract could have been satisfactorily implemented by the successful tenderer using less qualified staff than those which until then had been responsible for that application, that does not, in any event, suffice to justify the successful tenderer's altering the composition of the core team which it had put forward in its bid as the one which could be deployed if it was awarded the contract, in order to lower the overall price of the bid and thereby meet a new requirement formulated by the contracting authority for the purpose of awarding

the contract. That amounted to an a posteriori alteration of the terms on the basis of which the successful tenderer's bid had been evaluated by the evolution committee from both a technical and financial point of view, without the unsuccessful tenderers, including the applicant, being given the same opportunity to alter their bids.

174 It is clear from the foregoing considerations that, in the present case, there is no basis for the EIB's claim that the sole purpose of the meeting held on 29 January 2008 was to discuss certain terms of performance of the contract with the successful tenderer and not to alter the content of its bid in order to award it the contract.

175 It is also apparent from those considerations that those alterations distorted not only the financial evaluation of the successful tenderer's bid but also its technical evaluation. Furthermore, the contact between the EIB and the successful tenderer led, in actual fact, to the alteration of the weighting applied to the award criteria. Those negotiations and their outcome, namely the alteration of the successful tenderer's bid, were the result of the fact that, in practice, the EIB accorded greater relative importance to the financial criterion than it accorded to the technical criteria, as defined in the tendering documents on the basis of which the bids had not only been prepared by the tenderers but also compared by the evaluation committee. There can be little doubt that the increased relative importance ultimately accorded by the EIB to the financial criterion, for the purpose of awarding the contract to the successful tenderer, would have been more favourable to the applicant if it had also been applied to it during the comparative evaluation of the tenders, since its tender was the one which proposed the lowest price and thus obtained the highest score for the financial criterion.

176 However, the EIB is of the view that those alterations did not distort the comparative evaluation of the tenders in such a way as to affect the rights of the tenderers who were rejected at the end of the evaluation.

177 Even if, as the EIB implicitly claims by referring, inter alia, to the judgment in Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 59, annulment of a decision to award a public contract adopted at the end of a procedure distorted as a result of the fact that the successful tenderer was authorised to alter the terms of its bid is subject to a finding by the Court that the taking into account of that alteration placed the other tenderers at a disadvantage by changing the conditions under which the tenders were compared, thus potentially affecting the ranking of the tenderers, the Court finds that such an effect can indeed be established in the circumstances of the present case.

178 It is true that, from the financial point of view, the contested alterations could not have had the effect of further improving the evaluation of the successful tenderer's bid by comparison with those of the other tenderers, in particular the applicant. However, it is incorrect to claim that, from the technical point of view, the replacement of certain 'senior software developers' of the core team proposed by the successful tenderer by 'more junior' staff members did not have the effect of altering the evaluation of the successful tenderer's bid. It is apparent from the information on the file, in particular the list of 'Questions and Answers', that 'the [EIB] wish[ed] to ensure that the [successful tenderer] not only [had] a sufficient number of competent and experienced staff to constitute a core team but also [had] an adequate pool of suitably competent and experienced resources at its disposal to respond to additional needs'. In that context, 'the [curricula vita] [were] expected to correspond to the tenderer's proposed core team while the table of staff profiles [would] provide an indication of the depth and breadth of competence and experience at the tenderer's disposal which the [EIB] could call upon'. Thus, while the curricula vitae were intended to enable the EIB to assess the qualifications of the core team proposed by the tenderer, namely the persons corresponding to the profiles which, according to section 7.1.2 of the terms of reference, were most likely to be deployed in the implementation of the contract (see paragraph 165 above), the table of staff profiles were meant to enable the EIB to assess whether the staff at the tenderer's disposal on which it could rely to meet any additional needs were generally qualified. In those circumstances, the replacement of

certain 'senior software developers' of the core team proposed by the successful tenderer in its bid, whose curricula vitae had been taken into account for the purpose of verifying whether the team was technically qualified, by 'more junior' staff members, who were necessarily less qualified, can only have had the effect of downgrading the overall technical merit of that bid by comparison with that of the bids of the other tenderers, in particular the applicant's.

179 In view of the weightings to be applied to the award criteria, namely 25 % for the financial criterion and 75 % for the technical criteria, and the fact that 60 % of the comparative evaluation of the tenders was itself based on the analysis of the curricula vitae and the table of staff profiles put forward by the tenderers (see paragraph 165 above), it may be considered that the improvement in the financial evaluation of the successful tenderer's bid — liable to result from the reduction of the overall price of that bid — was unlikely to compensate for the downgrading of the technical evaluation of that bid, liable to result from the replacement of certain 'senior software developers' of the core team proposed in the bid by 'more junior' staff members. It follows that the a posteriori alterations to the successful tenderer's bid could only have had an unfavourable overall effect on the evaluation of that bid in the event of a new comparative evaluation of the tenders.

180 In any event, at the stage at which the contract was awarded to the successful tenderer, the EIB in fact altered the weightings applied to the technical criteria and the financial criterion, as defined in the official tendering documents, in order to accord greater importance to the financial criterion (see paragraph 175 above).

181 In the present case, the Court does not have before it any evidence enabling it to conclude, or to rule out the possibility, with any certainty, that the alterations to the successful tenderer's bid and the weightings applied to the technical criteria and the financial criterion, following the meeting of 29 January 2008 and after the adoption of

the contested decision, were capable of distorting the comparative evaluation of the tenders to the detriment of the unsuccessful tenderers, in particular the applicant, in such a way that the outcome of the tendering procedure was affected by it. As the EIB was best placed to provide evidence in that regard, such uncertainty must be construed against it (see, to that effect and by analogy, Joined Cases 169/83 and 136/84 *Leussink* v *Commission* [1986] ECR 2801, paragraph 17). The applicant's argument that the alterations referred to above are capable of having distorted the outcome of the tendering procedure, in such a way that they unlawfully deprived it of a real chance of being awarded the contract, must therefore be accepted.

182 It follows from the foregoing that, by requiring the successful tenderer to alter its bid at the meeting of 29 January 2008, the EIB vitiated the contested decision, adopted on 31 January 2008 in the light of that alteration, by infringing the principles of equal treatment, non-discrimination and transparency, which is capable of having distorted the outcome of the tendering procedure by unlawfully depriving the applicant of a real chance of being awarded the contract.

183 In the light of the foregoing considerations, the sixth plea must be upheld.

The fifth plea

— Arguments of the parties

184 The applicant submits that the EIB acted in breach of the law applicable to tendering procedures and the principle of equal treatment by adopting the contested decision on the basis of the weightings applied to the award criteria, namely 75 % of the

points for the technical criteria and 25% of the points for the financial criterion. In accordance with the principles of sound financial management, as reflected in Article 36 of Directive 92/50, Article 34 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), Article 138(3) of the Implementing Rules and in the case-law, where a contract is to be awarded to the most economically advantageous tender, the contracting authority should set the weightings to be applied to the award criteria by ensuring that the 'price effect' is not neutralised or minimised in such a way that the tendering procedure might lead to the award of a public contract that is unreasonably costly in relation to the actual needs of the administration.

185 The applicant submits that in virtually all procurement procedures launched by the Community administration for its own account over the last 15 years, the comparative evaluation of the tenders has been carried out by attributing, as regards the weightings to be applied to the award criteria, 50%, or almost 50%, of the points to the financial criterion when the procedure did not involve tenderers being classified solely on the basis of price. That practice corresponds to the principle of sound financial management, whereby the evaluation committee allocates, first, a certain number of points to each tender on the basis of its technical merit, then divides that number of points by the tender price, the tenderer having the highest score being awarded the contract. In that context, quality is guaranteed by the selection criteria and the use of thresholds associated with the technical criteria during the award stage. Conversely, the weightings applied to the award criteria in the present case, namely 75% of the points for the technical criteria and only 25% of the points for the financial criterion, are the result of poor financial management, which leads to the 'price effect' being neutralised or minimised in a tendering procedure which is none the less supposed to identify the 'most economically advantageous' tender and may lead to the acquisition of unreasonably costly services by the administration because tenderers are encouraged to develop to an excessive degree the technical quality of their tenders with the sole aim of obtaining the best possible score and ultimately being awarded the

contract. Those unusual weightings, by reference to the practice of the Community administration, also constitute indirect discrimination in so far as they place small and medium-sized undertakings at a clear disadvantage by comparison with tenderers which have the capacity to propose tenders with a much greater technical merit than is actually required by the public contract in question. They are therefore contrary to the principle of equal treatment of tenderers.

186 Lastly, the applicant is of the view that the EIB cannot validly claim that its tender was 'the worst', since it relies for that purpose on the results of an evaluation which is itself unlawful and lacking in objectivity. The applicant submits in that regard that the present complaint should be read in conjunction with the complaint alleging that the EIB confused the criteria.

187 In the reply, the applicant claims that the neutralisation of the 'price effect' of the tenders, resulting from the weightings applied to the award criteria in the present case, is contrary to Article 138(3) of the Implementing Rules, which provides that '[t]he weighting applied to price in relation to the other criteria must not result in the neutralisation of price in the choice of contractor'.

188 The EIB submits that the fifth plea must be rejected. It argues that, according to case-law, the contracting authorities are free not only to choose the criteria for awarding the contract, but also to determine the weighting to be applied to such criteria. Moreover, section 2.5.1.2 of the Guide clearly states that, when the tendering procedure is subject to the most economically advantageous criterion, which is based on the price/quality ratio, the technical criteria may be weighted more highly than the financial criterion. By way of comparison, Article 97 of the Financial Regulation and Article 138 of the Implementing Rules also guarantee the contracting authorities the necessary flexibility to adapt the weightings to be applied to the award criteria to the subject of the contract, and Article 241 of the Implementing Rules provides that the Community administration may allocate weightings representing 80% of the points to the technical criteria and 20% of the points to the financial criterion for service

contracts awarded in the context of external actions. In the present case, the technical merit of the tenders and the competence of the tenderers were essential factors for the EIB, since the IT application in question was intended to support the lending activities which are its core business.

189 The EIB submits that the weightings applied to the award criteria were not uncommon for contracts of the same type awarded by the EIB or even the institutions, and also for quality norms applied by the EIB's IT department for "intellectual' services in support of the EIB's Information Systems'.

190 As for the applicant's assertion that the weightings applied to the award criteria in the present case placed it at a disadvantage by neutralising the 'price effect' in the tendering procedure, the EIB submits that the applicant could not reasonably expect to be awarded the contract solely because it had proposed the lowest price. Even if the weightings applied had been those indicated by the applicant, namely 50% of the points awarded for the technical criteria and 50% of the points for the financial criterion, the applicant's tender would not have been accepted, since the score obtained by its tender for the technical criteria was much lower than that obtained by the successful tenderer's bid for those criteria. As regards banking experience, the successful tenderer's bid was very complete, as evidenced by the curricula vitae of most of the persons whom it proposed, whereas only one of the analysts proposed by the applicant had the necessary competence in banking. Nor can the applicant validly claim that the weightings applied neutralised the 'price effect' in the tendering procedure, since, in spite of a technical merit considered to be the worst of the five tenders not eliminated for technical reasons by the evaluation committee and scarcely better than

the two tenders eliminated following the technical evaluation, the applicant's tender obtained the second best score overall on account of the score obtained for the financial criterion, since it had proposed the lowest price.

— Findings of the Court

191 It should be noted that the contested decision is not based on the weightings to be applied to the award criteria initially selected (see paragraph 3 above), since the EIB departed from those weightings by requiring the successful tenderer to lower the overall price of its bid before awarding it the contract (see paragraph 175 above). However, since, to the extent that it rejected the bids of the other tenderers allowed to participate in the comparative evaluation of the tenders, including that of the applicant, the contested decision is based on the application of those weightings of the award criteria, the applicant retains an interest in seeking review of the lawfulness of those weightings, as a collateral issue, irrespective of any breach of the principle of equal treatment and non-discrimination established in the examination of the sixth plea, because the weightings applied to the award criteria were altered during the tendering procedure (see paragraph 182 above).

192 According to established case-law, in choosing the most economically advantageous tender, the contracting authorities are free not only to choose the elements for awarding the contract but also to determine the weighting of such elements, provided that the weighting enables an overall evaluation to be made of the elements applied in order to identify the most economically advantageous tender (see, to that effect, Case C-234/03 *Contse and Others* [2005] ECR I-9315, paragraph 68 and the case-law cited, and *Strabag Benelux* v *Council*, paragraph 109 above, paragraph 77). Moreover,

in accordance with the principle of equal treatment and non-discrimination, the weightings applied to the various criteria or sub-criteria must not have been adopted on the basis of matters likely to give rise to discrimination against one of the tenderers (see, to that effect, Case C-331/04 *ATI EAC e Viaggi di Maio and Others* [2005] ECR I-10109, paragraph 32, and *Lianakis and Others*, paragraph 142 above, paragraphs 42 and 43)..

193 It is apparent from the introduction to the Guide that 'the [EIB] considers that, as a general rule, [the fundamental EU] principles [regarding public procurement] can be best implemented by competition among qualified tenderers and by a selection based both on cost and quality considerations'. Furthermore, section 2.1 of the Guide refers to the EIB's 'overriding concern for best value for money' in awarding contracts for its own account. Section 2.5.1.2 of the Guide, relating to '[a]ward criteria', states in that regard that 'the tender most economically advantageous … from the point of view of the [EIB]' is, as a general rule, the tender offering the 'best price-quality ratio' in the light of 'various criteria linked to the subject-matter of the contract in question …'.

194 Save in exceptional circumstances, for which the EIB must give reasons, in order to ensure that the best 'value for money' or 'price-quality' ratio is achieved at the conclusion of the overall evaluation of the criteria chosen for the purpose of identifying the economically most advantageous tender, the weighting applied to the financial criterion must not result in the neutralisation of that criterion in choosing the successful tenderer.

195 On the face of it, the weightings applied to the award criteria in the present case, namely 75% of the points for the technical criteria and 25% of the points for the financial criterion, could be regarded as having been lawfully established by the EIB, in so far as, first, they reflect the EIB's own assessment that, in view of the nature and subject-matter of the contract, which related to an IT application supporting the

lending activities that are its core business, the price, while not insignificant, was of secondary importance vis-à-vis technical merit and, second, those weightings were applied in the same way and transparently to all the tenderers.

196 However, as is apparent from the facts of the case, the EIB ultimately found, in the light of the outcome of the comparative evaluation of the tenders, that the weighting initially chosen to be applied to the financial criterion resulted in too great a neutralisation of that criterion in the choice of the contractor and that it was therefore necessary to reassess the importance of the price criterion for the purpose of awarding the contract to the successful tenderer, which is what happened in the course of the negotiations with that tenderer at the meeting of 29 January 2008 (see paragraph 175 above).

197 It follows that, in so far as it rejected the bids of the other tenderers allowed to participate in the comparative evaluation of the tenders, including that of the applicant, the contested decision is based on weightings applied to the award criteria which, according to the EIB's assessment of the weightings at the time it adopted the decision, resulted in too great a neutralisation of the financial criterion and, therefore, did not make it possible to ensure that the best 'value for money' or 'quality-price' ratio was achieved at the conclusion of the overall evaluation of the criteria chosen for the purpose of identifying the most economically advantageous tender.

198 Moreover, it is clear from the foregoing, as from the examination of the sixth plea, that the EIB acted in breach of the principle of equal treatment and non-discrimination by altering the weightings applied to the award criteria during the tendering procedure.

199 In the light of the foregoing considerations, the fifth plea must be upheld.

200 It follows from all the above considerations that the six pleas relied on in support of the application for annulment are all well founded and, to that extent, the application must be granted and the contested decision annulled.

The claim for damages

Arguments of the parties

201 The applicant claims that, should the Court find that the contested decision was adopted in breach of the law applicable to tendering procedures and/or the principles of transparency and equal treatment, and given that the Court will in all likelihood adjudicate on the present case after the contract has been fully performed by the successful tenderer, in accordance with the contested decision, it should order the EIB, on the basis of Articles 235 EC and 288 EC, to pay the applicant compensation of EUR 1 940 000.

202 The applicant is of the view that its claim for damages must be granted for the following reasons.

203 First of all, the applicant submits that it relied, in accordance with consistent case-law, on a sufficiently serious breach of a superior rule of law for the protection of the individual or of a rule of law intended to confer rights on individuals such as to give rise to liability on the part of the Community, or in this case the EIB. That breach was committed by the EIB, in its capacity as contracting authority, and results from the 'illegality' of the contested decision and of the evaluation on which it is based, as invoked in

its application, namely infringement of the law applicable to tendering procedures, breach of the principles of transparency and equal treatment, breach of the provisions of the Guide, the late communication of information, an insufficient statement of reasons for the contested decision, the use of discriminatory criteria, confusion of the award criteria and the selection criteria and, last, an unlawful weighting of the technical criteria and the financial criterion at the stage of the award of the contract.

204 In addition, the applicant claims that it relied on harm resulting from the contested decision corresponding to the gross profit of which it was unjustly deprived because the contract was unlawfully awarded to the successful tenderer rather than to the applicant. If the Court should consider that the applicant's tender ought to have been placed first following the comparative tender evaluation stage, such harm should be imputed to the EIB for the purposes of penalising it for the illegal acts committed during the tendering procedure or, as the applicant stated at the hearing in response to a question put by the Court, in order to require the EIB to contribute to the fixed costs and economic risks incurred by the applicant in connection with its activities in the area of public procurement. On the other hand, the applicant makes it clear that it does not seek compensation for the expenditure incurred for the purposes of its participation in the tendering procedure.

205 Lastly, the applicant claims that it has quantified its loss. That loss amounts to the sum of EUR 1 940 000. As regards the latter sum, account must be taken of the fact that its gross profit for this type of service would be approximately 50 % of the price received, as evidenced by the financial statements which were approved by the Commission in the context of research and development projects financed by the Commission. In so far as, in the terms of reference, the EIB requested the services of 10 experts in all (4 for maintenance and 6 for service projects) and the 'average daily cost' of its tender came to EUR 441, the price corresponding to that tender can be calculated as follows: EUR 441 multiplied by 220 person-days per year multiplied by 10

persons per year multiplied by 4 years, namely approximately EUR 3.88 million. That price is consistent with the budget announced for the contract, which was between EUR 3.5 and 7 million. The gross profit not received therefore corresponds to 50 % of EUR 3.88 million, or EUR 1.94 million.

206 The EIB contends, by way of alternative plea, that the claim for damages is unfounded. According to the case-law, when one of the conditions of non-contractual liability is not satisfied, the action must be dismissed in its entirety without there being any need to examine the other conditions. In the present case, it is therefore sufficient to find that the EIB committed no irregularity or illegality capable of incurring the non-contractual liability of the Community in the tendering procedure. Nor can the applicant validly claim compensation for a loss corresponding to the gross profit which it would have received if the contract had been awarded to it. The alleged loss of profits is future and hypothetical since, even if the contract had not been awarded to the successful tenderer on the basis of the contested decision and the impugned evaluation, the applicant could not be certain that the contract would have been awarded to it. Although the Court may annul the decision awarding a contract, it can never order the administration to award the contract to a particular tenderer. Therefore, in accordance with the case-law, such loss cannot be taken into account.

Findings of the Court

207 According to established case-law, non-contractual liability on the part of the Community is incurred under the second paragraph 228 EC if a set of conditions as regards the unlawfulness of the conduct alleged against the institution is fulfilled, namely the fact of damage and the existence of a causal link between the conduct in question and the damage complained of. It follows that the Community's liability may be

incurred only if all those conditions are satisfied (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30).

208 In this case, it is appropriate to start by examining whether the condition relating to the existence of a causal link between the EIB's unlawful conduct and the loss alleged by the applicants is satisfied.

209 As regards the condition relating to the existence of a causal link between the conduct alleged and the loss pleaded, it is settled case-law that the alleged loss must be a sufficiently direct consequence of the conduct complained of and such a causal link must be the determining cause of the loss (see, to that effect, Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others* v *Council* [1979] ECR 3091, paragraph 21, and Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 55). The burden of proof of such a casual link rests on the applicants (see Joined Cases C-363/88 and C-364/88 *Finsider and Others* v *Commission* [1992] ECR I-359, paragraph 25, and Case T-220/96 *EVO* v *Council and Commission* [2002] ECR II-2265, paragraph 41 and the case-law cited).

210 As is apparent from the application (see paragraph 81 above), the applicant alleges loss corresponding to 'its estimated gross profit from the … public procurement procedure, should the contract have been awarded to the applicant'. In its written pleadings, it accepts that the EIB could be ordered to pay damages to it corresponding to gross loss of profit, as calculated in the application, only if the Court was able to find that its tender ought to have been placed first following the comparative tender evaluation stage (see paragraph 204 above). The applicant's claim for damages is therefore based on the belief that the contested decision prevented it from being awarded the contract and signing the framework agreement for the implementation of the contract with the EIB. The purpose of such a claim must be interpreted as being not compensation for the loss of the opportunity to conclude the contract, but compensation for the loss of the contract itself. That is not called into question by the fact that, at the hearing, in response to a question put by the Court, the applicant stated that the

claim for damages included, in a certain way, a loss of opportunity since the fact that this contract had not been signed by it had jeopardised its chances of being awarded other public contracts in the future and, in a general way, of recovering the fixed costs which it incurs in connection with its activities in the area of public procurement. In addition to the fact that those new heads of loss were pleaded out of time and are, accordingly, inadmissible, they are in any event not based on the applicant's loss of opportunity to conclude the contract but on the consequences which, in its view, flowed directly from the loss of the contract itself.

211 In the present case, the applicant has neither proved nor provided to the Court evidence which would enable it to conclude, with any degree of certainty, that its tender ought to have been placed first in the comparative evaluation of the tenders. In any event, even if it were to be accepted that the applicant's tender ought to have been placed first and that the applicant should therefore have been awarded the contract, that would not have obliged the EIB to sign the framework contract with the applicant. Indeed, there is no principle or rule applicable to the EIB's tendering procedures which requires it to sign the relevant contract with the person designated as the contractor at the conclusion of the tendering procedure (see, to that effect and by analogy, *Fracasso and Leitschutz*, paragraph 147 above, paragraphs 24 and 25, and *Embassy Limousines & Services* v *Parliament*, paragraph 125 above, paragraph 54).

212 It is therefore impossible to establish the existence of a causal link between the EIB's adoption of the contested decision, which, as is apparent from the examination of the application for annulment, is unlawful, and the damage alleged by the applicant, which results from the loss of the contract itself. It follows that there is no basis for the applicant's claim for damages to compensate for the loss resulting from the fact that it did not conclude the framework agreement with the EIB or, a fortiori, implement the contract.

213 It follows from the foregoing that the claim for damages must be dismissed in its entirety.

214 That finding is without prejudice to the compensation to which the applicant may be entitled, under Article 266 TFEU, by being restored sufficiently to its original position, following the annulment of the contested decision (see paragraph 67 above).

Costs

215 The applicant explains that it was forced to bring the present proceedings and seek damages for the loss sustained as a result of the EIB's deficient evaluation of its tender and of the fact that it was not informed of the characteristics and the relative advantages of the tender selected by comparison with those of the applicant's tender. The failure to state reasons and the fact that, in spite of its requests, the evaluation report was never communicated to it constitute sufficient reasons for the EIB to be ordered to pay the costs even if the application should be dismissed.

216 The EIB contends that the conditions of Article 87(3), second subparagraph, of the Rules of Procedure are not satisfied in the present case and that Article 87(2) of those rules is thus applicable. The applicant has failed to demonstrate that the EIB unreasonably or vexatiously caused it to incur costs, and the EIB did not in fact do so. Furthermore, it must be taken into account that the EIB responded to the applicant's requests for additional information, in particular by its letter of 1 August 2008 (Case T-169/00 *Esedra* v *Commission* [2002] ECR II-609, paragraph 192). At the time when the applicant lodged its application, it therefore had all the necessary information to defend its rights.

217 The second paragraph of Article 87(3) of the Rules of Procedure provides that the General Court may order a party to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur. In the present case, in view of the fact that the contested decision is vitiated by a failure to state sufficient

reasons, and in order to take account of the numerous unlawful acts committed by the EIB in the tendering procedure leading to the adoption of that decision, forcing the applicant to bring the present action, the EIB must be ordered to pay all the costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls the decision of the European Investment Bank (EIB) not to accept the tender submitted by Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE in the context of call for tenders 2007/S 176-215155 for the provision of services in the form of 'assistance in the maintenance, support and development of the Loans Front Office system (Serapis)' and to award the contract to Sybase BVBA;**

2. **Dismisses the action as to the remainder;**

3. **Orders the EIB to pay the costs.**

Pelikánová Jürimäe Van der Woude

Delivered in open court in Luxembourg on 20 September 2011.

[Signatures]

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