JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

10 December 2009 *

In Case T-195/08,

Antwerpse Bouwwerken NV, established in Antwerp (Belgium), represented initially by J. Verbist and D. de Keuster, and subsequently by J. Verbist, B. van de Walle de Ghelcke and A. Vandervennet, lawyers,

applicant,

v

European Commission, represented by E. Manhaeve, acting as Agent, and by M. Gelders, lawyer,

defendant,

APPLICATION for (i) annulment of the decision of the Commission rejecting the tender submitted by the applicant in a restricted public procurement procedure concerning the construction of a reference materials production hall in the grounds

* Language of the case: Dutch.

of the Institut des matériaux et mesures de référence (Institute for Reference Materials and Measurements) in Geel (Belgium) and awarding the contract to another tenderer and (ii) compensation for the damage purportedly suffered by the applicant by reason of that decision of the Commission,

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras (Rapporteur), President, M. Prek and V.M. Ciucă, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 10 June 2009,

gives the following

Judgment

Legal context

1 Articles 27(1), 89(1), 91(1), 99, 100(2) and 101 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 by Council

Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ 2006 L 390, p. 1) ('the Financial Regulation'), provide:

'*Article 27*

1. Budget appropriations shall be used in accordance with the principle of sound financial management, namely in accordance with the principles of economy, efficiency and effectiveness.…

Article 89

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

Article 91

1. Procurement procedures shall take one of the following forms:

(a) the open procedure;

(b) the restricted procedure;

(c) contests;

(d) the negotiated procedure;

(e) the competitive dialogue.

…

Article 99

While the procurement procedure is under way, all contacts between the contracting authority and candidates or tenderers must satisfy conditions ensuring transparency and equal treatment. They may not lead to amendment of the conditions of the contract or the terms of the original tender.…

Article 100

…

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

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

Article 101

The contracting authority may, before the contract is signed, either abandon the procurement or cancel the award procedure without the candidates or tenderers being entitled to claim any compensation.

The decision must be substantiated and be brought to the attention of the candidates or tenderers.'

2 Articles 122, 138, 139, 148 and 158a of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1), as amended by Commission Regulation (EC, Euratom) No 1261/2005 of 20 July 2005 (OJ 2005 L 201, p. 3), Commission Regulation (EC, Euratom) No 1248/2006 of 7 August 2006 (OJ 2006 L 201, p. 3), and Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 (OJ 2007 L 111, p. 13) ('the Implementing Regulation') provide:

'*Article 122*

Types of procurement procedure

(Article 91 of the Financial Regulation)

1. Contracts shall be awarded by call for tender, using the open, restricted or negotiated procedure after publication of a contract notice or by negotiated procedure without prior publication of a contract notice, where appropriate following a contest.

2. Calls for tenders are open where all interested economic operators may submit a tender ...

Calls for tenders are restricted where all economic operators may ask to take part but only candidates satisfying the selection criteria referred to in Article 135 and

invited simultaneously and in writing by the contracting authorities may submit a tender ...

The selection phase may be repeated for each individual contract, … or may involve drawing up a list of potential candidates under the restricted procedure referred to in Article 128.

…

Article 138

Award arrangements and criteria

(Article 97(2) of the Financial Regulation)

1. Without prejudice to Article 94 of the Financial Regulation, contracts shall be awarded in one of the following two ways:

(a) under the automatic award procedure, in which case the contract is awarded to the tender which, while being in order and satisfying the conditions laid down, quotes the lowest price;

(b) under the best-value-for-money procedure.…

Article 139

Abnormally low tenders

(Article 97(2) of the Financial Regulation)

1. If, for a given contract, tenders appear to be abnormally low, the contracting authority shall, before rejecting such tenders on that ground alone, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements, after due hearing of the parties, taking account of the explanations received. ...

Article 148

Contacts between contracting authorities and tenderers

(Article 99 of the Financial Regulation)

1. Contact between the contracting authority and tenderers during the contract award procedure may take place, by way of exception, under the conditions set out in paragraphs 2 and 3.

…

3. If, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may contact the tenderer, although such contact may not lead to any alteration of the terms of the tender.

…

Article 158a

Standstill period before signature of the contract

(Article 105 of the Financial Regulation)

1. The contracting authority shall not sign the contract or framework contract, covered by Directive 2004/18/EC, with the successful tenderer until 14 calendar days have elapsed.

That period shall run from either of the following dates:

(a) the day after the simultaneous dispatch of the award decisions and decisions to reject;

(b) where the contract or framework contract is awarded pursuant to a negotiated procedure without prior publication of a contract notice, the day after the contract award notice referred to in Article 118 has been published in the *Official Journal of the European Union*.

If necessary, the contracting authority may suspend the signing of the contract for additional examination if this is justified by the requests or comments made by

unsuccessful or aggrieved tenderers or candidates or by any other relevant information received. The requests, comments or information must be received during the period set in the first subparagraph. In the case of suspension all the candidates or tenderers shall be informed within three working days following the suspension decision.Except in the cases provided for in paragraph 2, any contract signed before the expiry of the period set in the first subparagraph shall be null and void.Where the contract or framework contract cannot be awarded to the successful envisaged tenderer, the contracting authority may award it to the following best tenderer.

…'

3 Articles 2 and 28 of 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) provide as follows:

'*Article 2*

Principles of awarding contracts

Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.

Article 28

Use of open, restricted and negotiated procedures and of competitive dialogue

In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award these public contracts by applying the open or restricted procedure. …'

Background to the dispute

4 With a view to the construction of a reference materials production hall in the grounds of the Institut des matériaux et mesures de référence (Institute for Reference Materials and Measurements) (IMMR) in Geel (Belgium), the Commission of the European Communities decided to award a public procurement contract ('the contract'). It opted for a restricted procedure within the meaning of the second subparagraph of Article 122(2) of the Implementing Regulation and, after publication of a contract notice on 31 May 2006, it launched a restricted call for tenders for that construction.

5 The applicant — Antwerpse Bouwwerken NV — took part in that procedure, as did Company C and two other undertakings. They were sent the contract documents, the

administrative annex to which states, at point 25, that the contract is to be awarded to the cheapest tender, and that:

'Failure to state all the prices required in the take-off ["cost estimation summary"] will result in exclusion. That also applies where alterations are made to the [cost estimation summary] in response to comments submitted in good time by the tenderers.'

6 On 21 September 2007, the applicant submitted its tender. The tender price was EUR 10 315 112,32.

7 On 5 November 2007, the Commission Evaluation Committee drafted an initial evaluation report on the tenders submitted. That report states, inter alia, that '[Company C] has given a Unit Price for Item 03.09.15B but omitted to include it in the Global Price. EUR 973,76 should be added, giving a new total of EUR 9 728 946,14'; that '[Company C] also omitted to give a Unit price for Item E.9.26'; that '[n]o omissions were found in the tender of [the applicant]'; that '[Company C] and [other undertakings] all omitted to give prices for some items'; that, for that reason, '[their tenders] have to be considered non-conform'; and that, 'therefore the only conform offer was submitted by [the applicant]'. In view of that conclusion, the Evaluation Committee proposed that the contract be awarded to the applicant.

8 By letter of 27 February 2008, the applicant was informed by the Commission that:

— its tender had been selected for the award of the contract, while, nevertheless, its attention was drawn to the fact that no obligation was thereby placed on the Commission, given that the competent Commission departments may at any time abandon the idea of a procurement contract or cancel the award procedure, without the applicant being entitled to claim any compensation whatsoever;

— the contract could not be signed until after the expiry of a two-week period and the Commission reserved the right to suspend its signing of the contract pending additional examination should this be justified in the light of requests or comments made by the unsuccessful tenderers or of any other relevant information received.

9 In reply to a letter of 3 March 2008 from Company C requesting detailed explanations for the rejection of its tender, the Commission stated by letter of 10 March 2008 that Company C's tender had been rejected because it did not comply with the conditions laid down in the contract documents and in the administrative annex thereto. In that letter, the Commission included an extract from the evaluation report of 5 November 2007 stating, inter alia, that Company C had omitted to quote a price for Item E 9.26 of the cost estimation summary.

10 By letter of 11 March 2008, received by the Commission on the following day, Company C stated that the price for Item E 9.26 of the cost estimation summary — missing from its tender — could clearly be deduced from the price bid for Item E 9.13 in that summary, which was worded identically. Company C also submitted that it would be manifestly unjust, imprudent and contrary to the principle of economy to reject its tender on that ground alone, particularly as the price for Item E 9.26 accounted only for a tiny proportion of the total value of the contract.

11 By letter of 12 March 2008, the Commission informed the applicant that one of the unsuccessful tenderers had provided information which justified suspension of the signing of the contract, in accordance with Article 158a(1) of the Implementing Regulation.

12 By letter of 16 April 2008, the Commission asked Company C to confirm that its tender was to be understood as meaning that the price bid for Item E 9.26 of the cost estimation summary was the same as that for Item E 9.13 of the summary — that is to say, EUR 903,69 — and that, when that price was taken into consideration together with that for Item 03.09.15B, which Company C had mistakenly omitted to include in the calculation of the overall bid price, the overall price was EUR 9 729 849,83.

13 By two letters dated 22 April 2008 and received by the Commission on the same day, Company C confirmed that that understanding of its tender was correct.

14 On 23 April 2008, the Evaluation Committee drew up a new evaluation report on the tenders submitted, in which it states, inter alia, in point 3.2.1.3, that '[Company C] omitted to give a Unit price for Item E 9.26', but that 'in a clarification letter they mentioned that the price could be retrieved from item E 9.13 [(EUR 903,69)] since it is exactly the same item'. The Evaluation Committee adds that, '[b]ased on this clarification … EUR 903,69 should be added to their original offer', and that, '[a]s per the … Commission Legal Service, this event should be considered as a clarification to the offer and not as a modification'. The Evaluation Committee accordingly proposed that the contract be awarded to Company C. In that new evaluation report, the applicant's tender is presented as only the third cheapest tender.

15 By letter of 29 April 2008, received on 5 May 2008, the Commission informed the applicant that, ultimately, its tender had not been selected for award of the contract, on the ground that its bid price 'was higher than that bid by the successful tenderer'.

16 By letter of the same day, the Commission informed Company C that it had been awarded the contract.

17 In reply to a request made by the applicant, the Commission informed it, by letter of 6 May 2008, of the following additional reasons:

'When this voluminous file was first examined, you appeared to be the successful tenderer despite the fact that your price was noticeably higher than that of the successful tenderer. The reason for the initial rejection of that tenderer's tender was that

no price could be found for a certain low-price item. That was also the position in the case of two other tenderers. Consequently, those tenders were initially regarded as non-compliant.

During the standstill period provided for in Article 158a of the [Implementing] Regulation, the other tenderers pointed out that the missing prices were in fact to be found in their tenders. As a consequence, the standstill period was suspended so that an additional examination could be carried out. It emerged from that examination that the prices, initially missing, were in fact stated and that those undertakings had therefore submitted compliant tenders. Accordingly, it was necessary to re-examine all the tenders. Given that one of those undertakings had submitted the cheapest tender, it has been selected as the successful tenderer in this procurement procedure.'

18 By letter of 15 May 2008, received by the applicant on the following day, the Commission sent the applicant a copy of the evaluation reports of 5 November 2007 and 23 April 2008.

Procedure and forms of order sought by the parties

19 By application lodged at the Registry of the Court on 30 May 2008, the applicant brought the present action. By separate document lodged on the same day, the applicant requested that the case be decided under the expedited procedure, pursuant to Article 76a of the Rules of Procedure of the Court; that request was refused by decision of 9 July 2008.

20 By another separate document lodged on 30 May 2008, the applicant also applied for interim relief in accordance with Article 243 EC and Article 104 et seq. of the Rules of Procedure, that action being registered as Case T-195/08 R. By order of the President

of the Court of 15 July 2008 in Case T-195/08 R *Antwerpse Bouwwerken* v *Commission*, not published in the ECR, the application for interim relief was dismissed.

21 Acting upon a report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure, asked the Commission to reply in writing to a question and to produce certain documents. The Commission complied with that request.

22 At the hearing on 10 June 2009, the parties presented oral argument and answered the questions put by the Court.

23 The applicant claims that the Court should:

— annul the decision, contained in the Commission's letter of 29 April 2008 as supplemented by its letter of 6 May 2008, rejecting the tender submitted by the applicant, and the Commission's decision of 23 April 2008 awarding the contract to Company C, notified to the applicant by letter of the Commission of 15 May 2008;

— declare the Commission to be non-contractually liable for the damage suffered by the applicant, to be quantified at a later date;

— order the Commission to pay the costs.

24 In the reply, the applicant assessed the damage suffered at EUR 619 000 and reserved the right to re-assess the damage in the course of the proceedings.

25 The Commission contends that the Court should:

— dismiss the action as inadmissible or, failing which, as unfounded;

— order the applicant to pay the costs.

The application for annulment

The subject-matter of the dispute

26 By its first head of claim, the applicant seeks annulment of (i) the Commission's decision of 29 April 2008 rejecting its tender and (ii) the Commission's 'decision' of 23 April 2008 awarding the contract to Company C. The applicant was informed of the latter decision by letter of the Commission of 15 May 2008.

27 Nevertheless, it is clear, as was pointed out in paragraph 18 above, that, by letter of 15 May 2008, the Commission merely sent the applicant the evaluation reports of 5 November 2007 and 23 April 2008 and that those reports do not contain any decision on the part of the Commission, but only proposals made by the Evaluation

Committee concerning the award of the contract to the applicant and to Company C, respectively, which are not binding upon the Commission (see, to that effect, Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697, paragraphs 33 and 34, and Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 152).

28 It should also be borne in mind that provisional measures intended to pave the way for the decision awarding a public procurement contract, which is a decision drawn up under an internal procedure involving several stages, cannot themselves be contested in an action for annulment. Such an action can be brought only against the measures which definitively lay down the position of the Commission upon the conclusion of that internal procedure (see, to that effect, Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 10, and Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 28), that is to say, in the present case, the decision rejecting the tender submitted by one tenderer and the decision awarding the contract to another tenderer.

29 It should also be observed that, in response to a request from the Court for a copy of its decision awarding the contract to Company C, the Commission stated that, at the material time, it was not the practice of the competent department to adopt a formal award decision but that, on the basis of the recommendations made in the evaluation report and after seeking a favourable opinion from an internal committee, that department forwarded to the successful tenderer the decision awarding it the contract and notified to the other tenderers the decision rejecting their tenders. At the hearing, the parties confirmed that point, which was recorded in the minutes.

30 In those circumstances, it must be concluded that the applicant's first head of claim is to be understood as seeking the annulment of the Commission's decision of 29 April 2008 awarding the contract to Company C and rejecting the applicant's tender ('the contested decision'). By letters of the same day, both Company C and the applicant were informed of that decision (see paragraphs 15 and 16 above).

Admissibility

Arguments of the parties

31 The Commission points out that the applicant's tender was only the third lowest tender. Consequently, if the Court were to uphold the action, the contract would be awarded to the tenderer ranked second lowest, and not to the applicant. Accordingly, the applicant has no interest in bringing the present action, which should on that ground be dismissed as inadmissible.

32 The applicant maintains that this preliminary plea of inadmissibility must be rejected for the reasons set out in the order in Case T-195/08 R *Antwerpse Bouwwerken* v *Commission*, paragraph 20 above (paragraphs 21 to 25).

Findings of the Court

33 It should be borne in mind that, 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 (Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 44 and the case-law cited). In order for such an interest to be present, the annulment of the contested measure must of itself be capable of having legal consequences (Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 59 and the case-law cited) and the action must be likely, if successful, to procure an advantage for the party who has brought it (see, to that effect, Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 21).

34 It must therefore be determined whether, in the present case, annulment of the contested decision is likely to procure an advantage for the applicant. The Commission contends that that is not the case, since, if the contested decision were to be annulled, the Commission would be entitled to award the contract to the tenderer whose tender was ranked second lowest rather than to the applicant, whose tender was ranked third lowest.

35 While it is indeed true that, if Company C's tender had to be rejected because of failure to comply with the conditions laid down in the contract documents, that would not automatically result in the contract being awarded to the applicant, it is also true that, although the Commission states in the evaluation report of 23 April 2008 that the undertaking ranked second lowest had omitted — just like Company C — to state a price for certain items in the cost estimation summary, the Commission nevertheless, in the light of the explanations provided by that undertaking, treated its tender (EUR 10 140 841,12) as being in compliance with the conditions laid down in the contract documents.

36 By the sole plea in law put forward in support of its application for annulment, the applicant disputes precisely the Commission's conclusion that an undertaking which had omitted to state in its tender the price for certain items in the cost estimation summary may none the less have its tender treated as being in compliance with the conditions laid down in the contract documents, in the light of the explanations provided by that undertaking.

37 It follows that, if Company C's tender were rejected because of the defect relied upon by the applicant, the Commission could be legally prevented from awarding the contract to the undertaking ranked second lowest, whose tender is liable to be vitiated by the same omission as the tender submitted by Company C. Accordingly, the undertaking ranked second lowest cannot be an impediment to the award of the contract to the applicant. As a consequence, the applicant has an interest in bringing proceedings and its application for annulment is admissible.

Substance

Arguments of the parties

38 By its sole plea in law, the applicant alleges infringement of Article 91 of the Financial Regulation, Articles 122, 138 and 148 of the Implementing Regulation and Articles 2 and 28 of Directive 2004/18. The applicant notes that the contract was awarded upon the conclusion of a restricted procurement procedure, as is stated, moreover, in points 2 and 4.2 of the administrative annex to the contract documents. It is also apparent from point 25 of that annex that there was a single award criterion — the price bid by each tenderer — and that all the prices requested in the cost estimation summary must be stated, 'otherwise the tenderer will be excluded'.

39 Furthermore, under a restricted procedure, negotiation between the contracting authority and the tenderers is not possible. Nor may tenderers amend or supplement their tenders after submitting them. Consequently, a tender which does not comply with the conditions laid down in the contract documents must perforce be rejected by the contracting authority. Otherwise, the power to ask for clarification concerning tenders would be in breach of the principle of non-discrimination as between tenderers and the obligation of transparency under Article 2 of Directive 2004/18, which applies in the present case by virtue of the contract documents.

40 Furthermore, in Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 37, the Court of Justice held that the principle of the equal treatment of tenderers requires that all the tenders comply with the terms of the contract documents, so as to ensure an objective comparison of the various tenders submitted. That requirement would not be met if tenderers were permitted to enter reservations in their tenders which allowed them to depart from the 'basic terms'of the contract documents.

41 It is also apparent from the evaluation reports that, contrary to the clear instructions in point 25 of the administrative annex to the contract documents, the cost estimation summary was not completed in full in the tender submitted by Company C, since no price was quoted for Item E 9.26. That is why, in the evaluation report of 5 November 2007, the Evaluation Committee proposed that Company C's tender be rejected as failing to comply. In the evaluation report of 23 April 2008, however, the Evaluation Committee had altered its position, following the intervention on the part of Company C.

42 Such intervention is prohibited under a restricted procedure within the meaning of Article 122(2) of the Implementing Regulation, during which negotiation between the contracting authority and the tenderers is not permissible. Contrary to the opinion delivered by the Commission Legal Service, referred to in point 3.2.1.3 of the evaluation report of 23 April 2008, the letter of 22 April 2008 from Company C cannot be regarded as clarification, since it does not relate to an element which was already included in that undertaking's tender, but seeks rather to supplement that tender by inserting a price which did not appear there. In reality, the Commission allowed Company C to amend the tender which it had submitted, even though such amendment is prohibited under the restricted procedure followed in the present case.

43 Failure to quote a price for an item in the cost estimation summary cannot be regarded as a clerical error for the purposes of Article 148(3) of the Implementing Regulation, even if the missing price can be deduced from the price quoted for another item in that summary. That is confirmed by the fact that, in the evaluation report of 5 November 2007, the Evaluation Committee had already corrected a clerical error in Company C's tender — where it had omitted to take into consideration, for the purposes of calculating the overall price bid, the price quoted for Item 03.09.15 B in the cost estimation summary — and, as a result, the overall price was increased by EUR 973,76.

44 According to the applicant, the fact that Company C was permitted to supplement the tender which it had submitted constitutes a 'procedural error'. The Commission does not have any discretion in that regard and is under a duty to apply the rules of procedure strictly. Established case-law to the effect that the Commission has a broad discretion for the purposes of assessing the tenders submitted in a contract award

procedure is irrelevant in the present case, which concerns a 'procedural error' and not a manifest error of assessment. For the same reason, the principle of proportionality is not applicable in the present case.

45 Even supposing that the Commission had discretion as to whether to take an incomplete cost estimation summary into account, it erred in that it decided to exclude the tenderer concerned and to inform the applicant that it had won the contract, and then changed its position and awarded the contract to that tenderer, following the latter's intervention. Moreover, according to the applicant, that conclusion is unaffected by the fact that, in its letter of 27 February 2008, the Commission reserved the right to suspend signing the contract with the applicant, since, after being told that it would be awarded the contract, the applicant had to take certain necessary action — such as refraining from taking part in other procurement procedures — in order to be ready to commence the construction works under the contract.

46 The applicant further submits that, although it is indeed correct that the wording of Items E 9.13 and E 9.26 in the cost estimation summary was identical, the fact remains that the price quoted by Company C for the second of those items cannot be deduced from the price quoted for the first. The same wording appears in other items in the summary, namely, Items E 9.05, E 9.22, E 9.31, E 9.37 and E 9.43. The applicant quoted different prices for each of those items. Since it was not possible to deduce the price bid by Company C for Item E 9.26, its tender should have been rejected by the Commission as incomplete, in accordance with the initial proposal of the Evaluation Committee.

47 Lastly, the applicant submits that the contested decision fails also to comply with the principle of transparency referred to in Article 2 of Directive 2004/18, since certain passages in the copies of the evaluation reports provided were obscured without objective justification. Consequently, the applicant maintains that, since it was not fully informed, the 'standstill period' provided for in Article 158a of the Implementing Regulation has not yet commenced.

48 The Commission contests the applicant's arguments.

Findings of the Court

49 According to the case-law, the Commission has a broad discretion with regard to the factors to be taken into account for the purposes of deciding to award a contract following an invitation to tender (Case T-169/00 *Esedra* v *Commission* [2002] ECR II-609, paragraph 95, and Joined Cases T-376/05 and T-383/05 *TEA-CEGOS and Others* v *Commission* [2006] ECR II-205, paragraph 50). In that context, the Commission also has a broad discretion in determining both the content and the application of the rules applicable to the award of a contract following a call for tenders (*TEA-CEGOS and Others* v *Commission*, paragraph 51).

50 In addition, although a contracting authority is required to draft the conditions relating to a call for tenders clearly and with precision, it is not required to make advance provision for all the situations, however rare, which could in practice arise (order of 20 April 2007 in Case C-189/06 P *TEA-CEGOS and STG* v *Commission*, not published in the ECR, paragraph 30).

51 A condition laid down in the contract documents must be interpreted in the light of its subject-matter, broad logic and wording (see, to that effect, order in *TEA-CEGOS and STG* v *Commission*, paragraph 50 above, paragraph 46). Where there is doubt, the contracting authority concerned may gauge the applicability of such a condition by conducting an examination of each individual case, taking into account all the relevant factors (see, to that effect, order in *TEA-CEGOS and STG* v *Commission*, paragraph 50 above, paragraph 31).

52 Furthermore, given the broad discretion enjoyed by the Commission, as referred to in paragraph 49 above, review by the Courts must be limited to checking that the

rules governing the procedure and the stating of reasons have been complied with; that the facts are correct; and that there has been no manifest error of assessment or misuse of powers (see *TEA-CEGOS and Others* v *Commission*, paragraph 49 above, paragraph 50 and the case-law cited).

53 In the context of such a review, it is for the Court to determine, inter alia, whether the interpretation attributed by the Commission, as contracting authority, to a condition laid down in the contract documents is correct (see, to that effect, order in *TEA-CEGOS and STG* v *Commission*, paragraph 50 above, paragraph 46).

54 It should also be noted that Article 148(3) of the Implementing Regulation empowers the institutions to contact tenderers in the event that some clarification is required in connection with a tender, or if clerical errors contained in the tender must be corrected. It follows that that provision cannot be interpreted as imposing, in the exceptional, limited circumstances which it identifies, a duty on the institutions to contact tenderers (see, by analogy, Case T-19/95 *Adia interim* v *Commission* [1996] ECR II-321, paragraphs 43 and 44).

55 It can be otherwise only if, by virtue of the general principles of law, that power has evolved into an obligation on the part of the Commission to contact a tenderer (see, to that effect and by analogy, *Adia interim* v *Commission*, paragraph 54 above, paragraph 45).

56 That is the position, inter alia, where a tender has been drafted in ambiguous terms and the circumstances of the case, of which the Commission is aware, suggest that the ambiguity probably has a simple explanation and is capable of being easily resolved. In principle, it would be contrary to the requirements of sound administration for the Commission to reject the tender in such circumstances without exercising its power to seek clarification. It would be contrary to the principle of equal treatment to accept that, in such circumstances, the Commission enjoys an unfettered discretion

(see, to that effect, Case T-211/02 *Tideland Signal* v *Commission* [2002] ECR II-3781, paragraphs 37 and 38).

57 In addition, the principle of proportionality requires that measures adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately 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 (Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 60). That principle requires that, when the contracting authority is faced with an ambiguous tender and a request for clarification of the terms of the tender would be capable of ensuring legal certainty in the same way as the immediate rejection of that tender, the contracting authority must seek clarification from the tenderer concerned rather than opt purely and simply to reject the tender (see, to that effect, *Tideland Signal* v *Commission*, paragraph 56 above, paragraph 43).

58 However, it is also essential, in the interests of legal certainty, that the Commission be able to ascertain precisely what a tender submitted in the course of a procurement procedure means and, in particular, to determine whether the tender complies with the conditions set out in the contract documents. Thus, where a tender is ambiguous and the Commission is not in a position to establish, quickly and efficiently, what it actually means, that institution has no choice but to reject the tender (*Tideland Signal* v *Commission*, paragraph 56 above, paragraph 34).

59 Lastly, it is ultimately for the Court to determine whether a tenderer's replies to requests from the contracting authority for clarification can be regarded as explanations of the terms of the tender or whether those replies go beyond clarification and modify the substantive terms of the tender in relation to the conditions laid down in the contract documents (see to that effect, *Esedra* v *Commission*, paragraph 49 above, paragraph 52).

60 In the present case, it must first be determined whether, in a situation where a tenderer has omitted to quote, in the cost estimation summary accompanying its tender, the price for a particular item, the condition laid down in point 25 of the administrative annex to the contract documents must be interpreted as meaning that rejection of the tender is mandatory, as the applicant essentially submits, or whether, as the Commission submits, the tender cannot be rejected where there is a simple explanation for the clerical omission in question and the missing price can be deduced, easily and with certainty, from the price bid for another item in that summary.

61 In that regard, it should be noted that the condition laid down in point 25 of the administrative annex to the contract documents is intended to provide the contracting authority — in the present case, the Commission — with a detailed explanation regarding the way in which the overall price bid for the contract by each tenderer is broken down into individual prices for the various operations covered by that contract.

62 It must also be held, in the light of the clarifications on that subject provided by the parties at the hearing, that the obligation on each tenderer to quote a price for all the items in the cost estimation summary is intended to enable the Commission easily to verify the precise nature of the overall price bid by each tenderer and to determine whether it is normal, in accordance with Article 139(1) of the Implementing Regulation. Lastly, that obligation is intended to facilitate adaptation of the overall price bid for the contract in the event that additional work proves necessary, after the contract has been awarded, in the course of performance.

63 However, as regards the condition laid down in point 25 of the administrative annex to the contract documents, attainment of the above objectives is in no way affected by the Commission's interpretation of that provision to the effect that a tender is not incomplete and need not be rejected if the missing price for a particular item can be deduced with certainty from the price quoted for another item in the same cost estimation summary or, at the very least, after obtaining clarification of the terms of that tender from the tenderer who submitted it.

64 As the Commission states, in the latter situation, it is not a matter of inserting a new price bid in the cost estimation summary for the item concerned; rather, it is simply a matter of explaining the terms of the tender, in order to make it clear that the price bid for a particular item is to be understood as also having been bid for every other identical or similar item.

65 In such a case, a purely literal and strict interpretation of the condition laid down in point 25 of the administrative annex to the contract documents, as proposed by the applicant, would lead to the rejection of economically advantageous tenders because of clerical errors which are obvious and insignificant, a course of action which — as the Commission rightly points out — cannot, in the long run, be reconciled with the 'principle of economy' referred to in Article 27 of the Financial Regulation.

66 In the light of those considerations, it is necessary, next, to determine whether the Commission was correct in taking the view that the price quoted by Company C for Item E 9.26 of the cost estimation summary could, in the present case, be deduced with certainty from the price quoted by Company C for another item in the cost estimation summary, a view which led the Commission not to reject the tender submitted by that undertaking as failing to comply with the conditions laid down in the contract documents.

67 In that regard, it should be borne in mind that, on being informed of the Commission's decision to award the contract to the applicant, Company C initially asked the Commission, in accordance with Article 100(2) of the Financial Regulation, for details of the grounds on which its tender had been rejected. Once informed of those grounds, Company C, acting in accordance with Article 158a(1) of the Implementing Regulation and within the time-limits laid down in that provision, submitted observations in which it asked the Commission to award it the contract on the ground that the price for Item E 9.26 was not missing from the cost estimation summary accompanying its tender, since that price could easily be deduced from the price bid for Item E 9.13 (see paragraphs 9 and 10 above).

68 It should also be noted that it is apparent from the extracts of the summaries which accompanied the tenders submitted by the applicant and by Company C — produced by the Commission at the request of the Court — that Items E 9.05, E 9.13, E 9.22, E 9.26, E 9.31, E 9.37 and E 9.43 are all worded identically and concern an identical installation, that is to say, a semi-automatic switching centre for gas cylinders.

69 The difference between the seven items referred to above lies, first, in the location of the installation in question, since each item refers to a different site or laboratory. However, at the hearing, the parties stated that the location of that installation was not liable to affect its cost or, in consequence, the price bid for the corresponding item by each tenderer.

70 Secondly, those seven items can also be distinguished according to the type of gas for which the installation in question will be used. Thus, the installations covered by Items E 9.05, E 9.22, E 9.31, E 9.37 and E 9.43 will be used for non-combustible gases. On the other hand, the installations covered by Items E 9.13 and E 9.26 will be used for propane, which is a combustible gas.

71 At the hearing, the Commission stated — without being contradicted by the applicant — that the combustible or non-combustible nature of the gas concerned was liable to affect the cost of the installation in question and, therefore, the price bid for the corresponding item by each tenderer. The Court does indeed find that the extract of the cost estimation summary which accompanied the applicant's tender reveals that it bid the same price (EUR 880,69) for each of Items E 9.05, E 9.22, E 9.31, E 9.37 and E 9.43, which concern non-combustible gases, and a different price (EUR 1 016,92) for both Item E 9.13 and Item E 9.26, which concern a combustible gas.

72 With regard to Company C, it is apparent from the cost estimation summary which accompanied its tender that it also bid the same price (EUR 782,63) for each of Items E 9.05, E 9.22, E 9.31, E 9.37 and E 9.43. In addition, it bid EUR 903,69 for Item E 9.13,

while it quoted no price in the cost estimation summary which accompanied its tender for Item E 9.26.

73 It should also be noted that, both in the applicant's tender and in that of Company C, the price bid for the installation in question, when it is intended to be used for non-combustible gases, represents 86,60% of the price bid for the same installation when it is intended to be used for propane, a combustible gas.

74 It follows that the Commission was right to find that the omission of a price for Item E 9.26 in the cost estimation summary accompanying Company C's tender constituted a simple clerical error in that tender or, at the very least, an ambiguity having a simple explanation and capable of being easily resolved. In the light of the points raised in paragraphs 68 to 73 above, the obvious conclusion is that the missing price for Item E 9.26 of the cost estimation summary for Company C's tender cannot be different from the price bid by that undertaking for Item E 9.13 (EUR 903,69) and that it was a mere oversight that Company C did not state that price for Item E 9.26.

75 In those circumstances, the Commission was entitled, in accordance with Article 148(3) of the Implementing Regulation and without failing to have due regard to the condition laid down in point 25 of the administrative annex to the contract documents, to request clarification from Company C regarding the terms of its tender.

76 It matters little that the request for clarification from Company C was made after it had submitted observations on the rejection of its tender. As the Commission rightly points out, if the Commission were not entitled, following the submission of observations under Article 158a(1) of the Implementing Regulation, to request clarifications

which it considered necessary and, where appropriate, to withdraw its decision awarding the contract and to award it to another tenderer, that provision would be entirely devoid of meaning.

77 After obtaining, in response to its request for clarification from Company C, confirmation from that undertaking that its tender was indeed to be read in such a way that the price bid for Item E 9.26 was the same as that bid for Item E 9.13 (see paragraphs 12 and 13 above), the Commission rightly concluded that the tender complied with the conditions laid down in the contract documents and subsequently awarded the contract to Company C, since its tender was the cheapest.

78 The argument put forward by the applicant is not such as to call that conclusion into question. First, it should be noted that, contrary to the applicant's submissions, the Commission did not commence prohibited negotiations with Company C with a view to amending the tender submitted by that undertaking, but merely exercised its power under Article 148(3) of the Implementing Regulation to request clarification of the terms of that tender.

79 Secondly, with regard to the applicant's argument alleging breach of the principle of equal treatment as between tenderers, set out in both Article 2 of Directive 2004/18 and Article 89(1) of the Financial Regulation, it should be noted that that principle cannot prevent the Commission from exercising its power under Article 148(3) of the Implementing Regulation to ask for clarification concerning tenders, after opening those tenders, since it is stated that the Commission is obliged to treat all tenderers in a similar manner with regard to the exercise of that power (see, to that effect and by analogy, *Tideland Signal* v *Commission*, paragraph 56 above, paragraph 38).

80 In the present case, the Commission acted consistently with the principle of equal treatment of tenderers, since it did not request clarification only from Company C; rather, it requested clarification from all those whose tenders contained, in particular, the same error as that submitted by Company C, that is to say, which omitted to quote prices for certain items in the cost estimation summary accompanying their tenders (see paragraphs 7 and 17 above). The applicant was not asked to provide such clarification because it was unnecessary, since there was no price missing from the cost estimation summary accompanying its tender. Nevertheless, as is apparent from the evaluation report of 23 April 2008, the fact remains that the Evaluation Committee also made certain corrections to the applicant's tender, which led to a slight reduction in the overall price bid.

81 Lastly, it is necessary to reject the applicant's argument, summarised in paragraph 47 above, alleging that certain passages of the copies of the evaluation reports provided were obscured, in breach of the principle of transparency, with the consequence that the standstill period before signature of the contract, provided for in Article 158a(1) of the Implementing Regulation, has not yet commenced.

82 In that regard, it should first be noted that, at the hearing, the applicant was unable to explain the relevance of that standstill period to the present case, it having been established that there is no dispute whatsoever that the action was brought in good time.

83 Next, it should be noted that the applicant's request, to which the Commission responded by sending copies of the evaluation reports, was made after the contested decision was adopted. As a consequence, the question whether or not the Commission's response to that request was complete cannot have any bearing on the lawfulness of the contested decision, which is the only decision to which the application for annulment relates.

84 Lastly, it should be noted, in any event, that the principle of transparency, referred to in both Article 89(1) of the Financial Regulation and Article 2 of Directive 2004/18, must be reconciled with the protection of the public interest, of legitimate business interests of public or private undertakings, and of fair competition: that is the reason for the provision made in the second subparagraph of Article 100(2) of the Financial Regulation, under which it is possible to refuse to disclose certain details to a rejected tenderer, where non-disclosure is necessary to ensure that those requirements are satisfied.

85 It follows from all of the foregoing considerations that the sole plea in law put forward by the applicant in support of its application for annulment is unfounded and that, in consequence, that application must be dismissed.

The application for damages

Arguments of the parties

86 The applicant submits that the Commission unlawfully authorised Company C to amend or supplement its tender after that tender had been submitted, in breach of the provisions relied on in the application for annulment. That breach is sufficiently clear, since the Commission manifestly and gravely misused its discretion to evaluate the tenders and infringed higher-ranking rules of law intended to protect the interests

of individuals, including, inter alia, the principles of non-discrimination and of transparency. Moreover, the damage suffered by the applicant is a direct consequence of the irregularities committed by the Commission. That damage is also imminent and foreseeable with a sufficient degree of certainty.

87 The applicant additionally submits that its application for damages is admissible. According to the applicant, uncertainty as to the extent of the damage suffered does not render inadmissible an action for damages brought on the basis of the second paragraph of Article 288 EC. It is apparent from settled case-law that quantification of the damage is to be reserved if, at the time when the action for damages is held to be well founded, the information needed in order to calculate the amount of the damage is not yet available. It follows, in the submission of the applicant, that the admissibility of an action for damages is not conditional upon the existence, at the time when the action is brought, of a precise calculation of the extent of the damage purportedly suffered.

88 The applicant states that it had attempted to secure the contract by means of an action for interim relief, and that it brought the main proceedings even though the outcome of the action for interim relief was not yet known. For the time being, therefore, it confined itself in the application to claiming that the Commission should be declared liable and reserved the right not to provide an assessment of the amount of the damage suffered until later. According to the applicant, it is also obvious that the purported damage is imminent and sufficiently certain, since it is common ground that its turnover will fall if it does not carry out the contract. Such a fall in turnover indisputably has a negative impact on its profits for the relevant financial year. Furthermore, Belgian legislation applies a flat rate to that damage, setting it at 10% of the value of the contract. The applicant has also produced a report from its company auditor, in which the damage which it has suffered is set at EUR 619 000, and it reserves the right to carry out, if necessary, a re-assessment of the damage. The rights of the defence of the Commission are in no way infringed, since the Commission can always enter, by way of defence, pleas relating to the applicant's assessment of the damage.

89 The Commission contends, principally, that the claim for damages is inadmissible, since the applicant merely claims that the Court should recognise the existence of the purported damage which the applicant has suffered on account of the Commission's conduct, without quantifying that damage. In Case T-461/93 *An Taisce and WWF UK* v *Commission* [1994] ECR II-733, paragraphs 42 and 43, the Court held that such a head of claim was inadmissible.

90 In the alternative, the Commission contends that the claim for damages must be dismissed as unfounded, since none of the three conditions required by the case-law is satisfied in the present case.

Findings of the Court

91 It is settled case-law that, in order for a claim for damages brought under the second paragraph of Article 288 EC to be well founded, a number of conditions must be satisfied: the alleged conduct on the part of the institution must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the purported damage (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44). If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraphs 19 and 81, and Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37).

92 In the present case, it has already been found on examination of the application for annulment that the contested decision is in no way unlawful.

93 Consequently, since the condition relating to the unlawfulness of the conduct of the Commission is not satisfied, the claim for damages must be dismissed as unfounded, without it being necessary to give a ruling as to admissibility.

Costs

94 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the pleadings of the successful party. Since the applicant has been unsuccessful, it must be ordered to pay the costs, including those of the proceedings for interim relief, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders Antwerpse Bouwwerken NV to pay the costs, including those relating to the proceedings for interim relief in Case T-195/08 R.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 10 December 2009.

[Signatures]