JUDGMENT OF THE GENERAL COURT (Second Chamber)

11 May 2010 *

In Case T-121/08,

PC-Ware Information Technologies BV, established in Amsterdam (Netherlands), represented by L. Devillé and B. Maerevoet, lawyers,

applicant,

v

European Commission, represented by E. Manhaeve, acting as Agent, and P. Wytinck, lawyer,

defendant,

* Language of the case: Dutch.

APPLICATION, principally, for annulment of the Commission's decision of 11 January 2008 rejecting the tender submitted by the applicant in public procurement procedure DIGIT/R2/PO/2007/022 and, in the alternative, for compensation for the loss allegedly suffered by the applicant as a result of the Commission's conduct,

THE GENERAL COURT (Second Chamber),

composed of I. Pelikánová, President, K. Jürimäe (Rapporteur) and S. Soldevila Fragoso, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 7 July 2009,

gives the following

Judgment

Legal context

A — *Community legislation*

1 The award of public supply contracts of the European Commission is subject to the provisions of Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the financial regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1, 'the financial regulation') and the provisions of Title V of Part One of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the financial regulation (OJ 2002 L 357, p. 1; 'the implementing rules'), in the versions applicable to the facts of the case.

2 Article 100 of the financial regulation provides:

'1. The authorising officer shall decide to whom the contract is to be awarded, in compliance with the selection and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules.

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.'

3 Article 130(1) and (3) of the implementing rules provides:

'1. The documents relating to the invitation to tender shall include at least:

...

(b) the attached specification ... ;

...

3. The specifications shall at least:

…

(c) set out the technical specifications … ;

… ;'

4 Article 139(1) of the implementing rules states:

'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. These details may relate in particular to compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed.

The contracting authority may, in particular, take into consideration explanations relating to:

(a) the economics of the manufacturing process, of the provision of services or of the construction method;

(b) the technical solutions chosen or the exceptionally favourable conditions available to the tenderer;

(c) the originality of the tender.'

5 Article 146(4) of the implementing rules provides:

'In the case of abnormally low tenders as referred to in Article 139 of this Regulation, the evaluation committee shall request any relevant information concerning the composition of the tender.'

6 Article 149 of the implementing rules provides:

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

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

(3) In the case of contracts awarded by the Community institutions on their own account, with a value equal to or more than the thresholds set in Article 158 and which are not excluded from the scope of Directive 2004/18/EC, the contracting authority shall inform all unsuccessful tenderers or candidates, simultaneously and

individually, by mail, fax or e-mail, that their application or tender has not been accepted, at either of the following stages:

(a) shortly after decisions have been taken on the basis of exclusion and selection criteria and before the award decision, in procurement procedures organised in two separate stages;

(b) as regards the award decisions and decisions to reject offers, as soon as possible after the award decision and within the following week at the latest.

In each case, the contracting authority shall indicate the reasons why the tender or application has not been accepted and the available legal remedies.

The contracting authority shall, at the same time as the unsuccessful candidates or tenderers are informed that their tenders or applications have not been accepted, inform the successful tenderer of the award decision, specifying that the decision notified does not constitute a commitment on the part of the contracting authority.

Unsuccessful tenderers or candidates may request additional information about the reasons for their rejection in writing by mail, fax or email, and all tenderers who have put in an admissible tender may obtain information about the characteristics and relative merits of the tender accepted and the name of the successful tenderer, without prejudice to the second subparagraph of Article 100(2) of the Financial Regulation. The contracting authority shall reply within no more than fifteen calendar days from receipt of the request.'

7 Paragraph 3.3 of the technical specifications relating to call for tenders DIGIT/R2/PO/2007/022, entitled 'Large Account Reseller Microsoft Products (LAR 2007)' and published by the Commission in the Supplement to the *Official Journal of the European Union* (OJ 2007 S 183; 'the call for tenders'), provides:

'By the way of derogation from the Guidebook "Submitting an offer in response to a call for tenders issued by the Directorate-General Informatics" the contract resulting from the present call for tenders will be governed by the law of the European Communities complemented by the Belgian law, where the Community law does not regulate the specific legal issue.'

8 Paragraph 1.1.1 of the Guidebook 'Submitting an offer in response to a call for tenders issued by the Directorate-General Informatics' states:

'The procurement procedure for the EU institutions, agencies and other bodies, is governed by the following provisions, more particularly:

(1) Part 1, Title [V] 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, as last amended

(2) Part 1, Title [V] of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation 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, as last amended

(3) The World Trade Organisation's Agreement on Government Procurement, which the European Community joined following Council Decision of 16 November 1987 concerning the conclusion of the Protocol amending the GATT Agreement on Government Procurement.'

B — *National legislation*

9 Article 40 of the Law of 14 July 1991 on trade practices and consumer information and protection (*Moniteur belge,* 29 August 1991, p. 18712; 'the Belgian law on trade practices') provides:

'Traders shall be prohibited from offering a product for sale or selling a product at a loss.

A sale shall be considered to have been made at a loss if the price is not at least equal to the price at which the product was invoiced at the time of supply or at which it would be invoiced if it were resupplied.

... .'

Facts of the dispute

10 On 30 March 2007, the Commission published in the Supplement to the *Official Journal of the European Union* (OJ S 63) a prior information notice concerning the award of a contract entitled 'Large account reseller Microsoft products (LAR 2007)' — in order to establish a framework agreement creating a single point of purchase for the acquisition of software products and licences from the supplier Microsoft ('the supplier') by the Commission and the other European institutions, under the reference DIGIT/R2/PO/2007/022.

11 By letter of 21 September 2007, the applicant, PC-Ware Information Technologies BV, received a copy of the technical specifications relating to that contract.

12 On 22 September 2007, the Commission published the call for tenders.

13 On 2 November 2007, the applicant sent its tender to the Commission. In accordance in particular with Article 40 of the Belgian law on trade practices, which prohibits sales at a loss, that tender stated that the discount granted by the applicant on the price of the supplier's goods and licences in the context of the contract at issue was 17.7%.

14 By letter of 3 December 2007, the Commission requested the successful tenderer to confirm that its tender complied with the relevant legislation and, in particular, that it did not sell at a loss. By letter of 4 December 2007, the successful tenderer confirmed that requirement.

15 On 10 January 2008, the Commission took the decision to award the contract at issue to the successful tenderer.

16 By letter of 11 January 2008, the Commission informed the applicant of its decision to reject its tender, on the ground that, based on the application of the contract award formula, it did not offer the best price/quality ratio. That letter stated also that the applicant could request further information.

17 By e-mail of 16 January 2008, followed by a reminder of 18 January 2008, the applicant requested the Commission to hold an evaluation meeting, specifying specifically that the aim of that meeting was to obtain an overview of the advantages and disadvantages of its tender compared with the successful tender, so as better to understand the result of the evaluation.

18 Following that request, the Commission organised a debriefing meeting with the applicant's representatives, which took place on 28 January 2008.

19 By letter of 29 January 2008, the Commission informed the applicant of the name of the tenderer to which the contract at issue had been awarded and communicated a report of the evaluation meeting, in which it was stated in particular that the price offered by the successful tenderer amounted to 81.75% of the price of the goods concerned for the contract at issue, that is to say a discount of 18.25%. That letter also stated that the contract had been awarded to the successful tenderer on the ground that it offered the best price/quality ratio.

20 On 21 February 2008, the Commission concluded a contract with the successful tenderer, reference No DI 06270 00.

21 On 15 March 2008, the Commission published the notice of award of that contract in the Supplement to the *Official Journal of the European Union* (OJ S 53).

Procedure and forms of order sought

22 By application lodged at the Registry of the Court on 10 March 2008, the applicant brought the present action.

23 At the hearing on 7 July 2009, the parties presented oral argument and replied to the questions put by the Court.

24 The applicant claims that the Court should:

— declare the action admissible;

— annul the Commission's decision, communicated by letter of 11 January 2008, to reject the applicant's tender in response to call for tenders DIGIT/R2/PO/2007/022 - LAR 2007 and to award the contract to the successful tenderer;

— declare that the Commission's unlawful action constitutes fault giving rise to the Commission's liability;

— in the alternative, if the contract has already been carried out when the Court gives judgment, or the decision can no longer be declared void, order the Commission to pay damages of EUR 654 962.38 as compensation for the loss suffered by the applicant in regard to that procedure;

— order the Commission to pay the costs.

25 The Commission contends that the Court should:

— declare the action for annulment entirely inadmissible or at least unfounded;

— declare the application for damages inadmissible or at least unfounded;

— order the applicant to pay the costs.

Law

A — *The application for annulment*

26 By its second head of claim set out in paragraph 24 above, the applicant seeks annulment of the Commission's decision, communicated by letter of 11 January 2008, to reject its tender and to award the contract to the successful tenderer.

27 However, as is apparent from paragraph 16 above, by the letter of 11 January 2008, the Commission simply informed the applicant of its decision to reject its tender, on the ground that, based on the application of the contract award formula, it did not offer the best price/quality ratio. Therefore, the Court considers that that letter cannot be interpreted as containing, in itself, a decision to award the contract to the successful

tenderer. In the present case, as stated in paragraph 15 above, the decision to award the contract was taken on 10 January 2008.

28 It follows from the case-law, however, that an application for annulment of a decision to award a contract to a tenderer and an application for annulment of a decision to reject another tender for the same contract are closely connected (see, to that effect, Case T-195/05 *Deloitte Business Advisory* v *Commission* [2007] ECR II-871, paragraph 113).

29 It must therefore be held that the contested decision in the present action means both the decision to reject and the decision to award the contract.

1. *Admissibility of the application for annulment*

30 Without formally raising an objection of inadmissibility, the Commission contends that the application for annulment is inadmissible, first, on the ground that the applicant has no interest in bringing proceedings and, secondly, as being devoid of purpose.

(a) The applicant's lack of interest in bringing proceedings

Arguments of the parties

31 The Commission considers that the application for annulment must be dismissed on the ground of lack of interest in bringing proceedings. If the argument put forward by the applicant in support of its application, according to which the successful tender

for the contract at issue infringes Article 40 of the Belgian law on trade practices which prohibits sales at a loss, were accepted, it would follow that the tender submitted by the applicant would also infringe Article 40 of the Belgian law on trade practices. The applicant acknowledges itself that it sold the goods without any profit margin, which, according to Article 40 of the Belgian law on trade practices, should also be considered as a sale at a loss. It follows that not only is there no possibility of its tender being accepted, but, moreover, the applicant cannot even claim damages, because the Commission's allegedly unlawful conduct did not cause it any loss.

32 The applicant claims that the Commission's opinion relating to inadmissibility for lack of interest in bringing proceedings is of a substantive nature, so that it is not relevant to the question of the admissibility of the application.

Findings of the Court

33 It is settled case-law that 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. Such an interest presupposes that the annulment of the measure must of itself be capable of having legal consequences and that the action must be likely, if successful, to procure an advantage for the party who brought it (see the Order in Case T-387/04 *EnBW Energie Baden-Württemberg* v *Commission* [2007] ECR II-1195, paragraph 96 and the case-law cited).

34 The Commission's argument relating to the applicant's lack of interest in bringing proceedings is based on the premise that Article 40 of the Belgian law on trade practices is applicable to the present case. It is expressly apparent from the Commission's pleadings that it is only to the extent that the Court must consider that the successful

tender is inconsistent with Article 40 of the Belgian law on trade practices that the applicant would have no interest in bringing proceedings.

35 However, the Court notes that it is apparent from the Commission's written pleadings concerning the second plea that it disputes the application, in the present case, of that provision. Therefore, as the applicant submits, the question of the application of Article 40 of the Belgian law on trade practices should be considered to relate to the examination of the substance of the application for annulment.

36 Therefore, in the absence of relevant arguments put forward by the Commission in support of its claims that the applicant has no interest in bringing proceedings, the plea of inadmissibility must be rejected.

(b) Plea that the application for annulment is devoid of purpose

Arguments of the parties

37 The Commission considers that the applicant now claims only damages and that its main application for annulment has become devoid of purpose. The contract has already been partially performed, which, in the light of the applicant's claims, has the consequence that, in respect of the present application, it has withdrawn its application for annulment and replaced it with a claim for damages.

38 The applicant disputes the Commission's arguments and claims that it retains an interest in the annulment of the contested decision.

Findings of the Court

39 According to the case-law, for an applicant to retain during the proceedings an interest in the annulment of the contested measure, that annulment must be capable, in itself, of producing legal effects which may consist, in particular, in redressing any harmful consequences arising from that measure or in preventing future repetition of the alleged illegality (see, to that effect, Case 207/86 *Apesco* v *Commission* [1988] ECR 2151, paragraph 16; Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 41; and order of 5 December 2007 in Case T-133/03 *Schering-Plough* v *Commission and EMEA*, not published in the ECR, paragraph 31).

40 In the present case, concerning a framework contract of a kind likely to serve as a model for similar future procurement contracts, there is an interest in preventing the unlawfulness alleged by the applicant from recurring in the future. Therefore, the Commission is wrong to maintain that the application for annulment is devoid of purpose.

41 In the light of the conclusions drawn in paragraphs 36 and 40 of this judgment, the present application for annulment must be declared admissible.

2. *Substance*

42 In support of its application for annulment of the contested decision, the applicant puts forward two pleas in law alleging, first, an infringement of the obligation to state reasons and, secondly, infringement of the provisions of Article 55 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 L 134, p. 114), and of Articles 139(1) and 146(4) of the implementing rules, read in conjunction with the provisions of Article 40 of the Belgian law on trade practices, which prohibits sales at a loss.

43 It is appropriate, in order to delimit the purpose of the present application, to start by examining whether the second plea is well founded.

(a) The second plea, alleging infringement of Article 55 of Directive 2004/18 and Articles 139(1) and 146(4) of the implementing rules, read in conjunction with the provisions of Article 40 of the Belgian law on trade practices

Arguments of the parties

44 First, the applicant claims that it expressly drew the Commission's attention, when submitting its tender, to the fact that it offered, in the context of the procedure for the award of the contract at issue, the highest possible percentage discount, namely 17.7%. That maximum percentage discount was valid for all the offers relating to the award of the contract at issue, including that of the successful tenderer. In support of that assertion, the applicant relies on a letter of 29 October 2007 sent to it by the supplier, included in its tender of 2 November 2007 ('the supplier's letter'). The applicant

claims moreover that that assertion is reinforced by the fact that three other tenderers lodged tenders containing a discount of 17.7%, of which the Commission was aware.

45 However, it points out that it is apparent from the documents before the Court that the successful tender included an offer of a discount of 18.25%, a discount which was greater than that granted by the supplier to all the dealers. According to the applicant, such a discount is therefore inconsistent with Article 40 of the Belgian law on trade practices, which prohibits sales at a loss and, pursuant to paragraph 3.3 of the technical specifications, is applicable in the present case. Therefore, because of the level of that discount offered by the successful tenderer, its tender constitutes an abnormally low tender within the meaning of Articles 139(1) and 146(4) of the implementing rules.

46 In conclusion, the applicant claims that, by choosing the successful tender although it constituted an abnormally low tender, the Commission infringed Article 55 of Directive 2004/18 and Articles 139(1) and 146(4) of the implementing rules. The applicant is of the opinion that such a tender should have been immediately rejected by the Commission.

47 Secondly, since the Commission did not verify, despite the information communicated by the applicant, whether the successful tender contravened the prohibition on sales at a loss, it infringed the principle of good administration on the ground that it did not examine carefully and impartially all the relevant factors.

48 Thirdly, the applicant notes that the lawfulness of the contract concluded by the Commission with the successful tenderer could be challenged before the Belgian courts by any interested party pursuant to Articles 95 and 98 of the Belgian law on trade practices or Articles 6 and 1133 of the Belgian Civil Code.

49 The Commission disputes the applicant's arguments and contends that the second plea should be dismissed as unfounded.

Findings of the Court

— The branches of the second plea alleging infringement of a directive and the Belgian legislation

50 First, it must be pointed out immediately that the second plea, in particular, alleges infringement of Article 55 of Directive 2004/18. However, Directive 2004/18 is addressed to the Member States to which it applies and, therefore, does not apply to public contracts awarded, as in the present case, by a Community institution. This branch of the second plea must therefore be dismissed as inoperative.

51 Secondly it is apparent from the applicant's pleadings that the second plea relates, in essence, to an infringement of the provisions of Community law applicable to abnormally low tenders, namely Articles 139(1) and 146(4) of the implementing rules, and that it is in connection with those provisions of Community law that the applicant refers to Article 40 of the Belgian law on trade practices.

52 In the first plea, the applicant explicitly complains that the Commission infringed those articles of the implementing rules.

53 In the second plea, the Court notes that the applicant equates sales at a loss, within the meaning of Article 40 of the Belgian law on trade practices, with abnormally low tenders, and that in two ways. It claims that the successful tender constitutes both a sale at a loss and an abnormally low tender, because it offered a discount of an amount greater than the discount granted by the supplier. It also considers that the successful tender, both as an abnormally low tender and as a sale at a loss, should have been immediately excluded from the award procedure at issue, in accordance with the provisions of Article 139(1) of the implementing rules.

54 Thirdly, it should be noted, as is apparent from Article 100(1) of the financial regulation, that the selection of the tenderer to whom the contract is to be awarded must be made in compliance, both, with the selection and award criteria and with the procurement rules. It is also apparent from that article that the selection and award criteria are laid down in advance in the documents relating to the call for tenders.

55 Now, as noted in paragraph 1 above, the award of public supply contracts of the Commission is subject solely to the provisions of Title V of Part One of the financial regulation and to Title V of Part One of the implementing rules.

56 Moreover, Articles 139(1) and 146(4) of the implementing rules, which the applicant alleges in its second plea to have been infringed, are in Section 3, entitled 'Procurement procedures', of Chapter 1 of Title V of Part One of the implementing rules.

57 Consequently, first, the provisions of Articles 139(1) and 146(4) of the implementing rules constitute procurement rules within the meaning of Article 100(1) of the financial regulation. Therefore, it must be considered, in essence, that the second plea alleges an infringement of the procurement rules.

58 Secondly, the Court notes that, as is apparent from paragraph 45 above, in order to support its assertion that Article 40 of the Belgian law on trade practices applies in the present case, the applicant relies on paragraph 3.3 of the technical specifications.

59 In accordance with Article 130(1)(b) and (3)(c) of the implementing rules, the technical specifications are one of the elements of the specifications, which in turn are a document relating to the invitation to tender.

60 Therefore, in view of the conclusion reached in paragraph 57 above that the second plea raised in support of the application for annulment of the contested decision alleges, in essence, an infringement of a procurement rule within the meaning of Article 100(1) of the financial regulation, the applicant is wrong to rely on a provision of the technical specifications of the call for tenders at issue, which does not constitute a procurement rule, in order to maintain that Article 40 of the Belgian law on trade practices applies in the present case.

61 For the sake of completeness, it should be stated that, even assuming the applicant had alleged an autonomous infringement of Article 40 of the Belgian law on trade practices, such a complaint could not be upheld.

62 The Court has jurisdiction, in the context of annulment proceedings, to adjudicate in actions for lack of competence, infringement of essential procedural requirements, infringement of the treaties or of any rule of law relating to their application, or misuse of powers. It follows that the Court cannot treat the alleged infringement of Belgian legislation as a question of law for which unlimited judicial review is available. Review of that kind is a matter exclusively for the Belgian authorities (see, to that effect, Case T-139/99 *AICS* v *Parliament* [2000] ECR II-2849, paragraph 40).

63 Nevertheless, in accordance with the principles of sound administration and solidarity as between the institutions of the European Union and the Member States, the Commission was required to ensure that the conditions laid down in the present invitation to tender did not induce potential tenderers to infringe the Belgian legislation likely to be applicable to the contract at issue in the present case (see, by analogy, Case T-139/99 *AICS* v *Parliament*, cited in paragraph 62 above, paragraph 41, and Case T-365/00 *AICS* v *Parliament* [2002] ECR II-2719, paragraph 63), as that question constitutes an assessment of facts (Case T-365/00 *AICS* v *Parliament*, paragraph 63).

64 In the present case, the Court notes that, following the applicant's letter of 2 November 2007, in which the applicant drew the Commission's attention to the fact that its offer was consistent with the provisions of Article 40 of the Belgian law on trade practices, the Commission requested the successful tenderer, by letter of 3 December 2007, to confirm that its tender complied with the applicable legislation and, in particular, that it was not selling at a loss, which the successful tenderer confirmed by

letter of 4 December 2007. By so doing, the Commission was careful not to encourage the successful tenderer to infringe the Belgian legislation likely to apply to the contract at issue in the present case.

65 Furthermore, the Court is of the opinion that the applicant has not shown that the successful tender clearly or necessarily involved an infringement of Article 40 of the Belgian law on trade practices. The applicant merely assumes that the successful tenderer had enjoyed a discount identical to its own and relies solely on the supplier's letter in order to maintain that the successful tender constituted a sale at a loss within the meaning of Article 40 of the Belgian law on trade practices. According to the applicant, it is apparent from that letter that the maximum percentage discount granted by the supplier to all of the dealers, including the successful tenderer, in the context of the tendering procedure at issue was 17.7%.

66 However, it cannot be inferred from the supplier's letter that that discount offered by the applicant in its tender was valid for all the supplier's dealers.

67 The following is stated in the only two paragraphs of that letter:

'We hereby confirm that with regards to the [abovementioned] in the subject mentioned Call for Tenders, your LAR discount for the Custom Enterprise Agreement Subscription is 17.7%.

The LAR discount you receive for the Select Agreement is mentioned in the Microsoft Select pricelist.'

68 It is apparent from the wording of the supplier's letter, which was sent only to the applicant, that the author thereof clearly indicated the amount of the discount which could be claimed only by the applicant. In the absence of further information, that presentation therefore does not allow it to be concluded, as the applicant claims, that the discount indicated was that granted to all of the dealers.

69 Moreover, it should be noted that the applicant's claim that other dealers lodged tenders with the Commission containing a discount of 17.7% is merely conjecture which is not supported by any evidence.

70 In those circumstances, assuming that Article 40 of the Belgian law on trade practices is applicable in the present case, the applicant has not shown that the Commission made an obvious error in its assessment of the lawfulness of the successful tender in the light of the provisions of that article.

— The branch of the second plea alleging infringement of the implementing rules

71 It is necessary to examine, in the light of the information in its possession concerning the abnormally low nature of the successful tender, whether, as the applicant claims, the Commission erred by not immediately excluding that tender on the basis of Articles 139(1) and 146(4) of the implementing rules.

72 In that regard, under the provisions of Article 139(1) of the detailed implementing rules, the contracting authority is obliged to allow the tenderer to clarify, or even explain, the characteristics of its tender before rejecting it, if it considers that a tender is abnormally low. The obligation to check the seriousness of a tender also arises where there are doubts beforehand as to its reliability, also bearing in mind that the main purpose of that article is to enable a tenderer not to be excluded from the procedure without having had an opportunity to explain the terms of its tender which appears abnormally low (Case T-148/04 *TQ3 Travel Solutions Belgium* v *Commission* [2005] ECR II-2627, paragraph 49).

73 It should also be recalled that the Commission 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, and that review by the Court is limited to checking compliance with the procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (see *TQ3 Travel Solutions Belgium* v *Commission*, cited in paragraph 72 above, paragraph 47 and the case-law cited).

74 In the present case, the only information which the applicant relies on to claim that the successful tender was abnormally low is once again the supplier's letter. In that respect, the applicant claims that the maximum percentage of discount would have been valid for all the tenders relating to the award of the contract at issue, including that of the successful tenderer.

75 However, in the light of the findings of the Court set out in paragraphs 65 to 68 above, that claim is clearly not supported by the wording of the supplier's letter.

76 Therefore, in view of the broad margin of assessment enjoyed by the Commission with regard to the factors to be taken into account in the context of the procedure for awarding a contract following an invitation to tender, the applicant is wrong to criticise the Commission for not finding that the successful tender was abnormally low and consequently not excluding it as such, under Article 139(1) of the implementing rules.

77 That finding cannot be altered in the light of the following two arguments also raised by the applicant in support of the second plea.

78 First, concerning the argument raised by the applicant with regard to the infringement of the principle of sound administration, which is said to follow from the Commission's infringement of its obligation to undertake a careful and impartial examination of all the relevant elements of the present case and, more precisely, from the failure to reject the successful tender as an abnormally low tender, it suffices to note that, notwithstanding the fact that the Commission did not classify that tender as abnormally low, it demonstrated diligence in the examination of the successful tender. As the Court pointed out in paragraph 64 above, in its letter of 3 December 2007, the Commission requested the successful tenderer to confirm that its tender complied with the applicable legislation and, in particular, that it was not selling at a loss. Therefore, in the absence of other factors raised by the applicant in support of the argument alleging infringement of the principle of sound administration with regard to the examination of the successful tender, that argument must be rejected as unfounded.

79 Secondly, concerning the applicant's argument relating to the possibility of challenging the validity of the contract concluded between the Commission and the successful tenderer before the Belgian courts, it should be noted that it does not concern the lawfulness of the contested decision, taken in the context of the procurement procedure at issue, but rather the lawfulness of the resulting contract. It follows that that argument must be rejected.

80 It follows from all the above considerations that the second plea must be rejected.

(b) The first plea, alleging an infringement of the obligation to state reasons

Arguments of the parties

81 The applicant claims that the contested decision lacks a proper statement of reasons, both with regard to form and substance.

82 First, the applicant points out that it expressly drew the Commission's attention, first, to the application of Article 40 of the Belgian law on trade practices to the tendering procedure at issue and, secondly, to the fact that, in its tender, it offered the highest possible level of discount given the prohibition on sales at a loss provided for by that article. However, notwithstanding the Commission's obligation to undertake a careful and impartial examination of all the relevant elements of the case, neither the contested decision nor the minutes of the debriefing meeting contained reasons concerning that relevant fact, and it is also not apparent from them that the Commission took that fact into account. Therefore, the reasoning for the contested decision was too narrow or too vague or unclear. The Commission therefore infringed the general

obligation to state reasons and Article 18 of the European Code of Good Administrative Behaviour, approved by resolution of the European Parliament of 6 September 2001 (OJ 2002 C 72 E, p. 331) ('the code of good behaviour').

83 Secondly, the applicant claims that the Commission failed to comply with its obligation under Article 18(2) of the code of good behaviour to state individually the grounds of the contested decision with regard to the application of Article 40 of the Belgian law on trade practices.

84 Thirdly, it is not apparent from the statement of reasons in the contested decision that the principle of equal treatment, as referred to in Article 5 of the code of good behaviour, was in fact complied with by the Commission concerning the application of Article 40 of the Belgian law on trade practices. The statement of reasons was therefore fundamentally insufficient.

85 Fourthly, the statement of reasons in the contested decision does not allow it to be ascertained and monitored, in accordance with Article 4 of the code of good behaviour, whether the legislation applicable in the present case, namely Community law supplemented by Article 40 of the Belgian law on trade practices, was in fact applied and complied with.

86 The Commission disputes the applicant's arguments and contends that the plea should be rejected as unfounded.

Findings of the Court

87 First, in support of the first plea alleging infringement of the obligation to state reasons, the applicant raises, in essence, four arguments alleging that the contested

decision does not include, first, a statement of reasons with regard to the prohibition on sales at a loss which follows from Article 40 of the Belgian law on trade practices, secondly, separate reasons with regard to Article 40 of that law, thirdly, information which could show that the principle of equal treatment was in fact complied with concerning the application of Article 40 and, fourthly, information allowing it to be ascertained and monitored whether the Community legislation, supplemented by Article 40 of the Belgian law, was indeed applied and complied with.

88 In the light of the Court's conclusion in paragraph 60 above, Article 40 of the Belgian law on trade practices does not apply to the tendering procedure at issue, the applicant's four arguments must be rejected at the outset, inasmuch as they seek to show that the contested decision infringes the obligation to state reasons with regard to Article 40 of the Belgian law.

89 Secondly, the applicant refers to infringement of Article 18 of the code of good behaviour and infringement of the general obligation to state reasons.

90 According to the case-law, the code of good behaviour is not a legal provision but a resolution of the Parliament amending a draft which had been submitted to it by the European Ombudsman and calling on the Commission to submit a legislative proposal in that respect (order of 24 April 2007 in Case T-132/06 *Gorostiaga Atxalandabaso* v *Parliament*, not published in the ECR, paragraph 73). Therefore, that code is not a measure binding on the Commission and the applicant cannot claim any rights on the basis of it.

91 However, although the applicant does not refer expressly to Article 253 EC, it is apparent from the application that the applicant intended to invoke, in essence, the general duty to give reasons laid down in that article.

92 With regard to the question whether the contested decision is consistent with the general duty to give reasons, pursuant to Article 253 EC, it should first of all be noted that, according to established case-law, the duty to give reasons depends on the type of document at issue and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution in such a way, firstly, as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to verify whether or not the decision is well founded and, secondly, to permit the Court to exercise its power to review the lawfulness of the measure (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16; Case T-217/01 *Forum des migrants* v *Commission* [2003] ECR II-1563, paragraph 68; and *Deloitte Business Advisory* v *Commission*, cited in paragraph 28 above, paragraph 45).

93 Next, in accordance with Article 100(2) of the financial regulation and Article 149(2) of the implementing rules, in this case the Commission had to communicate to the applicant the grounds for the rejection of its tender and furthermore, as the applicant had put in an admissible tender, information about the characteristics and relative merits of the tender accepted and the name of the successful tenderer, within no more than 15 calendar days from receipt of the request.

94 It is settled case-law that, since that manner of proceeding, as described in Article 100(2) of the financial regulation, discloses the reasoning followed by the authority which adopted the measure in a clear and unequivocal fashion, it satisfies the purpose of the duty to state reasons laid down in Article 253 EC, as noted in paragraph 92 above (judgment of 12 July 2007 in Case T-250/05 *Evropaïki Dynamiki* v *Commission*,

not published in the ECR, paragraph 69; see also, to that effect, judgment of 1 July 2008 in Case T-211/07 *AWWW* v *FEACVT*, not published in the ECR, paragraph 34 and the case-law cited).

95 In the present case, in its letter of 11 January 2008, the Commission informed the applicant that its tender had not been chosen, because it did not offer the best price/quality ratio according to the contract award formula in the specifications. It follows that the applicant was informed, in accordance with the provisions of Article 100 of the financial regulation and Article 149 of the implementing rules, of the exact grounds for the rejection of its tender.

96 Concerning the Commission's obligation to notify the applicant of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded, it should be noted that, following a request from the applicant in its e-mail of 16 January 2008, in accordance with the provisions of the third subparagraph of Article 149(3) of the implementing rules, the Commission organised a debriefing meeting in order to give the applicant an overview of the advantages and disadvantages of its tender compared with those of the successful tenderer.

97 Furthermore, by letter of 29 January 2008, the Commission, notified the applicant of the name of the successful tenderer and annexed minutes of the debriefing meeting to that letter. Those minutes take the form of telegraphic notes which specify the criteria used for the technical evaluation of the tender and the score received by the applicant's tender for each of those criteria and the overall resulting score. It is apparent therefrom that the applicant's tender was classified in first place following the technical evaluation. Concerning the financial evaluation, those minutes specify that it was based on the discount granted by the tenderers on the price of the supplier's goods. In that respect, it is stated that the applicant's tender was classified in second place with a difference of 0.55% compared with the price offered in the successful

tender. It is apparent from the minutes of the debriefing meeting that, following the application of the formula used for those purposes, the successful tender offered a better price/quality ratio than the applicant's tender, which justified the acceptance of the successful tender.

98 Since, as pointed out in paragraph 92 above, the obligation to state reasons for a measure depends on the context in which it was adopted, in the present case the information communicated by the Commission to the applicant, following the latter's e-mail of 16 January 2008, must be regarded as disclosing its reasoning in a sufficiently clear and unequivocal fashion. Therefore, that information made the applicant aware of the reasons for the measure taken so as to be able to defend its rights and to verify whether or not the contested decision was well founded, and permitted the Community judicature to review the lawfulness of that decision.

99 Therefore, in the present case, the Commission satisfied the general obligation to state reasons laid down in Article 253 EC.

100 It follows from all of the foregoing considerations that the first plea in law must be rejected.

101 In the light of the conclusions reached in paragraphs 80 and 100 above, the application for annulment of the contested decision must be dismissed in its entirety.

B — *The claim for damages*

1. *Arguments of the parties*

102 In the alternative, the applicant claims damages in accordance with Articles 235 EC and 288 EC, in the event that the object of the contract has already been carried out or the decision can no longer be annulled. It submits that the Commission's unlawful conduct gives rise to liability on its part. The applicant assesses the amount of damages *ex aequo et bono* at EUR 654 962.38, which represents the gross profit it would have made had it been granted the contract. All the arguments, complaints and grounds set out in support of the second plea for annulment support the claim for damages, which is therefore sufficiently substantiated.

103 The Commission contends that the claim for damages must, at the very least, be declared unfounded.

2. *Findings of the Court*

104 First of all, it should be noted that the third head of claim in the application, claiming that the Court should rule that the Commission's unlawful conduct constitutes fault giving rise to liability on its part, must be interpreted in conjunction with the fourth head of claim, which seeks that the Commission be ordered to pay damages. As is

expressly stated in the grounds set out in the alternative by the applicant in its application, its claim for damages, on the basis of Articles 235 EC and 288 EC, is said to be justified in the light of the fact that the Commission has, by its unlawful conduct, committed a fault giving rise to its liability.

105 It is settled case-law that, in order for the Community to incur non-contractual liability within the meaning of the second paragraph of Article 288 EC on account of the unlawful conduct of its institutions, a number of requirements must be satisfied, namely that the alleged conduct of the institutions is unlawful, that the damage is real and that there is a causal link between the conduct alleged and the damage in question (see Case T-69/00 *FIAMM and FIAMM Technologies* v *Council and Commission* [2005] ECR II-5393, paragraph 85 and the case-law cited).

106 Since those three conditions for the incurring of liability are cumulative, failure to meet one of them is sufficient for an action for damages to be dismissed, without it therefore being necessary to examine the other conditions (see Case T-226/01 *CAS Succhi di Frutta* v *Commission* [2006] ECR II-2763, paragraph 27 and the case-law cited).

107 In the present case, it should be noted that, as is apparent from the reasoning in paragraphs 71 to 80 above, all the arguments, complaints and grounds set out by the applicant in support of the second plea for annulment on which it relies so as to justify its claim for damages have been examined and rejected. Likewise, as is apparent from the reasoning in paragraphs 87 to 100 above, all the arguments set out by the

applicant in support of the first plea for annulment have been examined and rejected. Finally, it should be noted that the applicant does not allege any other form of unlawfulness which could be taken into account in the context of the examination of its claim for damages. In those circumstances, the Community cannot incur liability on the basis of the alleged unlawfulness of the contested decision.

108 Therefore, as the first of the three conditions for the Community to incur liability is not fulfilled, the claim for damages must be dismissed as unfounded.

109 It follows from the conclusions in paragraphs 101 and 108 above that the application must be dismissed in its entirety.

Costs

110 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

111 In the present case, since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders PC-Ware Information Technologies BV to pay the costs.**

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 11 May 2010.

[Signatures]

Table of contents

Legal context ..... II - 1546

A — Community legislation ..... II - 1546

B — National legislation ..... II - 1552

Facts of the dispute ..... II - 1553

Procedure and forms of order sought ..... II - 1555

Law ..... II - 1556

A — The application for annulment ..... II - 1556

1. Admissibility of the application for annulment ..... II - 1557

(a) The applicant's lack of interest in bringing proceedings ..... II - 1557

Arguments of the parties ..... II - 1557

Findings of the Court ..... II - 1558

(b) Plea that the application for annulment is devoid of purpose ..... II - 1559

Arguments of the parties ..... II - 1559

Findings of the Court ..... II - 1560

2. Substance ..... II - 1560

(a) The second plea, alleging infringement of Article 55 of Directive 2004/18 and Articles 139(1) and 146(4) of the implementing rules, read in conjunction with the provisions of Article 40 of the Belgian law on trade practices ..... II - 1561

Arguments of the parties ..... II - 1561

Findings of the Court ..... II - 1563

— The branches of the second plea alleging infringement of a directive and the Belgian legislation ..... II - 1563

— The branch of the second plea alleging infringement of the implementing rules ..... II - 1568

(b) The first plea, alleging an infringement of the obligation to state reasons ... II - 1571

Arguments of the parties ..... II - 1571

Findings of the Court ..... II - 1572

B — The claim for damages ..... II - 1577

1. Arguments of the parties ..... II - 1577

2. Findings of the Court ..... II - 1577

Costs ..... II - 1579