2. Orders each party to bear its own costs.

Kutscher Donner Pescatore

Mertens de Wilmars Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 7 December 1976.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 27 OCTOBER 1976 [1]

Mr President,
Members of the Court,

This case involves, first, a contractual dispute which has arisen between the limited partnership (société en commandite simple) Luigi Pellegrini and the Commission over the implementation of a contract concluded for the carrying out of cleaning work at the Nuclear Research Centre at Ispra; secondly, an application by the said undertaking for the annulment of the decision by which, on the basis of a request for tenders organized at the end of 1975, the Commission named a competing firm, the Flexon company, to carry out the same work from 1 February 1976.

It is clear from this that the jurisdiction of the Court will have to be examined from two different legal aspects:

— First, as regards the contractual dispute, the Pellegrini undertaking asks you to decide the issue on the basis of an arbitration clause included in the agreement between the Commission and the applicant pursuant to Article 153 of the Treaty on the European Atomic Energy Community.
— Secondly the claim for annulment is based on Article 146 of the same Treaty.

But, before I come to this examination, I consider it essential to take note of the facts underlying the application, particularly since the file submitted to this Court is incomplete in certain respects and some of the documents produced may be misleading.

I shall therefore endeavour first to clarify the factual situation before pursuing the legal discussion.

It is not disputed that from 1960 onwards the cleaning services in respect

1 — Translated from the French.

of the premises and equipment of the establishment at Ispra were entrusted to the applicant firm by the Commission, or at least by the Directorate-General of the Joint Research Centre acting in its name.

For the period from 1960 to the end of 1971, it seems that relations between the contracting parties were governed by a contract made by direct agreement.

But in November 1971 the Commission decided to organize a procedure for invitation to tender, pursuant to the provisions of the financial regulation then in force, in this case the regulation of 30 July 1968, since replaced by a regulation of 25 April 1973.

Such a procedure must be distinguished from adjudication. The effect of the latter procedure is to confer on the holder of that proposal which, among the tenders which are regular, comply with the conditions laid down by the institution and are comparable with each other, is the lowest, the *right* to the final award of the contract.

Although the aim of the invitation to tender, on the other hand, is also to put several undertakings in competition with one another, it reserves to the contracting institution free choice of the offer thought to be the most attractive taking into account *inter alia* the cost of performance, running costs and technical merits, together with the financial guarantees and the guarantees of professional competence put forward by each of the tenderers.

It is for the Community administration to choose between these two procedures.

In the case of adjudication, its powers are restricted since it can award the contract only to the tenderer who submitted the lowest proposal from the financial point of view. The procedure for invitation to tender on the other hand confers wide discretionary powers, in the application of which financial considerations are only one factor among others; in particular more reliable technical abilities and more substantial guarantees of professional competence may be regarded as decisive.

The invitation to tender of 8 November 1971 was organized on the basis of a document described as 'Clauses and Conditions Applicable to Supply Contracts' and a 'Draft Agreement concerning the Cleaning Services at the Ispra Establishment'.

The tenderers had to send back the said draft to the administration after stating the unit prices which they were proposing for the services required and breaking down on a percentage basis the costs of the various supplies and of labour.

In my opinion it must be inferred from this that the undertaking whose offer was accepted is bound by the provisions of the draft agreement, which moreover had to be signed by the authorized representative of the undertaking responsible.

In fact as a result of the invitation to tender the Commission awarded the contract to one of the tenderers in competition with the Pellegrini undertaking; but the tenderer thus chosen failed to carry out his commitment.

When this occurred, the Commission did not organize a fresh invitation to tender procedure, but entrusted the cleaning services to the applicant by direct agreement. But whereas the 'Draft Agreement' provides for a fixed term contract for a period of thirty-six months from 1 January 1972, the cleaning services were entrusted to Pellegrini for much shorter periods, in general two months, by letters signed either by the Director-General of the Joint Research Centre or by the Director of General, Technical and Administrative Services of that body.

The file produced by the applicant does not include all the copies of these letters. But it can be inferred from the documents supplied, including first, a letter of 20 December 1971 confirming the decision to entrust the cleaning services to Pellegrini for the months of January and February 1972 and from the letters pertaining to certain later periods, that this correspondence governed the contractual relations between the parties, at least as regards the length of time for which services were to be provided, until the end of 1975.

At all events it is not disputed that, under these circumstances, Pellegrini in fact provided the cleaning services at the establishment from 1 January 1972 until the end of 1975. The responsibility for these services for the last three months of that year was entrusted to it by a letter of 18 September 1975.

On the same date the Commission decided to organize another invitation to tender for the cleaning services at Ispra from 1 January 1976, under conditions similar to those of November 1971.

The applicant put in a tender. But its offer was not accepted. The Commission decided to award the contract to Flexon. However, since the results of the invitation to tender became known too late for the new contract-holder to take up its duties on 1 January, the applicant agreed to continue to provide the services until the end of January 1976.

These are the facts which emerge from the file on the case and upon which Pellegrini has brought before you, first of all, an application for the implementation of the contract of which it claims to have been the holder from the beginning of 1972 to 31 December 1975. It relies in fact both upon Article 2 of the Draft Agreement of 1971, concerning the length of the contract and upon Article 3 thereof, under which 'the Commission may at any time terminate this agreement, without being liable for damages, provided only that it gives ninety days' notice by registered letter'.

The applicant takes the view that its contractual relations with the Commission were governed by this draft agreement and that consequently the Commission could not terminate the contract before the agreed date without observing the period of notice laid down by Article 3. Under this head it seeks damages as compensation for losses which it claims to have suffered by reason of the unilateral termination of the contract.

It thus puts the Commission's contractual liability at issue. In principle this field is outside the jurisdiction of this Court; indeed disputes of this nature must in fact be brought before the national courts having jurisdiction, unless, as provided in Article 153 of the Euratom Treaty, an arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law, specially confers jurisdiction upon this Court.

In this instance reliance is placed upon such an arbitration clause. Indeed, Article 15 (2) of the Draft Agreement provides:

'The Court of Justice of the European Communities shall have jurisdiction to give judgment in disputes between the Commission and the contractor concerning this agreement.'

Let me say straight away that the Commission does not question either the existence or the effect of this clause. It merely expresses doubt as to its validity as regards strict compliance with the formal requirements. By that, it means that it would be possible to rely successfully upon the clause only if it had been concluded in a document signed by both parties.

But it readily accepts that it was agreed between the parties from the beginning

of their contractual relations to confer jurisdiction on the Court of Justice to give judgment in any disputes which might arise between them over the interpretation or the implementation of the contract. Therefore in this respect it leaves the matter to the discretion of this Court.

However this is a question of public policy which it behoves you to examine, if necessary of your own motion.

Thus in the first place it must be established whether the draft agreement did in fact govern the contractual relations between the applicant and the Commission.

In my opinion the solution emerges both from the circumstances under which the cleaning of the establishment at Ispra was entrusted, from 1 January 1972, to Pellegrini, and from the very wording of the successive letters by which the Joint Research Centre confirmed this task to it for definite periods, generally of two months at a time.

It should indeed be pointed out that the applicant had taken part in the invitation to tender of November 1971 and that, although its proposal was not accepted at the end of this procedure, it had expressly accepted, as all the tenderers had, the provisions of the draft agreement.

When subsequently it was appointed by direct agreement as holder of the cleaning contract, it is reasonable to think that the said provisions became applicable in its relations with the Commission, and in particular the arbitration clause in Article 15.

This view is moreover confirmed by the wording of the letters from time to time addressed to the undertaking with a view to confirming to it the award of the cleaning services.

Indeed the following provision is contained in the second paragraph of each of these letters:

'The conditions laid down in the draft agreement now in your possession shall apply.'

In my opinion this explicit reference to the draft agreement of 1971 confirms the intention of the parties to situate their contractual relations within the framework outlined by this draft agreement.

Furthermore, if this line of reasoning were to be rejected, the reference to the said agreement would be meaningless and it would be impossible to imagine what conditions bound the parties concerning in particular the employment of the staff of the undertaking, its liabilities, its working conditions, the specifications concerning the material and the equipment used, the supervision of the operations, the implementation of the tariff and its revision as well as the contractor's liability to the Commission, all of which are questions which are settled by the draft agreement.

As we shall see, the letters entrusting the services to the applicant depart, in express terms, from the conditions laid down in this document only in regard to the length of time prescribed by the draft agreement.

For the rest, it is my opinion that the clauses in the agreement were indeed applicable to the relations between the parties, and this is true in particular of the arbitration clause.

Can it therefore be said, on purely formal grounds, that this clause cannot be successfully relied upon in this instance, as the Commission seems to suggest?

Article 38 (6) of the Rules of Procedure requires in fact that any application submitted under Article 153 of the Euratom Treaty be accompanied by a

copy of the arbitration clause contained in the contract governed by private or public law entered into by the Communities or on their behalf. But in this instance is not this requirement sufficiently satisfied by the production of the draft agreement itself, which I have said formed an integral part of the agreement between the Commission and the applicant? Certainly it would have been clearer and more satisfactory from the Court's point of view if the draft agreement had been formally annexed to the document by which the directorate of the Joint Research Centre entrusted the carrying out of the cleaning services at the establishment at Ispra to Pellegrini in December 1971 and if both parties had signed that draft.

But in my view it would be an excessive insistence upon form to deny all validity to the arbitration clause simply on the grounds that the draft agreement was only referred to, though expressly, in the letters confirming the agreement between the parties.

I consider that I may now therefore begin the examination of the applicant's arguments.

Its line of reasoning is as follows: Article 2 of the draft agreement fixes the term of the implementation of the contract at thirty-six months. That implementation began, as stipulated, on 1 January 1972.

Therefore the contract was to end only on 31 December 1974.

It is not disputed that, throughout those three years, the applicant carried out its duties. On the expiry of, the term fixed by Article 2, the administration would have been entitled to issue a fresh invitation to tender, but it did not do so. On the contrary, it continued to entrust the cleaning service to the applicant under the same conditions.

The applicant infers from this that the contract was, for this reason alone, renewed for a further period of thirty-six months pursuant, in its submission, to Article 2 of the draft agreement. Therefore, if the administration could unilaterally terminate the contract while still in force, as Article 3 of the draft entitles it to do, it was at least obliged to give the undertaking 90 days' notice in order to do so.

The applicant maintains that the termination came without any warning, in breach of this provision, since the administration informed it of its decision to entrust the cleaning services to Flexon from 1 January 1976 only in December 1975.

The letter of 16 January 1976, signed by the Director-General of the establishment at Ispra, confirms this decision and at the same time thanks the undertaking for the spirit of cooperation which it showed in agreeing to provide its services until 31 January, so as to guarantee continuity of service.

It seems to me that this argument is unfounded.

The right of unilateral termination which the administration reserved to itself by Article 3 of the agreement, in the interests of the service and in so far as budgetary restrictions for example might compel it to reduce or suspend the activities of the establishment, is without doubt counterbalanced, in favour of the contracting undertaking, by the provision of a period of notice; but such a provision is inseparable from that contained in Article 2 whereby the length of time for the implementation of the contract was fixed at thirty-six months. It is inconceivable where, as in this case, the length of time for which services are to be successively provided is much shorter, being fixed for periods of two months as a rule, and at all events never more than three months at most.

Even if it were necessary to accept the applicant's argument that under Article 2 of the draft agreement it had an

individual right as from 1 January 1972 to the implementation of the contract until 31 December 1974, it is obvious from any point of view that that contract, being for a term fixed in advance, was incapable of being renewed by tacit agreement and that, from 1 January 1975, it could rely only upon the letters by which from time to time the administration instructed it to continue to provide the services.

There is no doubt that the last of these letters, dated 18 September 1975, limited its task to 31 December of that year.

Furthermore, the applicant could not have been unaware of the issue of an invitation to tender of which it was notified and in which it took part by submitting a proposal to the directorate of the Centre.

It knew therefore that in any case responsibility for the cleaning services would be withdrawn from it, unless its own proposal was accepted, in which case it would have continued its task under a fresh contract.

On the basis of Italian law, which is expressly applicable to the contract by virtue of Article 15 (1) of the draft agreement, the applicant also relies upon the provisions of Article 1563 of the Italian Civil Code.

Under this provision on contracts of 'somministrazione' (supply), a person to whom services are provided on successive occasions spread over a period of time has the right to fix the date for each of these occasions but he can do so only if he gives the person performing the services reasonable notice.

This provision is directed at a situation quite different from that obtaining in this instance. It makes the supposition that the periodicity of the services has not been fixed by the contract and will be decided as they are required. Consequently, it is reasonable for the person providing the services to be given a sufficient period of time to accomplish his task.

This has no relation to the provision for a period of notice in the event of unilateral termination of a contract. It should be added that in this instance the continuity and the regularity of the cleaning work render Article 1563 of the Civil Code inapplicable. This submission therefore has no relevance.

In my opinion it follows that the conclusions in this application which are based upon the alleged unilateral breach of contract must be rejected. It also follows that the claim for damages based on infringement of Article 3 of the draft agreement cannot be upheld.

I now go on to consider the conclusions for the annulment of the decision in which, having regard to the results of the invitation to tender issued in September 1975, the Commission accepted the proposal submitted by Flexon and entrusted the carrying out of the cleaning services to that undertaking.

A preliminary question arises in this connexion. Can such a decision form the subject-matter of an application for annulment under Article 146 of the Euratom Treaty?

In the first place, is it a unilateral decision by the Commission, separable from the contract concluded between that institution and the chosen undertaking? If the answer were to be in the negative, it would without any doubt be necessary to acknowledge that such conclusions are not admissible on the ground that they put at issue the contractual relations between the Commission and an undertaking which, in relation to the applicant, is a third party.

In other words, the decision by which the institution chooses its contracting partner, following an invitation to tender, cannot be separated from the conclusion of the contract.

However in my view a different analysis of the legal situation should prevail.

The aim of the procedure of the request for tenders is to put the undertakings consulted in competition with one another. Those of them which have tendered, that is to say which have addressed their proposal to the Community administration therefore have a legitimate interest which may be relied upon before the court having jurisdiction, in this instance the Court of Justice, not only in seeing that the procedure for invitation to tender is properly conducted but that the choice of the contracting undertaking is made lawfully.

Indeed, is there not some similarity between such a procedure and that of a competition held with a view to filling a vacant post?

Just as the appointment of an official chosen following a competition may be disputed by the unsuccessful candidates, so the tenderers for a public contract whose proposals have not been accepted must be allowed to contest the decision by which the administration chooses a competing undertaking and by that very fact by implication but certainly rejects the said tenderers. Such a decision must be regarded as *separable* from the contractual relations which are established with regard to the future with the undertaking to which the contract is awarded. It is in effect a unilateral measure adversely affecting the unsuccessful tenderers.

In the second place, can it be said that there tenderers, not being personally those to whom that measure was addressed, are deprived of all legal remedies? This, in my opinion, would be to misunderstand the real effects of it.

This leads me to agree that it is admissible for these tenderers to seek the annulment of such a measure on the basis of Article 146.

The applicant does not call into question the legality of the procedure for invitation to tender adopted by the Commission for the choice of its contractor. Moreover, before opening this procedure, the Commission obtained the opinion of the Purchases and Contracts Advisory Committee, which it was under no legal obligation to do, and it is not disputed that all the undertakings which put in tenders were able to acquaint themselves with the general clauses and conditions applicable to the contract, the draft agreement which was made available to them and the technical specifications relating to the cleaning services at the establishment at Ispra.

Similarly, the Purchases and Contracts Advisory Committee was again consulted, pursuant to Article 62 of the Financial Regulation, over the choice of contractor, and it carried out a comparative assessment of the respective advantages and disadvantages of the tenders submitted. It gave an opinion in favour of concluding the contract with Flexon. Therefore the institution cannot be reproached with having, as the applicant alleges, been negligent in carrying out this procedure.

Moreover the applicant does not base itself upon the ground of the formal legality of the procedure in order to challenge the legality of the contested decision. It relies upon an argument based on misuse of powers.

On the one hand, it is argued that the Commission ignored the fact that, for many years, Pellegrini had performed the cleaning services in a perfectly satisfactory fashion, as is clear from the comments expressed by the directorate of the establishment at Ispra, in particular in its letter of 16 January 1976.

On the other hand, it is argued that misuse of powers is manifested by the fact that the price offered by Flexon in

its tender was far higher than that which the applicant had itself agreed.

However let me point out that this is an area in which the administration has extensive discretionary powers, and that it cannot be accepted that there has been a misuse of powers on the basis of mere presumptions.

First of all, the fact that in the past Pellegrini has performed the cleaning services to the satisfaction of the administration and has indisputably acquired experience in that connexion did not confer upon it any vested right to a fresh contract on the basis of an invitation to tender. It was in competition with other undertakings and the Commission had to take its decision in consideration of the technical and economic guarantees as well as guarantees of professional competence put forward by each of the tenderers.

The other undertakings were also able to put their own experience in evidence and to present references based on their previous activities.

Secondly, as I have already said, the procedure for invitation to tender leaves the administration full discretion to assess the various factors in the tenders submitted. In comparing these offers the cost of performance is not a decisive factor.

At all events the fact that the Commission's choice fell upon an undertaking asking a higher price does not, of itself, disclose any misuse of powers. Indeed the Commission could lawfully come to its decision, as it states it did, on the basis of the technical and manpower resources of Flexon, which, the Commission tells us, was, in relation to the other competitors, 'of fully satisfactory commercial and industrial size', which was capable 'of ensuring the training of specialist staff', and whose references guaranteed a high standard of performance.

Furthermore, it appears that the said undertaking undertook to pay its staff appreciably higher wages than those offered by the applicant and this consideration was certianly not without effect upon the Commission's choice, because of the problem posed by the comparison between the level of pay of the employees of the cleaning undertaking and the level of pay of the local staff employed in the establishment at Ispra.

For the Court to find that there has been a misuse of powers, the facts supporting the reasons given for the Commission's choice would have to be patently incorrect, and in my view this has not been shown. I also think that it is not open to the Court to substitute its own assessment for that of the institution.

Therefore, the misuse of powers which, in the applicant's submission, consisted in giving Flexon an unfair advantage is not proved.

Finally, I am of the opinion that the application should be dismissed and that the applicant should be ordered to bear the costs.