Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

20 March 2013*

(Public supply contracts — Euratom — Procedure for call for tenders by the Joint Undertaking Fusion for Energy — Supply of electrical equipment — Rejection of a tenderer's offer — Open procedure — Offer contain deviations — Legal certainty — Legitimate expectations — Proportionality — Conflict of interests — Award decision — Action for annulment — No direct effect — Inadmissibility — Non-contractual liability)

In Case T-415/10,

Nexans France, established in Paris (France), represented by J.-P. Tran Thiet, J.-F. Le Corre and M. Pigeat, lawyers,

applicant,

v

European Joint Undertaking for ITER and the Development of Fusion Energy, established in Barcelona (Spain), represented by A. Verpont, acting as Agent, C. Kennedy-Loest and C. Thomas, Solicitors, J. Derenne and N. Pourbaix, lawyers, and M. Farley, Solicitor,

defendant,

APPLICATION, first, for annulment of the decision rejecting the tender submitted by the applicant and of the decision to award the contract to another tenderer and, second, for damages,

THE GENERAL COURT (First Chamber),

composed of J. Azizi, President, S. Frimodt Nielsen (Rapporteur) and M. Kancheva, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 27 November 2012,

gives the following

* Language of the case: French.

Judgment

Background to the dispute

1. *The Joint Undertaking*

1 On 21 November 2006 the European Atomic Energy Community (Euratom), the People's Republic of China, the Republic of India, Japan, the Republic of Korea, the Russian Federation and the United States of America entered into the Agreement on the Establishment of the ITER International Fusion Energy Organisation for the Joint Implementation of the ITER Project (OJ 2006 L 358, p. 62).

2 By Decision 2007/198/Euratom of 27 March 2007 establishing the European Joint Undertaking for ITER and the Development of Fusion Energy and conferring advantages upon it (OJ 2007 L 90, p. 58), the Council of the European Union established a Joint Undertaking within the meaning of Article 45 EA, called the 'European Joint Undertaking for ITER and the Development of Fusion Energy (Fusion for Energy)' ('the Joint Undertaking').

3 According to Article 1 of Decision 2007/198, the tasks of the Joint Undertaking are to be to provide the contribution of Euratom to the ITER International Organisation (Article 1(2)(a)), to provide the contribution of Euratom to the 'Broader Approach' activities with Japan for the rapid realisation of fusion energy (Article 1(2)(b)) and to prepare and coordinate a programme of activities in preparation for the construction of a demonstration fusion reactor and related facilities (Article 1(2)(c)). The tasks of the Joint Undertaking thus include, in particular, the organisation, at the request of the ITER International Organisation, of procedures for the invitation of tenders for the supply of the equipment and services necessary for the European contribution to the ITER Project and also, in the context of a specific agreement between Euratom and Japan, for the supply of certain components for the Japanese experimental nuclear fusion reactor JT-60SA ('the JT-60SA Project').

4 Article 5 of Decision 2007/198 provides that the Joint Undertaking is to have a distinct financial regulation based on the principles 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), but that it may depart from that regulation where the specific operating needs of the Joint Undertaking so require and subject to prior consultation with the Commission of the European Communities.

5 By two decisions of 22 October 2007, amended on 18 December 2007, the Governing Board of the Joint Undertaking adopted its financial regulation ('the Joint Undertaking's Financial Regulation') and the rules on the implementation of that regulation ('the implementing rules').

2. *Award of the contract*

6 In 2007, 2008 and 2009 the Joint Undertaking concluded supply agreements with the ITER International Organisation. Under those agreements, the Joint Undertaking agreed to supply certain superconductors required for the development of the ITER and JT-60SA projects.

7 Alongside those agreements, the Joint Undertaking concluded an agreement with the Russian national agency participating in the ITER project for the implementation of purchases, under which the Russian agency was to supply the cables necessary for the manufacture of superconductors for poloidal field coils ('PF conductors') that were to be the object of the Joint Undertaking's contribution to the ITER project, while the Joint Undertaking would be responsible for the jacketing of the PF conductors that were to be the object of the Russian contribution to the ITER project.

8 On 6 August 2009 the Joint Undertaking published, in the Supplement to the *Official Journal of the European Union* (OJ 2009/S 149-218279), Contract Notice F4E-2009-OPE-018 for the award, in the context of an open procedure, of a contract of supply ('the contract') for the purchase of PF conductors and also of superconductors for toroidal field coils ('TF conductors').

9 The object of the contract concerned, first, the cabling and jacketing of the TF conductors that were to be supplied by Euratom to the ITER project; second, the jacketing of the PF conductors that were to be supplied by Euratom and by the Russian Federation to the ITER project; and, third, the cabling and jacketing of the TF conductors that were to be supplied, on behalf of Euratom, by the French Republic and by the Republic of Italy to the JT-60SA project.

10 The contract notice stated that it related to an open procedure subject to the provisions of the Joint Undertaking's Financial Regulation and the implementing rules.

11 The tender documentation consisted of tender specifications and 18 annexes, including the 'Management Specification' (Annex A; 'the Management Specification'), the 'Technical Specification for supply of … conductors' (Annex B; 'the Technical Specification') and a draft contract (Annex 1; 'the draft contract'). The Technical Specification includes, inter alia, a schedule of deliveries.

12 Section 3.1 of the tender specifications stated that the various conductors forming the object of the contract were to be delivered in conformity with the time schedule as set out in section 3 of the Technical Specification. Under section 3.2 of the tender specifications deliveries of supplies were to comply with the terms set out in the draft contract, the Management Specification and the Technical Specification.

13 Section 4.1 of the tender specifications, 'General requirements', stated the following:

'Submission of a tender implies acceptance of all the provisions laid down in the draft contract and associated annexes, including the [Technical Specification] and [the Management Specification] and where appropriate, waiver of the Tenderer's own general or specific terms and conditions.

[The Joint Undertaking] may disregard any qualification or disclaimer to that effect contained in the offer and reserves the right to reject such offers without further evaluation on the grounds that they do not comply with the Tender Specifications.

This section defines the conditions for tendering, [that is to say,] the conditions which tenderers must meet when preparing and presenting their tenders, so that they will be accepted and so that those responsible for assessing them can gain a better understanding and appreciation of the information received.

Tenders must be clear and concise. Tenders must be perfectly legible so that there can be no doubt as to words and figures. Since tenderers will be judged purely on the content of their written tenders, these must make it clear that they are able to meet the requirements provided in [the Technical Specification] and in [the Management Specification], and are capable of carrying out the work.

…

Tenders must be drawn up in accordance with the provisions of these Tender Specifications and using the relative annexed forms.

The tender must be signed by the tenderer's authorised representative or representatives. Expenses incurred in the preparation and dispatch of tenders shall not be refunded by [the Joint Undertaking].

No information of any kind will be given on the state of progress in the evaluation of tenders.

Fulfilment of the conditions of the call for tenders and/or initiation of a tendering procedure impose no obligation on [the Joint Undertaking] to award the contract. [The Joint Undertaking] is not liable for any compensation to tenderers whose tenders have not been accepted. Nor is it so liable if it decides not to award the contract.'

14 The tender specifications, section 6 of which was entitled 'Contractual provisions', also stated that the draft contract attached as Annex 1 was applicable to the procedure and that the provisions of that contract formed part of the tender specifications.

15 Section 13.1.1 of the tender specifications provided that the technical information was to comply with the Management Specification and the Technical Specification. Section 13.1.1 also stated that:

'With regard to the above documentation, the total or partial omission of information of substance, or failure to comply with the minimum requirements of [the Management Specification] and [the Technical Specification] will lead to the exclusion of the offer from the award procedure. Consequently, the Tenderer should carefully study the specifications and provide in his offer all the requested information, together with any additional data which may facilitate [the Joint Undertaking] in evaluation the tender.'

16 According to section 3 of the Technical Specification, a schedule of deliveries determined, as a number of months from signature of the contract, the date on which the different types of conductors were to be delivered by the contractor to the Joint Undertaking.

17 The applicant, Nexans France, submitted a tender ('the Tender') on 23 October 2009. The Tender included Annex C 1, entitled 'List of major deviations from the contract form that will lead to a rewording of certain clauses', proposing a number of amendments to the draft contract ('the deviations'). The deviations related, in particular, to the following conditions: first, the applicant wished to make the coming into force of the contract subject to receipt of a down-payment by the Joint Undertaking and also to the receipt of a building permit for its plant at Cortaillod (Switzerland); second, the applicant wished to waive all liability in the event of problems in connection with the design of the cables determined by the Joint Undertaking or caused by intermediate products supplied by the Joint Undertaking, or caused by products made by the applicant but re-worked by the Joint Undertaking; third, the applicant wished to challenge the delivery schedule; it submitted a different schedule, under which the first delivery under the contract would be postponed by 12 months and the final delivery by 1 month, in other words to make the last delivery under the contract after 55 months instead of 54 months; fourth, the applicant requested that penalties for non-performance be calculated on the basis of the amount of products not delivered on time and not on the whole value of the contract and that the rate of penalties applicable be 1% per week, limited to 15% of the products not delivered on time and to 10% of the total value of the contract; fifth, the applicant sought to challenge the clauses relating to delays in deliveries, the rules on part deliveries, the duration of the guarantee of its products, the maximum amount of its liability and the fixed price principle; sixth, the applicant claimed the right, in the event of technical difficulties, to be given free access to a new technology supplied by the Joint Undertaking or, failing that, the right to terminate the contract unilaterally; seventh, the applicant wished to be granted broader intellectual property rights than those envisaged in the draft contract; eighth, the applicant wished to have a unilateral power to terminate the contract without compensation if the Joint Undertaking should fail to make payments within the prescribed periods, contest payment requests or if the applicant should be unable to manufacture the conductors required in accordance with the technical specifications defined by the Joint Undertaking; and, ninth, and last, the applicant expressed a deviation relating to section II.26 of the draft contract, the wording of which is incomplete.

18 By letter of 19 November 2009 a member of the Joint Undertaking's Contracts and Procurement Department, Ms R., requested the applicant to provide further information about the Tender. Ms R. reminded the applicant about the wording of Section 4.1 of the tender specifications (see

paragraph 13 above) and also invited it to submit a signed copy of the draft contract and to confirm that it accepted all the provisions in that contract. Section A of that letter ended with the following two paragraphs:

'Can you confirm that you accept the provisions laid down in the draft contract and associated annexes? If so, can you then confirm that the abovementioned deviations are therefore just indications and not contract qualifications? Can you provide the draft contract initialled on each page and duly signed by the authorised person in your company?

[If] you do not confirm acceptance [of] the contract provisions [the Tender] will be rejected without further evaluation.'

19 In the original of the letter sent to the applicant the words 'rejected without further evaluation' were underlined.

20 Ms R.'s letter also contained Section B, 'Exclusion criteria', and Section C, 'Technical and Professional Criteria'. The questions set out in those two sections of the letter were introduced by the following passage, in bold:

'Subject to your confirmation of acceptance [of] the contract provisions as provided above, please respond to the questions below …'.

21 The applicant's Vice President, Mr B., replied to that letter by letter of 26 November 2009. In his reply, he considered that the deviations should be taken into consideration and serve as a basis for the negotiations between the applicant and the Joint Undertaking, since the financial terms of the Tender had been defined by reference to the deviations. Mr B. further stated that he understood from a telephone conversation on 23 November 2009 that the Joint Undertaking considered that acceptance of the draft contract was a precondition of the evaluation of the Tender. He claimed, however, that section 4.1 of the tender specifications (see paragraph 13 above) did not establish an imperative rule, but conferred a discretion on the Joint Undertaking. For that reason he invited the Joint Undertaking to reconsider its interpretation of section 4.1 of the tender specification and to accept the Tender in the light of the deviations. He also stated the reasons for formulating the deviations. Also annexed to that letter were the applicant's answers to the questions at sections B and C of the letter of 19 November 2009 (see paragraph 20 above).

22 During and after that exchange of letters telephone contacts took place between the applicant and the Joint Undertaking.

23 By letter of 26 February 2010 the applicant's Chairman and Chief Executive Officer, Mr V., reiterated the deviations and requested the Joint Undertaking to take a position on them. In addition, in that letter the applicant's Chairman and Chief Executive Officer drew the Joint Undertaking's attention to a possible conflict of interests affecting one of its competitors.

24 The applicant again explained its position at a meeting with the Joint Undertaking on 25 March 2010.

25 By letter of 13 April 2010 the Joint Undertaking's Head of Contracts and Procurement answered the letters of 26 November 2009 (see paragraph 21 above) and 26 February 2010 (see paragraph 23 above). The Joint Undertaking's head of purchasing stated on that occasion that the Joint Undertaking would take the applicant's allegations of a conflict of interests into consideration. That letter also contained the following passage:

'With respect to the tender you refer to …, please note that the evaluation is still ongoing and that as such [the Joint Undertaking] cannot disclose any additional information about the matter. However, we are confident that the interactions which occurred between the [Joint Undertaking's] Contracts and

Procurement Department and Nexans were useful to clarify the general terms of participation and boundaries which regulate our procurements. In this sense, regarding your reference to the letter sent on [26] November [2009], we must highlight that that letter was sent by Nexans in response to a request for clarifications by [the Joint Undertaking]. …Nexans [having] provided all the necessary clarifications in that letter, there was no scope for a further follow up in the context of the evaluation itself'.

26 In a letter sent on 16 April 2010 to the Joint Undertaking's Head of Contracts and Procurement, the applicant's Vice President confirmed that there was in his view a conflict of interests owing to the presence on the Joint Undertaking's Governing Board of a person employed by the Agenzia nazionale per le nuove tecnologie, l'energia e lo sviluppo economico sostenibile (National Agency for New Technologies, Energy and Sustainable Economic Development, Italy; 'ENEA'). That letter also mentioned the possibility of misuse of confidential information concerning the applicant and also an infringement of intellectual property rights held by the applicant.

27 In two reports addressed to the Director and the Executive Committee, respectively, of the Joint Undertaking, drawn up, in application of Article 122 of the implementing rules, on 25 March and 6 April 2010, the Evaluation Committee proposed that the Tender should be rejected and the contract awarded to a consortium called the Italian Consortium for Applied Superconductivity (ICAS) ('the ICAS consortium'), the only other tenderer, consisting of ENEA, Tratos CAvi SpA and Criotect Impianti Srl.

28 As regards the Tender, the Tender Evaluation Committee stated the following. First, the declaration on honour in relation to the exclusion criteria was incomplete. Second, the applicant had not produced a signed copy of the draft contract, but, on the contrary, had formulated a set of deviations in respect of the terms of the contract relating to the delivery schedule, the technical and financial criteria and the extent of the guarantee to be borne by the contractor. Third, in response to a request for clarification, the applicant had maintained its deviations and supplied further information regarding the exclusion criteria, from which it emerged that the applicant had been convicted in 2007 of an infringement of the competition rules committed in 2001. In conclusion, the Tender Evaluation Committee proposed that the Tender should be rejected, owing, in particular, and without there being any need to comment with respect to the exclusion criteria, to the applicant's having maintained deviations that were incompatible with several essential requirements resulting from the tender specifications, the draft contract and the Technical Specification.

29 Consequently, only the ICAS consortium's offer was evaluated. Since the consortium remained the only tenderer in line for the award of the contract, negotiations were initiated, on the basis of Article 139(6) of the implementing rules, at the request of the Joint Undertaking.

30 At its 21st meeting, on 19 and 20 May 2010, the Executive Committee of the Joint Undertaking, to which the matter had been referred on the basis of Article 124(2) of the implementing rules, since the contract had a value of over EUR 1 million, confirmed the regularity of the award procedure.

31 On 8 July 2010 the Director of the Joint Undertaking rejected the Tender ('the rejection decision') and awarded the contract to the ICAS consortium ('the award decision').

32 By letter of 16 July 2010 Ms R. informed the applicant that the Tender had been rejected in application of Article 120(4) of the implementing rules, as it did not meet certain 'essential requirements' set out in the tender documentation, owing to the applicant's refusal to sign a copy of the draft contract and also to the deviations. In that letter, the award decision was also brought to the applicant's attention. The award decision was also sent to the ICAS consortium on the same date.

33 On 23 July 2010 the applicant's Vice President wrote to the Joint Undertaking requesting it to postpone the award decision and the rejection decision (together 'the contested decisions') and also to recommence a new procurement procedure. In addition, the Joint Undertaking was notified that it might face legal proceedings for receiving confidential protected information.

34 A reply to that letter was sent by the Joint Undertaking's Head of Contracts and Procurement on 3 August 2010.

Procedure and forms of order sought by the parties

35 By application lodged at the Court Registry e on 18 September 2010, the applicant brought the present action.

36 By separate document lodged at the Court Registry on the same date, the applicant applied for suspension of the operation of the contested decisions.

37 By letter registered at the Court Registry on 5 October 2010, the Joint Undertaking informed the Court that it had opened an internal investigation into the conflict of interests alleged in the application and requested that the present case be stayed pending the outcome of the investigation.

38 The applicant's request for interim measures was rejected by order of the President of the Court of 15 October 2010 and costs were reserved.

39 By letter of 27 October 2010 the applicant expressed its agreement that the present proceedings should be stayed.

40 By order of 19 November 2010, pursuant to Article 77(d) of the Rules of Procedure of the General Court, the President of the First Chamber of the Court stayed the present case until 15 December 2010.

41 In the context of the internal investigation referred to at paragraph 37 above, the applicant and the ICAS consortium were invited to submit observations. The services of the Joint Undertaking then drew up a report, which was placed before the Director of the Joint Undertaking on 29 November 2010. In the light of that report, the Director of the Joint Undertaking decided to confirm the contested decisions. Consequently, the contract was signed with the ICAS consortium on 9 December 2010 and on the same date the applicant was informed that the contract had been signed. The investigation report was communicated to the applicant on 18 January 2011.

42 By letter registered at the Court Registry on 12 April 2011 the applicant requested the Court to order, by way of measures or organisation of procedure, the Joint Undertaking to produce, if need be in a non-confidential version, the technical and commercial offer submitted by the ICAS consortium and the contract signed with that consortium on 9 December 2010.

43 By letter registered at the Court Registry on 17 May 2011 the Joint Undertaking requested the Court to reject that request. However, it produced a non-confidential version of the contract with the ICAS consortium and also Annex B to that contract, containing the delivery schedule.

44 Upon hearing the report of the Judge-Rapporteur, the Court (First Chamber, Extended Composition) decided to open the oral procedure and, in the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, put a number of written questions to the parties, to which the parties replied within the prescribed period.

45 The parties presented oral argument and answered the oral questions put to them by the Court at the hearing on 27 November 2012.

46 The applicant claims that the Court should:

— annul the contested decisions;

— annul all the measures adopted subsequently;

— order the Joint Undertaking to pay it the sum of EUR 175 453, to be increased, together with interest, by way of compensation for the harm which it claims to have sustained;

— in the alternative, in the event that a new tender procedure could not be organised, order the Joint Undertaking to pay it the sum of EUR 50 175 453, to be increased, together with interest, by way of compensation for the harm which it claims to have sustained;

— order the Joint Undertaking to pay the costs.

47 The Joint Undertaking contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

1. *The applications for annulment*

Admissibility of the applications for annulment

The admissibility of the second head of claim submitted by the applicant

48 By its second head of claim, the applicant requests, in addition to annulment of the contested decisions, annulment of 'all the measures adopted subsequently'.

49 Under the first paragraph of Article 21 of the Statute of the Court of Justice, which is applicable to the procedure before the General Court by virtue of the first paragraph of Article 53 of that Statute, and under Article 44(1)(c) of the Rules of Procedure, all applications must state the subject-matter of the proceedings. That statement must be sufficiently precise to enable the defendant to prepare his defence and the Court to exercise its power of review (see judgment of 17 October 2012 in Case T-447/10 *Evropaïki Dynamiki* v *Court of Justice*, not published in the ECR, paragraph 27 and the case-law cited).

50 In the present case the applicant does not state which decisions other than the contested decisions are referred to in its application for annulment. Such a head of claim thus lacks sufficient information to permit an assessment of its scope and must therefore be rejected as inadmissible (see, to that effect, *Evropaïki Dynamiki* v *Court of Justice*, paragraph 49 above, paragraphs 25 to 28, and order of 24 October 2012 in Case T-442/11 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 92 and the case-law cited).

The applicant's *locus standi* to bring an action against the award decision

51 The Joint Undertaking claims that, as the Tender does not comply with the tender specifications, it was required to reject it. In those circumstances, it maintains, the applicant has no interest in challenging the award decision. As regards the latter decision, the Joint Undertaking submits that the action must therefore be rejected as inadmissible.

52 The applicant, on the other hand, claims, referring to the order of the President of the Court in Case T-114/06 R *Globe* v *Commission* [2006] ECR II-2627, paragraph 30 et seq., that a candidate excluded in an invitation for tenders is always directly and individually concerned by the decision awarding the contract to another candidate. It therefore considers that it is entitled to seek annulment of the award decision.

53 Under the fourth paragraph of Article 263 TFEU, applicable to the present case pursuant to Article 106 *bis* AE, any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them. Since it is common ground that the award decision is addressed to the ICAS consortium and not to the applicant, it is necessary to ascertain whether that decision is of direct and individual concern to the applicant.

54 In that regard, it has consistently been held that a natural or legal person can be directly concerned by an act, within the meaning of the fourth paragraph of Article 263 TFEU, only where that act directly affects their legal situation (see, to that effect, Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraphs 43 and 45, and Case T-80/97 *Starway* v *Council* [2000] ECR II-3099, paragraph 61).

55 It has repeatedly been held that where a tenderer's bid is rejected before the phase preceding the award decision and accordingly was not compared with the other tenders, the admissibility of the action brought by the tenderer concerned against the award decision is conditional upon the annulment of the decision rejecting his bid (Case T-8/09 *Dredging International and Ondernemingen Jan de Nul* v *EMSA* [2011] ECR II-6123, paragraphs 134 and 135, and judgment of 22 May 2012 in Case T-17/09 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraphs 118 and 119).

56 Only if the latter decision is annulled is the award decision capable of directly affecting the legal situation of the tenderer whose bid was rejected before the phase preceding the award decision. On the other hand, where the application for annulment of the rejection decision is dismissed, the award decision cannot have legal consequences for a tenderer whose bid was rejected before the phase preceding the award decision. In that situation, the rejection decision prevents the tenderer concerned from being directly affected by the decision awarding the contract to another tenderer.

57 Thus, where, as in the present case, a candidate's bid has been rejected as not satisfying the essential requirements of the tender specifications, it is only if that candidate succeeds in showing that his bid was wrongly rejected on that ground that he can thus establish that he was entitled to have his bid compared with those of the other tenderers and, accordingly, that the decision awarding the contract to another candidate directly affects his legal situation.

58 Consequently, in the present case the admissibility of the application for annulment of the award decision depends on the applicant's being successful in securing annulment of the rejection decision. The Court must therefore first of all examine all the arguments relating to the legality of the rejection decision.

The merits of the application for annulment of the rejection decision

Preliminary considerations

59 In support of its applications for annulment, directed without distinction against the rejection decision and the award decision, the applicant puts forward four pleas in law. The first, which may be divided into three parts, alleges, respectively, breach of the principles of legal certainty, the protection of legitimate expectations and transparency. The second plea consists of four parts and alleges breach of the principles of equal treatment and equal opportunities between candidates during the procedure. The third plea relates to the breach of the principle of sound administration and of Articles 84 and 94 of the Joint Undertaking's Financial Regulation. Last, by the fourth plea the applicant claims that there has been an error of law in the application of Article 120(4) of the implementing rules.

60 It must be borne in mind that the Tender was rejected by the Joint Undertaking before the comparative examination phase, on the ground that it did not comply with the conditions laid down for tenderers in the tender documentation. As the third part of the second plea alleges that, in preparing its bid, the ICAS consortium had the benefit of information which placed it at an advantage, it thus has no impact on the legality of the rejection decision.

61 By its arguments, the applicant seeks, in essence, first, to call in question the legality of the conditions laid down for tenderers in the tender documentation and by reference to which the Joint Undertaking evaluated the Tender.

62 In the first place, the Court therefore considers it appropriate to examine together the arguments put forward in that regard in the context of the first and third parts of the first plea, the first and second parts of the second plea and the third and fourth pleas, relating to the unlawfulness of the tender documentation.

63 Furthermore, even on the assumption that the conditions of the invitation to tender are lawful, the applicant contends, second, that the Joint Undertaking was wrong to consider itself entitled to reject the Tender before the comparison of merits phase.

64 Then, in the second place, the Court considers it appropriate to examine the arguments relating to the application in the present case of the conditions laid down in the tender documentation which the applicant puts forward in the context of the first plea, the second and fourth parts of the second plea and the third and fourth pleas.

65 In the third place, the Court will examine the assertions relating to breach of the principle of protection of legitimate expectations which the applicant puts forward in the context of the second part of the first plea.

The legality of the tender documentation

66 The applicant's criticisms of the tender documentation may be grouped in three sets of arguments. First, in the context of the first and third parts of the first plea, and also of the fourth plea, the applicant takes issue with the Joint Undertaking for the lack of precision of the wording of the tender documentation, which, in its submission, prevented it from knowing with certainty the extent of the obligations placed on it, in breach of the principles of legal certainty and transparency. Second, in the context of the first part of the second plea, the applicant pleads that the tender specifications and the Technical Specification are illegal, on the ground that the deadlines for delivery were envisaged in such a way as to exclude any candidature other than that of the ICAS consortium. In the context of the third plea, the applicant submits, moreover, that the imposition of the delivery schedule constitutes a breach of the principle of sound administration. Third, in the context of the second part of the second

plea, the applicant takes issue with the Joint Undertaking for having allowed ENEA to influence to its advantage the conditions of the invitation to tender, which constitutes a situation of a conflict of interests.

– The clarity of the rules applicable to the tender procedure

67 In the context of the first and third parts of the first plea, the applicant takes issue with the Joint Undertaking for the lack of precision of the wording of the tender documentation, which, it submits, prevented it from knowing with certainty the extent of the obligations placed on it, in breach of the principles of legal certainty and transparency. Those criticisms are repeated by the applicant in its arguments relating to the fourth plea.

68 In that regard, the applicant maintains that the tender documentation did not specify clearly that tenderers were required to accept the draft contract without having the option to propose changes to it. Nor did the letter sent to it by the Joint Undertaking on 19 November 2009 (see paragraph 18 above) state that the Tender would inevitably be rejected owing to the formulation of the deviations, but the Joint Undertaking merely stated that it might be rejected. At no time before the adoption of the rejection decision did the Joint Undertaking mention Article 120(4) of the implementing rules. The applicant contends that it could not therefore reasonably assume that the Joint Undertaking would apply that provision in the present case or that the 'general conditions' mentioned in the tender specifications constituted 'essential conditions' within the meaning of that provision. Likewise, there was no indication that compliance with the delivery schedule constituted an 'essential condition' within the meaning of Article 120(4) of the implementing rules. In those circumstances, the applicant maintains that the Joint Undertaking breached the principle of legal certainty.

69 Furthermore, in the applicant's submission, section 4.1 of the tender specifications allowed the Joint Undertaking to assess whether the changes to the draft contract proposed by a tenderer might be accepted. The Joint Undertaking did not therefore have a mandatory duty but had a discretion. Yet at no time did the Joint Undertaking allow the applicant to understand that its interpretation of the scope of section 4.1 of the tender specifications was different. On the contrary, the Joint Undertaking concealed the legal basis on which it adopted the rejection decision. It therefore failed to respect the principle of transparency.

70 The Joint Undertaking disputes those assertions.

71 The principle of legal certainty requires that the persons concerned be in a position to know with certainty the extent of the obligations placed on them (Case C-345/06 *Heinrich* [2009] ECR I-1659, paragraph 44, and Case C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 79). As for the principle of transparency, which is a general principle, applicable to the Joint Undertaking when it awards public contracts, pursuant to Article 79 of its Financial Regulation, it implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or in the tender specifications, so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact scope and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract (Case C-92/00 *HI* [2002] ECR I-5553, paragraph 45; Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraphs 109 to 111; and judgment of 12 March 2008 in Case T-332/03 *European Service Network* v *Commission*, not published in the ECR, paragraphs 126 and 127).

72 It is therefore necessary, first of all, to ascertain whether the tender documentation meets the abovementioned criteria. The applicant's criticisms in that respect may be summarised in two complaints. First, in its submission, it was not clear that acceptance of the draft contract and the delivery schedule by tenderers was mandatory. Nor, second, was it clear that the bid submitted by a tenderer who refused to comply with that obligation had to be rejected.

73 As regards the first complaint, it is sufficient to refer to the first paragraph of section 4.1 of the tender specifications (see paragraph 13 above), which states the following:

'Submission of a tender implies acceptance of all the provisions laid down in the draft contract and associated annexes, including the [Technical Specification] and [the Management Specification] and where appropriate, waiver of the Tenderer's own general or specific terms and conditions.'

74 It is clear and wholly unequivocal from that requirement of the tender specifications that acceptance of the draft contract and of the delivery schedule (which forms part of the Technical Specification) was mandatory for tenderers and that tenderers were required, without exception, to waive any of their own terms.

75 The obligation to comply with the delivery schedule is also apparent from sections 3.1 and 13.1.1 of the tender specifications (see paragraphs 12 and 15 above). As regards acceptance of the draft contract, section 6 of the tender specifications states that that contract, attached as annex 1 to the tender specifications, is applicable to the procedure and that the provisions contained therein form part of the tender specifications (see paragraph 14 above).

76 It is made clear, moreover, at the third subparagraph of section 4.1 of the tender specifications that the conditions laid down in that section as a whole – namely, in particular, acceptance of the draft contract and of the delivery schedule – are 'conditions for tendering' and that they constitute, in other words, 'conditions which tenderers must meet when preparing and presenting their tenders, so that they will be accepted'. Likewise, at the fourth subparagraph of section 4.1, it is stated that 'tenderers will be judged purely on the content of their written tenders' and that, consequently, 'these must make it clear that [tenderers] are able to meet the requirements provided in [the Technical Specification] and in [the Management Specification]'.

77 At the hearing the applicant submitted that, while the meaning of those conditions taken in isolation might seem clear, the ambiguous nature of the extent of the obligations placed on tenderers emerged from the general structure of the whole of the documentation relating to the call for tenders. However, the applicant has failed to identify more precisely the slightest condition in the tender specifications or the other tender documents that might give rise to such ambiguity and has put forward no argument capable of establishing that, on a reading of the conditions of the tender documentation, in particular those referred to at paragraphs 73 to 76 above, it was not perfectly clear to a normally diligent operator that acceptance by tenderers of the draft contract and the delivery schedule was mandatory and was a condition of the tender's complying with the requirements laid down in the tender specifications.

78 It follows that the applicant's first complaint must be rejected as unfounded.

79 It is therefore appropriate to examine the second complaint, relating to breach of the principles of legal certainty and transparency, in which respect the applicant maintains that it was not clear from the tender specifications that tenders that did not comply with the requirements referred to at paragraph 77 above would be rejected.

80 It must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which it has thus defined

in regard to any of the tenderers without being in breach of the principle of equal treatment of candidates. It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications, for the purpose of establishing whether, as the applicant maintains, those specifications could permit the Joint Undertaking to accept the deviations.

81 In that regard, it is sufficient to refer once again to section 4.1 of the tender specifications, the second subparagraph of which reads as follows:

'[The Joint Undertaking] may disregard any qualification or disclaimer to that effect contained in the offer and reserves the right to reject such offers without further evaluation on the grounds that they do not comply with the tender specifications.'

82 It must be held that the literal meaning of that condition is clearly opposed to the interpretation given to it by the applicant, which maintains that the Joint Undertaking must have a discretion and the power to accept exceptions to the requirements set out in the first subparagraph of section 4.1 of the tender specifications (see paragraphs 13 and 73 above). Far from allowing the Joint Undertaking to take any amendments to the draft contract and the delivery schedule into account, the second subparagraph of section 4.1 allowed it only to disregard any proposed exceptions and enabled it lawfully to reject any offer that did not comply with the tender specifications.

83 It follows that, contrary to the applicant's contention, the Joint Undertaking had no discretion that allowed it not to reject an offer containing exceptions to the draft contract or the delivery schedule, but that its only discretion related to whether the exceptions which resulted in the offer not being in compliance with those requirements could be disregarded, on the understanding that, if they could not, it was required to reject that offer.

84 Furthermore, section 13.1.1 of the tender specifications (see paragraph 15 above), which states that 'failure to comply with the minimum requirements of [the Management Specification] and [the Technical Specification] will lead to the exclusion of the offer', constitutes an additional warning of the consequences of failure on the part of tenderers to observe the deadlines set out in the delivery schedule.

85 Sections 1 and 14 of the tender specifications, moreover, which are attached as annex A 2 to the application, state on two occasions that the Joint Undertaking's Financial Regulation and the implementing rules are to apply to the tender procedure. In addition, section 4.2 of the tender specifications states that the procedure is to be an open procedure within the meaning of Article 81(4) of the Joint Undertaking's Financial Regulation and Article 84 of the implementing rules. It is a feature of such procedures that the contracting authority is unable to negotiate with the various tenderers, which are judged purely on the content of their written tenders, as stated at the fourth subparagraph of section 4.1 of the tender specifications.

86 Furthermore, the letter sent to the applicant by the Joint Undertaking on 19 November 2009 (see paragraph 18 above) was quite explicit as to the scope of the rules applicable to the procedure in question. With regard to the deviations set out in the Tender, the Joint Undertaking stated the following:

'Can you confirm that you accept the provisions laid down in the draft contract and associated annexes? If so, can you then confirm that the abovementioned deviations are therefore just indications and not contract qualifications? Can you provide the draft contract initialled on each page and duly signed by the authorised person in your company?

[If] you do not confirm acceptance [of] the contract provisions [the Tender] will be rejected without further evaluation.'

87 The consequences for the applicant if it should state that its deviations were contractual terms and that it intended to rely on them as against the Joint Undertaking were also underlined by the conditional nature of the questions which, in the same letter, followed the passage reproduced above. Those questions, which related to the exclusion and selection criteria, were introduced by the following warning:

'Subject to your confirmation of acceptance [of] the contract provisions as provided above, please respond to the questions below …'

88 The applicant cannot therefore validly maintain that the Joint Undertaking, whether in the drafting of the tender documentation or by its conduct during the procedure for the award of the contract at issue, 'concealed' the legal basis, that is to say, Article 120(4) of the implementing rules, on which it founded the rejection decision.

89 As stated at paragraph 85 above, the applicant, on reading the tender documentation, could not fail to be aware that the procedure to which it was subject was governed by the implementing rules, Article 120(4) of which is worded as follows:

'Tenders which do not satisfy all the essential requirements set out in the supporting documentation for invitations to tender or the specific requirements laid down therein shall be eliminated.

The Evaluation Committee or the Joint Undertaking may ask tenderers to supply additional material or to clarify the supporting documents submitted, within the time limit it specifies.'

90 Accordingly, the second complaint, whereby the applicant alleges that the rejection of offers that did not meet the obligation to comply with the requirements of the draft contract and also with the deadlines laid down in the delivery schedule was not sufficiently foreseeable for tenderers, must also be rejected as unfounded.

91 It thus follows from the foregoing that the applicant cannot validly maintain either that the obligation placed on tenderers to accept the draft contract and the delivery schedule laid down in the Technical Specification, and also the rejection of offers not complying with those requirements, were not clear from the tender documentation or that those conditions were not made accessible to the applicant with sufficient clarity. It follows that its allegations relating to a breach of the principles of legal certainty and transparency must be rejected.

– The justification for the deadlines imposed by the delivery schedule

92 In the context of the first part of the second plea, and in support of the third plea, the applicant claims that the tender specifications and the Technical Specification are unlawful, on the ground that the delivery deadlines were laid down in such a way as to exclude any candidature other than that of the ICAS consortium. The applicant thus maintains that the imposition of the delivery schedule constitutes a breach of the principle of equal treatment of tenderers, having as its origin a situation of a conflict of interests, and also a breach of the principle of sound administration.

93 In the context of the first part of the second plea, the applicant maintains that the deadlines resulting from the delivery schedule laid down in the Technical Specification constitute a disproportionate imposition, since only undertakings with a suitable production line at their disposal on the date envisaged for the award of the contract had had a chance of winning the contract. The sole purpose of those excessively short deadlines was therefore to favour the candidacy of the ICAS consortium, of which ENEA is a member, which is borne out by the fact that no other tender was submitted. The fact that the signature of the contract between the Joint Undertaking and the ICAS consortium was delayed by nine months shows that the deadlines laid down were not objectively justified.

94 In the context of the third plea, the applicant claims, moreover, that in setting the delivery periods in such a way that only the ICAS consortium could win the contract the Joint Undertaking deprived itself of the possibility of obtaining more advantageous tenders than that submitted by the consortium. Accordingly, the determination of the delivery deadlines breaches not only the principle of equal treatment of tenderers but also the principle of sound administration.

95 The Joint Undertaking disputes those assertions.

96 It must be stated at the outset that, as the Joint Undertaking correctly maintains, the arguments whereby the applicant seeks to challenge the conditions of the invitation to tender relating to delivery deadlines are ineffective, since the rejection decision is based on the fact that a tender presenting deviations cannot be accepted and since the deviations formulated in the Tender did not relate purely to the delivery deadlines.

97 As explained at paragraph 17 above, the request for a derogation from the deadlines laid down in the delivery schedule was only one of the numerous deviations formulated in the Tender. The applicant also requested the Joint Undertaking, in particular, to accept that the entry into force of the contract should be conditional on its obtaining a building permit and postponed until that permit had been obtained, it refused to accept the fixed price clause and it claimed a reduction of the financial penalties and an attenuation of its liability. In other words, for reasons unconnected with the question of compliance with the deadlines laid down in the delivery schedule, each of which constituted a derogation from the provisions of the draft contract, the applicant refused to accept in their existing state the contract conditions as defined by the Joint Undertaking.

98 In those circumstances, even if it were accepted that the applicant's criticisms of the delivery schedule were founded, the fact none the less remains that the applicant refused to accept the draft contract and that that refusal was in itself sufficient for the Joint Undertaking to be required to reject the Tender, as stated at paragraphs 71 to 91 above. Thus, the objection of illegality which the applicant derives from the discriminatory and disproportionate nature of the delivery schedule cannot result in its request for annulment of the rejection decision being granted. It follows that this complaint must be rejected as ineffective.

99 In any event, the complaint is also unfounded.

100 According to the case-law, the awarding authorities have a broad discretion with respect to the factors to be taken into account for the purpose of adopting a decision to award a contract following an invitation to tender. In that context, they also have a broad discretion to determine both the content and the implementation of the rules applicable to the award of a contract by an invitation to tender (see judgment of 25 October 2012 in Case T-216/09 *Astrim and Elyo Italia* v *Commission*, not published in the ECR, paragraph 17 and the case-law cited).

101 It should also be borne in mind that, in the light of the broad discretion enjoyed by the awarding authority, review by the Court must be limited to checking that the rules governing the procedure and the statement 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, to that effect, *Astrim and Elyo Italia* v *Commission*, paragraph 100 above, paragraph 20 and the case-law cited).

102 None the less, as the applicant correctly claims, the Joint Undertaking is required to observe the principles of equal treatment and non-discrimination. Under Article 79 of its Financial Regulation, as awarding authority, the Joint Undertaking is required to ensure, at each stage of a tender procedure, compliance with the principle of equal treatment and, in consequence, equal opportunities for all tenderers. In addition, under the principle of equal treatment of tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when

formulating their tenders, which therefore implies that the tenders of all tenderers must be subject to the same conditions (Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 34; *Commission* v *CAS Succhi di Frutta*, paragraph 71 above, paragraph 108; and Case T-50/05 *Evropaïki Dynamiki* v *Commission* [2010] ECR II-1071, paragraphs 55 and 56).

103 In the present case the applicant does not claim that all candidates were not subject to the same conditions, but it maintains that the conditions imposed on all candidates were conceived in such a way as to favour the ICAS consortium. In support of that assertion, the applicant claims that only an undertaking with a suitable production line at its disposal was capable of winning the contract and that no candidate other than the ICAS consortium submitted a tender that met the deadlines imposed by the Technical Specification of the invitation to tender.

104 In that regard, while it is true that no acceptable offer other than that of the ICAS consortium was submitted, the assertion that only an undertaking with a suitable production line at its disposal could apply, in the light of the deadlines laid down, has not been established.

105 Second, the Joint Undertaking contends that the delivery deadlines were defined in order to enable it to meet its obligations towards the international organisation ITER, Russia and Japan, and which constitute the object of the contract at issue in the present case (see paragraphs 6 and 7 above). Those claims are borne out by the production of the three contracts concerned and also by the schedule imposed by the international organisation ITER, attached to the defence (Annexes B 7, B 8, B 10 and B 31 to B 35). In those circumstances, the Joint Undertaking must be considered to have demonstrated that the deadlines laid down in the Technical Specification were objectively justified and were not intended to favour any particular candidature whatsoever.

106 On the other hand, the argument to the contrary, which the applicant bases on the fact that, in postponing by nine months the signature of the contract with the ICAS consortium, the Joint Undertaking showed by its conduct that it was not bound by those deadlines, as it claims, is strongly contradicted by the Joint Undertaking. The Joint Undertaking claimed at the hearing that the signature of the contract could not take place during the summer of 2010 because the members of the ICAS consortium were unable to submit the administrative and financial documents necessary for the conclusion of the contract. It is common ground, moreover, that following allegations of a conflict of interests submitted directly to the Joint Undertaking by the applicant before the present action was brought, and which also constitute an element of the action, the Joint Undertaking decided to postpone the award decision and to open an investigation into those allegations. The contract was actually signed immediately upon the closure of that investigation (see paragraphs 37 and 39 to 41 above).

107 Third, and last, the alleged breach of the principle of sound administration consists, in the applicant's submission, in the fact that the Joint Undertaking voluntarily deprived itself of the possibility of receiving more advantageous tenders by deciding to define the delivery schedule in such a way as to exclude any candidature other than that of the ICAS consortium. It follows from the foregoing, however, that the deadlines laid down in the delivery schedule were objectively justified by the international commitments undertaken by the Joint Undertaking. In taking the view, in the exercise of the broad discretion recognised to it in such matters by the case-law (see paragraph 100 above), that its obligation to comply with those international commitments must prevail over the prospect, if it had laid down less constrictive delivery deadlines, that it might receive a larger number of candidatures, the Joint Undertaking did not vitiate its assessment by any manifest error.

108 It thus follows from the foregoing that the applicant has not succeeded in establishing either that the deadlines laid down in the delivery schedule were conceived in such a way as to favour the candidature of the ICAS consortium or that they were disproportionate. Accordingly, the complaints which the applicant derives from the irregularity of the delivery schedule, which are ineffective, are in any event also unfounded and must be rejected.

– The existence of a conflict of interests vitiating the determination of the conditions imposed on tenderers

109 In the context of the second part of the second plea, the applicant takes issue with the Joint Undertaking for having allowed ENEA, which is represented in various bodies of the Joint Undertaking and is also one of the members of the ICAS consortium, to influence to its advantage the conditions of the call for tenders, which in the applicant's submission constitutes a situation of a conflict of interests.

110 Mr M. and Mr P., both agents of ENEA and members of the Executive Committee and the Governing Board of the Joint Undertaking, were involved in preparing the call for tenders. They thus had the opportunity to influence the determination conditions imposed on candidates in a manner favourable to ENEA's candidature.

111 Furthermore, ENEA was involved in the design of the TF conductors intended for the JT-60SA project and the Technical Specification was sent to ENEA for validation before the call for tenders was launched.

112 Last, an agent of ENEA had access, during a visit to Nexans Korea's plant, to confidential information relating to the applicant.

113 The Joint Undertaking disputes those assertions.

114 According to the case-law, the fact that a tenderer, even though he has no intention of doing so, is capable of influencing the conditions of a call for tenders in a manner favourable to himself constitutes a situation of a conflict of interests. In that regard, the conflict of interests constitutes a breach of the equal treatment of candidates and of the equal opportunities for tenderers (Joined Cases C-21/03 and C-34/03 *Fabricom* [2001] ECR I-1559, paragraphs 29 and 30, and Case T-160/03 *AFCon Management Consultants and Others* v *Commission* [2005] ECR II-981, paragraph 74).

115 First, it follows from the case-law that the concept of a conflict of interests is objective in nature and, in order to characterise it, it is appropriate to disregard the intentions of those concerned, in particular whether they acted in good faith (Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281, paragraphs 44 to 48).

116 Second, it should be observed that the awarding authorities are under no obligation to exclude systematically tenderers in a situation of a conflict of interests, such exclusion not being justified in cases in which it is possible to show that that situation had no impact on their conduct in the context of the tender procedure and that it entails no risk of practices likely to distort competition between tenderers (see, to that effect, *Fabricom*, paragraph 114 above, paragraphs 33 to 36; Case C-538/07 *Assitur* [2009] ECR I-4219, paragraphs 26 to 30; and Case C-376/08 *Serrantoni and Consorzio stabile edili* [2009] ECR I-12169, paragraphs 39 and 40).

117 Third, on the other hand, the exclusion of a tenderer in a situation of a conflict of interests is essential where there is no more appropriate remedy to avoid any breach of the principles of equal treatment of tenderers and transparency (Case T-345/03 *Evropaïki Dynamiki* v *Commission* [2008] ECR II-341, paragraph 71 et seq.; see also, to that effect, *Assitur*, paragraph 116 above, paragraph 21; and *Serrantoni and Consorzio stabile edili*, paragraph 116 above, paragraphs 39 and 40).

118 It is therefore appropriate to examine, in the light of the foregoing considerations, the allegations that the participation of ENEA, one of the tenderers through the ICAS consortium, in the preparation of the tender documents, and in particular, according to the applicant, in the determination of the

Technical Specification, constitutes a situation of conflict of interests that rendered the conditions resulting from the tender documentation illegal, owing to the fact that those conditions were conceived in such a way as to favour that consortium's candidature.

119 In that regard, in the first place, the Joint Undertaking's claims that the representatives of ENEA who sit on the Governing Board and the Executive Committee are not members of those bodies in their capacity as representatives of ENEA does not preclude the existence of a conflict of interests of such a kind as to undermine the principle of equality of tenderers. The Joint Undertaking claims that Mr P., a member of the Governing Board, represents the Italian Republic and not ENEA and that Mr M. sits on the Executive Committee not as a representative of ENEA but in his capacity as a recognised expert in nuclear fusion. The fact that it is not in their capacity as agents of ENEA that those qualified individuals are members of the governing bodies of the Joint Undertaking is not in itself capable of preventing them from using their situation within the Joint Undertaking to serve the interests of the Italian national agency, which precisely constitutes a situation of conflict of interests.

120 Accordingly, that justification put forward by the Joint Undertaking cannot be accepted, but it is appropriate, rather, to examine the actual role that those agents of ENEA, and also ENEA itself, may have played in the preparation of the tender documents and, in particular, in the definition of the Technical Specification.

121 Thus, in the second place, the Joint Undertaking states that neither the Governing Board nor the Executive Committee was involved in preparing the tender documentation. In answer to the written questions put to it before the hearing, the Joint Undertaking supplied a particularly detailed account of the various successive stages of the preparation of the documents in question. The applicant did not offer, either before or at the hearing, any criticism with respect to the statements of the Joint Undertaking. Those statements support the Joint Undertaking's claims that neither the Governing Board nor the Executive Committee played the slightest role in the preparation of the tender documentation. In those circumstances, the complaint which the applicant bases on the presence of ENEA's agents within those bodies of the Joint Undertaking must be rejected as unfounded.

122 In the third place, as regards the applicant's assertion, acknowledged by the Joint Undertaking, that the Technical Specification concerning the TF conductors intended for the JT-60SA project were submitted to ENEA for validation before the call for tenders was launched, it must be borne in mind that Euratom's contribution to the JT-60SA project was to be provided, on behalf of Euratom, by the Italian Republic and the French Republic and that it was on that basis that the national agencies of those Member States, namely ENEA and CEA respectively, were consulted, as the Joint Undertaking acted as a substitute for those agencies in order to award the contract at issue.

123 However, it follows from the explanations provided by the Joint Undertaking at the hearing, and not disputed by the applicant, that it did not transpire either that ENEA was able to derive any advantage from the fact that the Technical Specification was submitted to it before the call for tenders was launched or that it was able to influence the determination of the Technical Specification in a manner that would subsequently have been favourable to its interests. The Joint Undertaking stated, without being contradicted, that the Technical Specification proposed by ENEA had ultimately not been accepted. It also claimed, again without being contradicted by the applicant, that the prior knowledge that ENEA had been able to gain from its involvement, first, in the phase of the development of the prototypes in question in the JT-60SA project and also, second, in the determination of the Technical Specification finally accepted for that project could not have the effect to securing a comparative advantage for ENEA, as the specification at issue had no consequence other than in terms of calibration and parametering of the plant used in the cabling and jacketing process and not on the nature of that plant, whereas the evaluation of the tenders concerned only candidates' capacity to have the plant at issue available and to make use of it.

124 In the fourth place, as the applicant has failed to explain how the confidential information obtained by an expert of ENEA during a visit to Nexans Korea's plant may have had an impact on the preparation of the tender documentation, those assertions cannot suffice to establish the illegality of those documents.

125 It follows from the foregoing that the applicant has not succeeded in establishing that the requirements flowing from the tender documentation were conceived under the influence of and for the advantage of ENEA and could not be legally imposed on all the tenderers.

126 It follows that the allegations that the conditions laid down by the tender documentation were vitiated by illegality owing to a conflict of interests must be rejected as unfounded.

127 Accordingly, the applicant cannot validly complain that compliance by the Tender with those requirements was a necessary condition in order for the Tender to be taken into consideration by the Joint Undertaking. It is therefore now necessary to consider whether the Joint Undertaking was correct to take the view that the Tender did not meet those requirements.

The legality of the rejection decision in the light of the conditions laid down in the tender documentation

128 In order to challenge the rejection decision in the light of the conditions laid down in the tender documentation, the applicant puts forward five supplementary complaints. First, in the context of the fourth plea, the applicant maintains that the obligation to accept the draft contract and the obligation to comply with the delivery schedule are not 'essential requirements' within the meaning of Article 120(4) of the implementing rules. Second, in the context of the first plea, the applicant takes issue with the Joint Undertaking for not having warned it, before adopting the rejection decision, that it interpreted the relevant provisions as meaning that it was bound to reject the applicant's tender as non-compliant. Third, in the context of the fourth part of the second plea, the applicant maintains that the excessive requirements imposed on tenderers had a negative impact on the price of its tender. Fourth, in the context of the second part of the second plea, the applicant takes issue with the fact that an agent of ENEA took part in the tender evaluation procedure. Fifth, and last, the applicant maintains that ENEA held privileged information concerning the applicant.

– The application of Article 120(4) of the implementing rules

129 In the context of the fourth plea, the applicant maintains that the deviations which it formulated related to 'general conditions' in the tender specifications and not to 'essential requirements' within the meaning of Article 120(4) of the implementing rules. Accordingly, the applicant maintains that the Joint Undertaking made an error of law in relying on that provision in order to reject its tender. In the applicant's submission, only the conditions identified as 'essential' in the tender document could entail the application of Article 120(4) of the implementing rules. Furthermore, in its submission, the Joint Undertaking could, in application of section 4.1 of the tender specifications, have disregarded the deviations rather than reject the applicant's tender.

130 The Joint Undertaking disputes those assertions.

131 As stated at paragraph 89 above, Article 120(4) of the implementing rules provides:

'Tenders which do not satisfy all the essential requirements set out in the supporting documentation for invitations to tender or the specific requirements laid down therein shall be eliminated.

The Evaluation Committee or the Joint Undertaking may ask tenderers to supply additional material or to clarify the supporting documents submitted, within the time limit it specifies.'

132 Furthermore, as stated at paragraphs 73 and 81 above, the first and second subparagraphs of section 4.1 of the tender specifications are worded as follows:

'Submission of a tender implies acceptance of all the provisions laid down in the draft contract and associated annexes, including the [Technical Specification] and [the Management Specification] and where appropriate, waiver of the Tenderer's own general or specific terms and conditions.

[The Joint Undertaking] may disregard any qualification or disclaimer to that effect contained in the offer and reserves the right to reject such offers without further evaluation on the grounds that they do not comply with the tender specifications.'

133 The applicant's overly formalistic interpretation, according to which only conditions expressly identified as 'essential' in the tender documentation can entail the application of Article 120(4) of the implementing rules, cannot be upheld. On the contrary, conditions which a normally attentive and diligent operator, on reading the tender documentation, would readily perceive to be mandatory in nature and not to be of negligible importance, by reference to the subject matter of the contract in question or the aims pursued by the rules governing public contracts, must be regarded as 'essential' within the meaning of that provision.

134 As has just been stated at paragraphs 72 to 91 above, it is clear from the tender documentation that acceptance of the draft contract and the delivery schedule constituted mandatory conditions with which tenderers' bids had to comply in order to be examined.

135 In addition, it is common ground that the deviations formulated by the applicant sought to challenge those conditions, since they related both to a large number of clauses in the draft contract and to the delivery schedule (see paragraph 17 above) and significantly affected the very terms of the contract, such as the date on which it would enter into force, the delivery schedule, the principles on which prices would be determined and the contractor's liability.

136 Owing to their importance and also to the extent of the consequences clearly attaching to any breach of those conditions, the requirements to which the deviations formulated by the applicant related must clearly be considered to constitute 'essential requirements' within the meaning of Article 120(4) of the implementing rules. In that regard, for the reasons set out at paragraph 133 above, the fact that the requirements at issue were called 'general conditions' in the tender specifications does not preclude such a legal qualification.

137 Accordingly, the applicant cannot validly maintain that the Joint Undertaking could not legally reject the Tender, on the ground that Article 120(4) of the implementing rules, since it provides only that tenders which do not satisfy all the essential requirements set out in the supporting documentation for invitations to tender are to be rejected, was not applicable in the present case.

138 However, the applicant also maintains that, even on the assumption that the deviations relate to essential conditions within the meaning of Article 120(4) of the implementing rules, the Joint Undertaking was not required to reject its offer, since it could, in the applicant's submission, in application of section 4.1 of the tender specifications, have decided to disregard the deviations.

139 That argument, first of all, is ineffective, since, as has just been held at paragraphs 131 to 137 above, the Tender could lawfully be rejected. Thus, a tenderer who has submitted a bid which does not comply with the requirements of the tender specifications cannot derive any right from section 4.1 of the tender specifications that his bid should be examined, even where the Joint Undertaking might also have been justified in disregarding the proposed deviations. In the words of the second subparagraph of section 4.1 of the tender specifications, the Joint Undertaking 'may disregard any qualification or disclaimer to that effect contained in the [Tender]' and, furthermore, 'reserves the right to reject such offers without further evaluation on the grounds that they do not comply with the

tender specifications'. It follows from those requirements, as was held at paragraph 82 above, that, far from giving the Joint Undertaking the possibility to take any amendments to the draft contract and the delivery schedule into account, the second subparagraph of section 4.1 authorised it only to disregard any proposals for derogations and allowed it lawfully to reject any offer not complying with the tender specifications.

140 In any event, as regards the merits of that argument, it must be observed that the extent to which the deviations derogate both from the clauses of the draft contract and from the delivery schedule was apparent from the actual tender submitted by the applicant and that the applicant itself confirmed in writing on at least two occasions (see paragraphs 21 and 23 above), in answer to a request for clarification sent to it by the Joint Undertaking (see paragraph 18 above), that it intended to confer contractual value on its deviations. In the light of that information, the Joint Undertaking could no longer choose to disregard the deviations without distorting the Tender and, moreover, without undermining the principle of equality between candidates, which assumes, in an open procedure, that the offers submitted will be evaluated literally and not re-interpreted as the awarding authority sees fit.

141 Accordingly, the Joint Undertaking could not disregard the deviations formulated by the applicant and it was required to reject the Tender without considering its merits, on the basis of section 4.1 of the tender specifications in conjunction with Article 120(4) of the implementing rules.

142 It follows that the applicant's complaint that the Joint Undertaking could not adopt the rejection decision without committing a breach of Article 120(4) of the implementing rules must be rejected as ineffective in part and, for the remainder and in any event, as unfounded.

– The complaint alleging that the Joint Undertaking did not warn the applicant either of its interpretation of the scope of section 4.1 of the tender specifications or of its intention to reject the offer on the basis of Article 120(4) of the implementing rules

143 In the context of the first plea, the applicant takes issue with the Joint Undertaking for not having warned the applicant before adopting the rejection decision that according to its interpretation it considered that it was required to reject the applicant's non-compliant bid. In the applicant's submission, the fact that the Joint Undertaking was silent on that point prevented the applicant from adjusting its bid, from disputing the terms of the tender specifications or from bringing an administrative or contentious action before the award decision was notified.

144 The Joint Undertaking disputes that argument.

145 First, it must be observed that that argument is factually incorrect, since the Joint Undertaking informed the applicant, in the request for clarification which it sent to the applicant (see paragraph 18 above), that '[if it did] not confirm [its] acceptance [of] the contract provisions [the Tender] w[ould] be rejected without further evaluation'.

146 Second, and for the sake of completeness, that argument is ineffective, since there is no rule or general principle that requires the awarding authority, in an open procedure, to warn a tenderer that its bid does not comply with the requirements of the tender specifications. Thus, even though the Joint Undertaking had not warned the applicant that it considered that the deviations rendered the Tender non-compliant, the fact that it remained silent on that point had no impact on the legality of the rejection decision.

147 The applicant's complaint that the Joint Undertaking failed to warn it that, owing to the deviations, the Tender was likely to be rejected must therefore be rejected as factually incorrect and, in addition, as ineffective.

– The complaint that the disproportionate conditions of the call for tenders reduced the quality of the Tender

148 In the context of the fourth part of the second plea, the applicant maintains that the excessive requirements imposed on tenderers had a negative impact on the price of its bid, as the production costs were increased without justification.

149 The Joint Undertaking disputes that argument.

150 Since the Tender was rejected without being examined, the present argument is ineffective and can only be rejected. The price of the Tender and its other features had no impact on its rejection.

151 In any event, as regards the merits of that argument, it has not been established that the requirements imposed on tenderers by the Joint Undertaking were disproportionate.

152 First, for the reasons set out at paragraphs 96 to 108 above, the applicant has not succeeded in establishing that the delivery schedule was without objective justification.

153 Second, the applicant has not even explained the reasons why it regards the requirements other than the delivery schedule to which its proposed deviations related as disproportionate.

154 In those circumstances, the alleged breach of the principle of proportionality cannot be established. Consequently, the applicant cannot validly complain that those requirements had an impact on the quality of the Tender.

155 It follows that the applicant's complaint that the disproportionate conditions of the call for tenders reduced the quality of the Tender must be rejected as ineffective and that, in any event and, in addition, that complaint is unfounded.

– The consequences of the participations of agents of ENEA in the tender evaluation procedure

156 In the context of the second part of the second plea, the applicant takes issue with the fact that an agent of ENEA took part in the tender evaluation procedure. He maintains that Mr M., who sat on the Executive Committee, was thus able to play a decisive role in the exclusion of the Tender.

157 The Joint Undertaking disputes that argument.

158 For the same reasons as those set out at paragraphs 120 and 121 above, the merits of the applicant's argument that agents of ENEA were able to use their membership of the Governing Board and the Executive Committee of the Joint Undertaking to influence the adoption of the rejection decision depends on the actual role played by those bodies in the adoption of that decision.

159 It follows from the statements of the Joint Undertaking, which have not been disputed by the applicant, that the bids submitted by the applicant and by the ICAS consortium were assessed by an Evaluation Committee, which proposed that the Tender should be rejected on the ground that it did not comply with the essential requirements set out in the tender documentation. It is common ground, moreover, that no agent of ENEA formed part of that committee.

160 It should be observed, first of all, that the presence of an agent of ENEA on the Governing Board cannot have had an impact on the adoption of the rejection decision, as the applicant does not deny that that body was not involved at any stage of the tender selection procedure.

161 The same applies to Mr M.'s presence on the Executive Committee, although that body was consulted before the contested decisions were adopted.

162 It follows from Article 124(2) of the implementing rules that the competence of the Executive Committee is limited to endorsing the results of the evaluation carried out by the Selection Committee and, more specifically, in attesting to the regularity of the procedure. It is also common ground between the parties that the Executive Committee limited itself, so far as the Tender is concerned, to endorsing the observations of the Evaluation Committee, according to which the Tender did not comply with the requirements resulting from the tender documentation. As held at paragraphs 131 to 141 above, the Joint Undertaking was required to reject the Tender on the ground that it did not comply with those requirements. Thus, the involvement of the Executive Committee, in the particular circumstances of the present case, had no impact on the direction taken by the decision that the Joint Undertaking was required to take with respect to the Tender. In those circumstances, the situation of conflict of interests alleged by the applicant with respect to the presence of a member of ENEA at the meeting of the Executive Committee which attested to the regularity of the evaluation procedure has not been established and there is no need to determine the merits of the justification put forward by the Joint Undertaking concerning the passive role played by that member at the meeting in question.

163 It follows that the applicant's complaint relating to a conflict of interests owing to the participation of an agent of ENEA in the meeting at which the Executive Committee ruled on the regularity of the tender evaluation procedure must be rejected as unfounded.

– The allegation that ENEA held privileged information about the applicant

164 As for the applicant's argument based on the fact that an agent of ENEA, in the context of a mission carried out on behalf of the international organisation ITER, could have access to information relating to a company of the Nexans group established in Korea, it is sufficient to observe that, even on the assumption that it is correct, that circumstance can have had no impact on the legality of the grounds on which the rejection decision is based and that, consequently, the complaint must be rejected as ineffective.

165 It follows from the foregoing that, subject to examination of the arguments alleging breach of the principle of protection of legitimate expectations, to which it is now appropriate to turn, the applicant cannot validly complain that its bid was rejected by the Joint Undertaking.

Breach of the principle of protection of legitimate expectations

166 In the context of the second part of the first plea, the applicant relies on a breach of the principle of protection of legitimate expectations. In its submission, the Joint Undertaking breached that principle by giving the applicant, on several occasions, assurances that it would not reject the applicant's bid.

167 In that regard, the applicant relies on section 4.1 of the tender specifications; the letter of 19 November 2009 (see paragraph 18 above); assurances given to it at the meeting of 25 March 2010 (see paragraph 24 above); the letter of 13 April 2010 (see paragraph 25 above); and, last, the fact that the Joint Undertaking voluntarily, in the applicant's submission, 'created an ambiguous situation between November 2009 and May 2010, allowing doubt to remain as to the admissibility of its bid'.

168 The Joint Undertaking disputes those assertions.

169 The principle of protection of legitimate expectations may be invoked where precise, unconditional and consistent assurances, from authorised and reliable sources, have been given to the person concerned by the administration of the European Union; those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed and must comply with

the applicable rules (see Case T-271/04 *Citymo* v *Commission* [2007] ECR II-1375, paragraphs 108 and 138, and Case T-145/06 *Omya* v *Commission* [2009] ECR II-145, paragraph 117 and the case-law cited).

170 It must be stated that none of the positions which the applicant ascribes to the Joint Undertaking satisfies the abovementioned requirements.

171 First, as has just been held, section 4.1 of the tender specifications does not support the applicant's argument, since it clearly states that compliance without exception with the draft contract and with the delivery schedule is a condition of the conformity of bids to the object of the contract. That same section also clearly mentions the possibility that the Joint Undertaking will disregard any qualification and reject non-compliant offers. Accordingly, the applicant cannot validly maintain that section 4.1 of the tender specifications constituted a precise assurance that the Tender would be examined in spite of the deviations.

172 Second, in the letter of 19 November 2009 (see paragraph 18 above), it was clearly stated to the applicant that, unless the deviations formulated were without any contractual value, the Tender was likely to be rejected. Such an indication clearly does not constitute a precise assurance that, in spite of the deviations, the Tender would be evaluated.

173 Third, the applicant adduces no evidence capable of establishing that such assurances were given to it at the meeting of 25 March 2010. The Joint Undertaking firmly disputes the applicant's assertions by producing detailed testimony from its agents. In those circumstances, the applicant has not satisfied the burden of proof which it bears in the present case.

174 Nor, fourth, does the letter of 13 April 2010 contain any assurance that would enable the applicant to hope that its offer would be evaluated. In that letter (see paragraph 25 above) it was simply stated to the applicant that the evaluation procedure was under way, that it was not for the Joint Undertaking to disclose information about that procedure until it had been completed and that the applicant had provided the information which it had been requested to supply. The information to which the letter refers is that which the applicant provided in answer to the request for clarification which had been sent to it and which concerned whether or not the deviations formulated in the Tender could be disregarded.

175 Fifth, and last, even on the assumption that, as the applicant claims, the Joint Undertaking 'created an ambiguous situation between November 2009 and May 2010, allowing doubt to remain about the admissibility of its bid', which, moreover, is contradicted by all the foregoing, such a circumstance would not in any event satisfy the requirements of the case-law referred to at paragraph 169 above, which requires that precise, unconditional and consistent assurances be given.

176 Accordingly, the applicant cannot validly maintain that the rejection decision was adopted in breach of the principle of protection of legitimate expectations.

177 Consequently, it follows from all the foregoing that the applicant cannot validly claim annulment of the rejection decision and that the claim for annulment of that decision must be rejected.

The application for annulment of the award decision

178 It follows from the considerations set out at paragraphs 54 to 58 above that rejection of the claim for annulment of the rejection decision has the consequence that the applicant has failed to establish that it is directly concerned by the award decision. It follows that the applicant lacks *locus standi* to bring an action against that decision and that the claim for its annulment must be rejected as inadmissible.

2. *The claim for damages*

179 Under Article 9(2) of Decision 2007/198, in the case of non-contractual liability, the Joint Undertaking is, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its servants in the performance of their duties. In that regard, in order for the Joint Undertaking to incur non-contractual liability, a number of requirements must be satisfied, namely the unlawfulness of the alleged conduct of the institutions, the reality of the damage and the existence of a causal link between that conduct and the alleged damage (see, by analogy, with respect to the liability of the European Union and Euratom, Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Case C-308/87 *Grifoni* v *Commission* [1990] ECR I-1203, paragraph 6; and Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44).

180 If any one of those conditions is not satisfied, the action for damages 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).

181 In support of its claim for damages, the applicant invokes, with respect to the requirement of unlawful conduct, the unlawfulness of the contested decisions.

182 It follows from an examination of the applications for annulment submitted by the applicant that the applicant cannot validly maintain that the rejection decision was vitiated by unlawfulness. The present claim for damages must therefore be rejected in that it is based on the alleged unlawfulness vitiating the rejection decision.

183 As regards the extent of the liability of the Joint Undertaking that might be incurred on account of the award decision, the legality of which was not assessed in the context of the examination of the claims for annulment submitted by the applicant, it is appropriate to consider first of all whether a causal link may be established between the heads of damage alleged by the applicant and that decision and whether those heads of damage are established and may lead to an award of damages.

184 The first head of damage on which the applicant relies consists of the costs incurred in participating in the tender procedure. However, it follows from the examination of the legality of the rejection decision that the applicant could not in any case claim that the contract should be awarded to it, since the Tender had to be rejected without being examined. The expenditure incurred by the applicant in participating in the tender procedure must therefore be borne by the applicant irrespective of the legality of the award decision, since the applicant placed itself in a position in which it was unable to obtain the contract. In those circumstances, the causal link between the first head of damage alleged and the award decision is not established. In addition, it should be observed that that head of damage could not be the subject of an award of damages, since it follows from section 4.1 of the tender specifications that '[e]xpenses incurred in the preparation and dispatch of tenders shall not be refunded by [the Joint Undertaking]'.

185 The second alleged head of damage consists of the costs incurred by the applicant in challenging the legality of the contested decisions. In that regard, since the applicant requests that the Joint Undertaking be ordered to pay the costs, the claim for compensation under the second head of claim could not be granted without the applicant being permitted to receive double compensation for the same damage. In any event, it should be observed that, even on the assumption that the award decision were illegal, it has just been held that the applicant did not have *locus standi* to seek its annulment and that the costs which it claims to have incurred for that purpose cannot, in those circumstances, constitute damage in respect of which an award can be made.

186 The third and fourth alleged heads of damage concern, respectively, the loss of an opportunity to obtain the contract and the loss of the competitive advantage that the award of the contract to the applicant would have secured. In that regard, it follows from the examination of the legality of the rejection decision that the applicant had no chance of obtaining the contract. There is therefore no causal link between the award decision and the alleged loss of opportunity and competitive advantage.

187 It follows that, for each of the heads of damage alleged by the applicant, at least one of the conditions required by the case-law is not satisfied, that the claim for damages must therefore be rejected and that, accordingly, the action must be rejected in its entirety.

3. *The request for measures of organisation of procedure*

188 The applicant requested, by way of measures of organisation of procedure, that the Court should order the Joint Undertaking to produce, if necessary in a non-confidential version, the technical and commercial offer submitted by the ICAS consortium and the contract signed with that consortium on 9 December 2010.

189 The Joint Undertaking produced a non-confidential version of the contract, and also the delivery schedule set out in annex B to the contract, but for the remainder objects to that request.

190 As the contract signed by the ICAS consortium has been produced and as the applicant has not disputed the extent of the confidentiality imposed by the Joint Undertaking, there is no longer any need to adjudicate on the request for measures of organisation so far as that document is concerned.

191 As the tender submitted by the ICAS consortium does not appear to be relevant to the outcome of the present dispute, since it has no impact whatsoever on the legality of the rejection decision, the application for a measure of organisation of procedure ordering its production must be rejected.

Costs

192 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 successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, including those relating to the interim measures proceedings, in accordance with the form of order sought by the Joint Undertaking.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Nexans France to pay the costs, including those relating to the interim measures proceedings.**

Azizi Frimodt Nielsen Kancheva

Delivered in open court in Luxembourg on 20 March 2013.

[Signatures]

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