Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

13 December 2013 *

(Public service contracts — Tendering procedure — Provision of support services with a view to developing IT infrastructure and eGovernment services in Albania — Rejection of a tender — Transparency — Obligation to state reasons)

In Case T-165/12,

European Dynamics Luxembourg SA, established in Ettelbrück (Luxembourg),

Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece),

represented by V. Christianos, lawyer,

applicants,

v

European Commission, represented by P. van Nuffel and M. Konstantinidis, acting as Agents,

defendant,

APPLICATION for annulment of European Commission decision CMS/cms D(2012)/00008 of 8 February 2012, rejecting the applicants' tender in the closed tendering procedure EuropeAid/131431/C/SER/AL,

THE GENERAL COURT (First Chamber)

composed of S. Frimodt Nielsen, acting as President, M. Kancheva (Rapporteur) and E. Buttigieg, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 11 June 2013,

gives the following

* Language of the case: Greek.

Judgment

Background to the dispute

1 The applicants, European Dynamics Luxembourg SA and Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, are, respectively, a company incorporated under Luxembourg law established in Ettelbrück (Luxembourg) and a company incorporated under Greek law established in Athens (Greece).

2 On 11 May 2011, a prior information notice was published in the electronic version of the *Official Journal of the European Union* (OJ 2011 S 90) concerning the tendering procedure under reference EuropeAid/131431/C/SER/AL ('the tendering procedure'). On 19 July 2011, a contract notice was published in the electronic version of the *Official Journal of the European Union* (OJ 2011 S 136) concerning the tendering procedure ('the contract notice').

3 The subject-matter of the tendering procedure was the provision of support services to the Albanian Ministry of Innovation and Information and Communication Technologies and the Albanian National Agency for Information Society with a view to developing IT infrastructure and eGovernment services in Albania. The period initially scheduled for the implementation of the contract was 18 months and the maximum budget was EUR 2 400 000.

4 The tendering procedure was part of the Instrument for Pre-Accession Assistance, created and governed by Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA) (OJ 2006 L 210, p. 82).

5 The aim of the IPA is to provide assistance to several countries, including Albania, to enable their progressive alignment with the standards and policies of the European Union, as well as the acquis communautaire, with a view to future membership. Such assistance takes the form of, in particular, the launch of tendering procedures and the award of public service contracts by the European Commission, where the successful tenderers provide the services in question in the beneficiary country, in the present case, Albania.

6 The contracting authority was the European Union represented by the Commission acting in the name and on behalf of the beneficiary country, Albania.

7 Contracts had to be awarded to the most economically advantageous tender within the framework of a closed procedure comprising two steps, namely shortlisting and award.

8 For the purpose of the shortlist, interested parties had until 2 September 2011 to submit their applications, together with information evidencing their financial, technical and professional capacities to perform the contract. After evaluating the applications, the evaluation committee had to draw up a list of between four and eight eligible candidates who would be the only parties invited by the Commission to participate in the second stage of the procedure, namely the contract award stage.

9 On 30 August 2011, the applicants submitted an application to participate in the tendering procedure in the form of a consortium alongside Performance SA.

10 By letter of 12 October 2011, the Commission notified European Dynamics Luxembourg — as leader of the consortium — that the consortium's tender had been shortlisted. The contractual documents explaining the award stage procedure were attached to that letter.

11 Those documents included the 'Instructions to tenderers', the 'Draft contract and special conditions' and its six annexes, entitled 'General conditions for service contracts', 'Technical specifications', 'Organisation and methodology', 'Key experts', 'Budget' and 'Forms and other relevant documents'. The documents also included other information such as the 'evaluation grid' containing the evaluation criteria and the tender submission form.

12 In accordance with section 12 of the instructions to tenderers, the tenders were evaluated in two successive stages: the evaluation of the technical bid followed by the evaluation of the financial bid.

13 The evaluation of the technical bid was based on the evaluation grid which set out the award criteria and their weightings. Thus, it was possible to score up to 70 points under the first criterion, headed 'organisation and methodology'. This criterion was divided into three sub-criteria, headed 'reasoned analysis of the implementation of the contract', 'strategy' and 'schedule of activities'. The second criterion headed 'key experts' concerned the capacities of three experts with different areas of expertise. The first expert was the 'team leader', the second was the 'expert in electronic documents and electronic record keeping' and the third was the 'portal expert'. The maximum number of points that could be awarded to each expert was 14 for the team leader, 8 for the expert in electronic documents and electronic record keeping and 8 for the portal expert, or a total of 30 points. Each expert had to be evaluated on the basis of three sub-criteria, headed 'qualifications and skills', 'general professional experience' and 'specific professional experience'.

14 The evaluation of the financial bid, which was subject to obtaining an average score of at least 80 points from the evaluation of the technical bid, could yield an extra 20 points.

15 It is apparent from section 12.4 of the instructions to tenderers that the entire evaluation procedure is confidential, without prejudice to the law of the contracting authority on access to documents. The decisions of the evaluation committee are collective. Its deliberations are held in closed session and the committee members are bound by the obligation to maintain confidentiality. That section also explains that evaluation reports and written minutes, in particular, are for official use only and may not be disclosed to the tenderers or to any party other than the contracting authority, the Commission, the European Anti-Fraud Office (OLAF) and the Court of Auditors of the European Union.

16 Section 8 of the instructions to tenderers specified that tenders had to be submitted before 30 November 2011.

17 The applicants submitted their technical bid as well as their financial bid within the prescribed period.

18 By letter of 8 February 2012, the Commission notified European Dynamics Luxembourg — as leader of the consortium — of the following:

— the consortium's tender had not been chosen as it was not the most economically advantageous tender of those technically admissible;

— the evaluation committee had recommended that the contract be awarded to the consortium made up of CSI-Piemonte and Infosoft Systems Sha;

— the consortium could challenge that decision in accordance with section 2.4.15 of the practical guide to contract procedures for the external actions of the Commission ('the practical guide').

19 That letter also included a table containing the overall scores obtained by the applicants and the successful tenderer, as well as their scores for the financial bid and technical bid. As regards the latter, the table contained the scores obtained by the applicants and the successful tenderer for the criteria headed 'organisation and methodology', 'key expert no 1', 'key expert no 2' and 'key expert no 3'.

20 By letter of 10 February 2012, the applicants asked the Commission to send them, in particular, the following information:

— a copy of the evaluation committee's detailed report and the composition of that committee;

— the strengths and weaknesses of their tender compared to the successful tender as regards organisation and methodology;

— the exact scores given to their tender and to the successful tender for each of the evaluation sub-criteria relating to the 'organisation and methodology' and 'key experts' criteria, as well as the reasons for those scores.

21 By letter of 21 February 2012, the Commission stated that it was not in a position to supply further information on the successful tenderer, as such information was confidential and for official use only. In that letter, the Commission also stated that the report of the evaluation committee ('the evaluation report') could not be disclosed to the tenderers or to any party outside the authorised services of the contracting authority, of the Commission and of the supervisory authorities. In this connection, it referred the applicants to section 3.3.10.5 of the practical guide. The Commission also stated, with reference to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), that the names of the evaluation committee members could not be disclosed on the ground of protection of privacy and the integrity of individuals.

22 The Commission's letter of 21 February 2012 also contained a table specifying the average scores obtained by the applicants' technical bid for the sub-criteria headed 'reasoned analysis of the implementation of the contract', 'strategy' and 'schedule of activities', which made up the 'organisation and methodology' criterion, as well as for the sub-criteria headed 'qualifications and skills', 'general professional experience' and 'specific professional experience', which made up the 'key experts' criterion.

23 As regards the reasons for the scores set out in that table, the Commission stated in the same letter that the three sub-criteria making up the 'organisation and methodology' criterion were evaluated as follows:

— reasoned analysis of the implementation of the contract: 'poor overall appraisal of key problems, risk analysis and mitigation not well defined';

— strategy: 'well detailed list of activities and very good list of support experts. Very competitive service level agreement';

— schedule of activities: 'good overall schedule of activities'.

24 As regards the reasons given for the scores awarded to the experts, the Commission stated: 'the experience, education and linguistic skills of your team leader, of the expert in electronic documents and electronic record keeping and of the portal expert were evaluated as follows: "good general profile"'.

25 On 21 March 2012, the applicants made a confirmatory application to the Commission, in accordance with Article 7(2) of Regulation No 1049/2001, seeking to have the Commission disclose the composition of the evaluation committee and send them a copy of the detailed evaluation report containing their comparative scores and those of the successful tenderer for each evaluation criterion.

Procedure and forms of order sought by the parties

26 By application lodged at the Court Registry on 11 April 2012, the applicants brought the present action.

27 By document lodged at the Court Registry on 19 June 2012, the Commission filed its defence.

28 During the proceedings, by letter of 25 July 2012, the Commission replied in part to the confirmatory application for access to documents made by the applicants. To that end, the Commission sent the applicants the evaluation report together with seven other attachments, namely the attendance record, the minutes of the evaluation committee's preparatory meeting, the tender opening report, the evaluation grid, the comments on each tender, the correspondence with the tenderers and the administrative compliance grid. However, the Commission stated that it had removed certain information from all of the documents in question on the ground of protection of privacy and the integrity of individuals under Article 4(1)(b) of Regulation No 1049/2001. The Commission also stated that it had removed other information from the evaluation report, the tender opening report, the evaluation grid, the comments on each tender and the correspondence with the tenderers on the ground of protection of commercial interests, in accordance with Article 4(2) of Regulation No 1049/2001.

29 The applicants lodged their reply on 20 August 2012 and the Commission lodged its rejoinder on 12 October 2012.

30 The applicants claim that the Court should:

— annul the decision of the Commission rejecting their tender in the contested tendering procedure;

— order the Commission to pay the costs.

31 The Commission claims that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

32 The applicants put forward three pleas in law in support of their application. The first plea in law alleges infringement of the principles of transparency and proportionality, as the Commission failed to give the applicants access to the evaluation report on which the contested decision is based. The second plea in law alleges infringement of the obligation to state reasons in respect of, first, the scores obtained by the applicants' tender and the successful tender and, second, the characteristics and advantages of the successful tender. The third plea in law alleges, in essence, infringement of the general principle preventing contractual documents from being altered during the tendering procedure, as the evaluation report supplied by the Commission on 25 July 2012 shows that it evaluated the applicants' tender on the basis of sub-criteria for which no provision had been made in the contractual documents.

The first plea in law, alleging infringement of the principles of transparency and proportionality

33 The first plea in law is divided into two parts: the first part alleges infringement of the principle of transparency and the second part alleges infringement of the principle of proportionality.

Infringement of the principle of transparency

34 The applicants essentially submit that the Commission infringed the principle of transparency, referred to in Articles 15 TFEU and 298 TFEU and Article 89(1) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1, 'the Financial Regulation'), by refusing to supply them with a copy of the evaluation report in its letter of 21 February 2012. That refusal is not justified by the provisions of the practical guide or by those of the Financial Regulation or Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1, 'the Implementing Regulation'), or even by the instructions to tenderers.

35 First, the applicants claim that section 3.3.10.5 of the practical guide — which states that the evaluation report cannot be disclosed to the tenderers or to any party other than the authorised services of the contracting authority, of the Commission and of the supervisory authorities — is for information purposes only.

36 Second, the applicants submit that Article 100(2) of the Financial Regulation and Article 149(3) of the Implementing Regulation do not exhaustively list the information that must be disclosed to tenderers. Accordingly, those provisions do not allow the Commission to justify its refusal to send a copy of the evaluation report to the applicants. In any event, those provisions cannot enable the Commission to derogate from a principle having the status of primary law, such as the principle of transparency.

37 Third and last, the applicants contend that the Commission's refusal to send them a copy of the evaluation report cannot be explained by section 12.4 of the instructions to tenderers. That section is contradictory, as it precludes disclosure of the evaluation report to the tenderers but stipulates that the evaluation procedure is subject to the law on access to documents, which is an embodiment of the principle of transparency.

38 The Commission disputes those arguments.

39 As a preliminary point, it is noteworthy that the first plea in law does not cover the possible infringement of Regulation No 1049/2001, Article 8 of which lays down the circumstances in which a legal person having its registered office in a Member State can institute court proceedings against the institution refusing it access to a document requested under that regulation. It only covers whether, in the contract award procedure at issue, the failure to disclose a copy of the evaluation report to the applicants infringes the various provisions they rely on, namely Articles 15 TFEU and 298 TFEU and Article 89(1) of the Financial Regulation. However, since the applicants' complaints on the non-disclosure of the evaluation report can also be interpreted as being directed at, in actual fact, a failure to provide an adequate statement of reasons, they will be considered under the second plea in law.

40 In any event, the Court considers it appropriate to dismiss at the outset the Commission's argument that a copy of the evaluation report was sent to the applicants on 27 July 2012, following their confirmatory application under Regulation No 1049/2001.

41 It should be noted that, as is apparent from the applicants' letter of 10 February 2012, after notification of the contested decision, the applicants asked the Commission to send them a copy of the evaluation report under the provisions governing public procurement in the European Union. The Commission's letter of 21 February 2012 shows that it refused to do so.

42 It should also be noted that, as is apparent from the Commission's letter of 25 July 2012, the Commission sent the applicants an expurgated version of the evaluation report — from which it had removed allegedly confidential information — in reply to the confirmatory applications for access to documents made by the applicants on 21 March and 25 April 2012 under Regulation No 1049/2001.

43 In the light of the autonomous nature of the procedures on public access to documents set out in Regulation No 1049/2001 and on public procurement set out in the Financial Regulation, the fact that, in the present case, the Commission granted the applicants' request for access with respect to the evaluation report has no bearing on a possible finding that the principle of transparency was infringed due to the non-disclosure of that report in the tendering procedure in question.

44 As regards such an infringement, Article 89(1) of the Financial Regulation provides that '[a]ll public contracts financed in whole or in part by the budget [of the European Union] shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination'.

45 Therefore, according to consistent case law, the contracting authority is required to ensure at each stage of a tendering procedure that the principle of equal treatment and, thereby, equality of opportunity for all the tenderers is observed (judgment of 29 April 2004 in Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 108; judgment of 17 December 1998 in Case T-203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II-4239, paragraph 85; and judgment of 17 March 2005 in Case T-160/03 *AFCon Management Consultants and Others* v *Commission* [2005] ECR II-981, paragraph 75).

46 Under the principle of equal treatment between 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 competitors must be subject to the same conditions (see, to that effect, judgment of 18 October 2001 in Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 34, and judgment of 12 December 2002 in Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 93).

47 The case law also shows that the principle of equal treatment implies an obligation of transparency so that it is possible to verify that that principle has been complied with (judgment of 18 June 2002 in Case C-92/00 *HI* [2002] ECR I-5553, paragraph 45, and *Universale-Bau and Others*, paragraph 46 above, paragraph 91).

48 That principle of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. 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 tendering specifications (*Commission* v *CAS Succhi di Frutta*, paragraph 45 above, paragraph 111).

49 The principle of transparency therefore implies that all technical information relevant for the purpose of a sound understanding of the contract notice or the tendering specifications must be made available as soon as possible to all the undertakings taking part in a public procurement procedure in order, first, to enable all reasonably well-informed and normally diligent tenderers to understand their precise scope and to interpret them in the same manner and, secondly, to enable the contracting authority actually to verify whether the tenderers' bids meet the criteria of the contract in question (judgment of 19 March 2010 in Case T-50/05 *Evropaïki Dynamiki* v *Commission* [2010] ECR II-1071, paragraph 59).

50 It should be noted that, as is apparent from Article 147 of the Implementing Regulation, the aim of the evaluation report is not to set out all the conditions and detailed rules of the award procedure, but rather to present the outcome of the evaluation carried out by the evaluation committee, including, in

particular, the names of the tenderers rejected and the reasons for the rejection of their tenders as well as the name of the contractor proposed and the reasons for that choice. The definitive decision on award of the contract is taken subsequently by the contracting authority in accordance with Article 147(3) of the Implementing Regulation and must meet the requirements laid down in the European Union's legal order on the statement of reasons.

51 Accordingly, the Commission's refusal in the present case to disclose the evaluation report during the pre-litigation procedure did not mean that there was inequality of opportunity between the applicants and the other tenderers when formulating their tenders, inequality which, in view of the case law cited in paragraphs 45 to 49 above, would infringe the principle of transparency.

52 It follows from all of the foregoing considerations that the first part of the first plea in law must be rejected as unfounded.

Infringement of the principle of proportionality

53 The applicants essentially submit that the total and absolute refusal of the Commission to disclose anything from the evaluation report also infringes the principle of proportionality.

54 The Commission disputes that argument.

55 It should be noted at the outset that the applicants raised this part of the first plea in law for the first time in their reply. It must therefore be regarded as new and thus inadmissible in accordance with Article 48(2) of the Rules of Procedure of the General Court, as the applicants did not justify its belated nature by reference to matters of law or of fact which came to light in the course of the procedure.

56 It follows that the first plea in law must be rejected as in part unfounded and in part inadmissible.

The second plea in law, alleging infringement of the obligation to state reasons

57 The applicants essentially claim that the Commission failed to disclose to them, first, the scores obtained by the technical bid of the successful tenderer under each sub-criterion listed in the evaluation grid (see paragraph 13 above) and the reasons for those scores, and, second, the reasons for the scores awarded to their own technical bid under the nine sub-criteria of the second evaluation criterion headed 'key experts'. According to the applicants, the Commission therefore infringed its obligation to notify an unsuccessful tenderer, who so requests in writing, of the characteristics and advantages of the selected tender and, consequently, infringed its obligation to provide reasons for the contested decision.

58 The Commission submits that an adequate statement of reasons was given for the contested decision, in the light of the requirements set out in Article 100(2) of the Financial Regulation and Article 149(3) of the Implementing Regulation.

59 Since the complaints put forward by the applicants in connection with the first plea in law seek to demonstrate that the Commission was under an obligation to send them a copy of the evaluation report, a preliminary point to note is that, in the context of contract award procedures, the only obligation incumbent on the Commission in this respect is the obligation to notify tenderers who so request, through that document or another, of the characteristics and advantages of the selected tender and the name of the successful tenderer.

60 It must be noted that the Commission, like the other institutions, has a broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following a tendering procedure. The Court's review of the exercise of that discretion is therefore limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers (judgment of 6 July 2005 in Case T-148/04 *TQ3 Travel Solutions Belgium* v *Commission* [2005] ECR II-2627, paragraph 47; see, to that effect, judgment of 23 November 1978 in Case 56/77 *Agence européenne d'intérims* v *Commission* [1978] ECR 2215, paragraph 20).

61 Moreover, where an institution has a broad discretion, respect for the guarantees conferred by the European Union legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to provide adequate reasons for its decisions. Only in this way can the European Union judicature verify whether the factual and legal elements upon which the exercise of the discretion depends were present (judgment of 21 November 1991 in Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14, and judgment of 9 September 2010 in Case T-387/08 *Evropaïki Dynamiki* v *Commission* [2010] not published in the ECR, paragraph 31).

62 For the award of public service contracts, the obligation to state reasons is given concrete expression in Article 100(2) of the Financial Regulation and Article 149 of the Implementing Regulation, from which it is apparent that a contracting authority meets its obligation to state reasons if it, first of all, merely informs the unsuccessful tenderers immediately of the rejection of their tender and, subsequently, notifies tenderers who expressly so request of the characteristics and relative advantages of the successful tender and of the name of the tenderer to whom the contract is awarded, within 15 days from receipt of a request in writing (judgment of 17 October 2012 in Case T-447/10 *Evropaïki Dynamiki* v *Court of Justice* [2012] ECR, paragraph 71).

63 This manner of proceeding satisfies the purpose of the obligation to state reasons laid down in Article 296 TFEU, whereby the reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to enable the persons concerned to ascertain the reasons for the measure and thereby enable them to assert their rights and, on the other, to enable the Court to exercise its power of review (judgment of 14 July 1995 in Case T-166/94 *Koyo Seiko* v *Council* [1995] ECR II-2129, paragraph 103, and *Evropaïki Dynamiki* v *Commission*, paragraph 49 above, paragraph 134).

64 It should also be borne in mind that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (see judgment of 2 April 1998 in Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case law cited).

65 Finally, it should be noted that compliance with the duty to state reasons must be assessed on the basis of the information available to the applicant at the time the application was brought (see, to that effect, judgment of 25 February 2003 in Case T-183/00 *Strabag Benelux* v *Council* [2003] ECR II-135, paragraph 58).

66 It is in the light of the abovementioned principles that the Court should examine whether the Commission infringed its obligation to state reasons. In order to determine whether, in this instance, the requirements of the obligation to state reasons that is laid down by the Financial Regulation and the Implementing Regulation have been complied with, it is necessary to examine the Commission's letter of 8 February 2012, as well as that of 21 February 2012, which was sent to the applicants following the request for additional information about the rejection of their tender. It should be pointed out that the Commission clearly stated during the hearing that, first, the letter of 21 February

2012 contained an adequate statement of reasons in the light of the obligations imposed by the Financial Regulation and the Implementing Regulation and, second, the evaluation report it had sent to the applicants was not a part of the statement of reasons for the contested decision. It should also be pointed out that the Commission sent the applicants the evaluation report for the first time on 25 July 2012. Therefore, having regard to the principle set out in paragraph 65 above, this document — which was produced for the first time during the proceedings before the Court — cannot be taken into account for the purpose of assessing the adequacy of the statement of reasons.

The letter of 8 February 2012

67 In the present case, the Commission notified the applicants in its letter of 8 February 2012 that, first, their tender had not been selected because it was not the most economically advantageous tender of those technically admissible, second, the evaluation committee had recommended that the contract be awarded to the consortium made up of two other tenderers whose names were supplied and, third, the applicants were able to challenge that decision in accordance with section 2.4.15 of the practical guide.

68 That letter also contained the following table:

	Organisation and methodology	Key expert 1	Key expert 2	Key expert 3	Technical score x 0.80	Financial score x 0.20	Overall score
Your tender	58.33	10.50	7.58	6.92	73.66	18.76	92.43
Selected tender	65.83	12.83	6.67	5.17	80.00	19.71	99.71

69 The letter was drafted in accordance with Article 100(2) of the Financial Regulation. It is, however, to be remembered that that provision also requires the contracting authority to notify all successful tenderers whose tenders were admissible and who have made a request in writing of the characteristics and relative advantages of the selected tender.

The letter of 21 February 2012

70 Following the applicants' request of 10 February 2012 — by which they sought to ascertain, in particular, the strengths and weaknesses of their tender compared to the successful tender as regards organisation and methodology, as well as the exact scores given to their tender and to the successful tender for each of the evaluation sub-criteria relating to the 'organisation and methodology' and 'key experts' criteria together with the reasons for those scores — the Commission sent a second letter to them on 21 February 2012.

71 In respect of that letter, first, it is to be noted that the Commission replied to the applicants' written request of 10 February 2012 within the period, prescribed by Article 149(2) of the Implementing Regulation, of not more than 15 calendar days from the date on which the request was received.

72 Second, it should therefore be examined whether the letter of 21 February 2012 contains a description of the characteristics and advantages of the successful tenders that meets the requirements of Article 100(2) of the Financial Regulation.

73 That letter contained the following table:

	Maximum	Average

Organisation and methodology		
reasoned analysis of the implementation of the contract	10	6.67
strategy	40	32.33
schedule of activities	20	19.33
Total score for organisation and methodology	70	58.33
Key experts		
Team leader	(Max 14 points)	
qualifications and skills	2	1.67
general professional experience	6	5.00
specific professional experience	6	3.83
		10.50
Expert in electronic documents and electronic record keeping	(Max 8 points)	
qualifications and skills	2	1.83
general professional experience	2	1.92
specific professional experience	4	3.83
		7.58
Portal expert	(Max 8 points)	
qualifications and skills	2	1.67
general professional experience	2	1.75
specific professional experience	4	3.50
		6.92
Overall total score	100	83.33

74 In that letter, the Commission drew the applicants' attention to the fact that the service contracts were awarded within the framework of a closed procedure based on criteria drawn up in accordance with the principle of the most economically advantageous tender and that those criteria covered both the technical quality of the tender and its financial dimension. The Commission also pointed out that the overall score awarded to the applicants' tender was very high, but it was not the most economically advantageous tender of those technically admissible. In addition, the Commission told the applicants that it was not in a position to provide them with the information they had requested in their letter of 10 February 2012 concerning the successful tender, as such information was confidential and for official use only.

75 The Commission also disclosed the comments corresponding to the evaluation committee's assessment of the applicants' technical bid.

76 As regards, first, the 'organisation and methodology' criterion, the Court finds that the Commission provided the assessment of the applicants' tender for each sub-criterion. Thus, first of all, for the sub-criterion headed 'reasoned analysis of the implementation of the contract', the Commission stated that the assessment was 'poor overall appraisal of key problems, risk analysis and mitigation not well

defined'. Next, the Commission stated that the assessment of the 'strategy' sub-criterion was 'well detailed list of activities and very good list of support experts. Very competitive service level agreement'. Lastly, according to the Commission, the assessment for the 'schedule of activities' sub-criterion was simply 'good overall schedule of activities'.

77 As regards, second, the 'key expert' criterion, the Commission stated that the assessment of the applicants' tender was 'the experience, education and linguistic skills of your team leader, of the expert in electronic documents and electronic record keeping and the portal expert were evaluated as follows: "good general profile"'.

78 Clearly, the statement of reasons contained in the letter of 21 February 2012 does not meet the requirements of Article 100(2) of the Financial Regulation.

79 First of all, it should be noted that the scores listed in the table referred to in paragraph 73 above do not in themselves constitute an adequate statement of reasons, contrary to the Commission's submissions during the hearing.

80 Admittedly, the table stated the scores given for the criteria and sub-criteria relating to the applicants' technical bid. However, since it did not contain the scores obtained by the successful tender for the same criteria and sub-criteria, the applicants were not able to compare directly the scores that the Commission awarded to their tender and to the successful tender.

81 In addition, those scores in themselves did not enable the applicants to ascertain the reasons why such scores had been awarded to their tender.

82 Contrary to the Commission's submissions at the hearing, nor did the award criteria laid down in the evaluation grid enable the applicants to understand the reasons for the scores awarded. It is true that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case and that it should therefore be examined whether the applicants were able to understand the reasons for those scores by taking account of the information contained in the contractual documents, such as the evaluation grid. However, those criteria left the Commission a not inconsiderable discretion.

83 As has been explained above, the corollary of the discretion enjoyed by the Commission in the area of public procurement is a statement of reasons that sets out the matters of fact and law upon which the Commission based its assessment. It is only in the light of those matters that the applicants are genuinely in a position to understand the reasons why those scores were awarded. Only such a statement of reasons therefore enables them to assert their rights and the Court to exercise its power of review (see, to that effect, *Evropaïki Dynamiki* v *Court of Justice*, paragraph 62 above, paragraph 92).

84 In the light of the not inconsiderable discretion that the award criteria laid down in the evaluation grid left the Commission, the scores set out in the table could not in themselves constitute an adequate statement of reasons.

85 Next, it must be stated that the Commission's comments on the applicants' tender do not disclose in a clear and unequivocal fashion the reasoning followed by the Commission, so as to enable the applicants to ascertain the reasons for the rejection of their tender.

86 Admittedly, Article 100(2) of the Financial Regulation does not necessarily require the contracting authority to make the evaluation report available to the unsuccessful tenderer or to undertake a detailed comparative analysis of the successful tender and of the unsuccessful tender. Article 100(2) of the Financial Regulation does not preclude as a matter of principle a contracting authority from performing its obligation to state reasons by means of succinct comments on the successful and the

rejected tender (*Evropaïki Dynamiki* v *Court of Justice*, paragraph 62 above, paragraph 95). That is why the applicants cannot complain that the Commission did not send them the entire evaluation report in reply to their request submitted under the Financial Regulation (see, as regards the assessment carried out under the first plea in law, paragraphs 39 to 52 above).

87 However, in order to meet the requirements of Article 100(2) of the Financial Regulation, the contracting authority's comments must be sufficiently precise to enable the applicants to ascertain the matters of fact and law on the basis of which the contracting authority rejected their offer and accepted that of another tenderer (*Evropaïki Dynamiki* v *Court of Justice*, paragraph 62 above, paragraph 96).

88 In the present case, the Commission's comments did not enable the applicants to ascertain those matters.

89 First, those comments only concerned the applicants' tender and not the successful tender. Second, they were not even of such a kind as to enable the applicants to understand the scores awarded to their tender.

90 Thus, as regards the 'key experts' criterion, the only comment provided by the Commission in the assessment of the applicants' tender in relation to the three key experts — that is 'good general profile' — is vague and does not reflect the disparity in the scores awarded to each of the applicants' experts. It should be observed that whilst the applicants' tender obtained a score of 10.50 points out of a possible 14 for the 'team leader', it was awarded 7.58 points out of a possible 8 for the 'expert in electronic documents and electronic record keeping' and 6.92 points out of a possible 8 for the 'portal expert'. Such a comment does not therefore enable the applicants to understand the scores awarded to their tender for the 'key experts' criterion.

91 Likewise, as regards the 'organisation and methodology' criterion, the comment 'well detailed list of activities and very good list of support experts. Very competitive service level agreement' in relation to the 'strategy' sub-criterion seems to be very positive. However, the comment 'good overall schedule of activities' in relation to the 'schedule of activities' sub-criterion merely indicates a vague positive assessment. Such comments do not enable the applicants to understand why their tender only obtained 32.33 points out of a possible 40 for the 'strategy' sub-criterion when it obtained 19.33 points out of a possible 20 for the 'schedule of activities' sub-criterion.

92 Furthermore, the comment 'poor overall appraisal of key problems, risk analysis and mitigation not well defined' in relation to the sub-criterion headed 'reasoned analysis of the implementation of the contract' is vague. In particular, it does not enable the applicants to understand why the Commission considered the description of the 'key problems' in their tender to be poor. Nor does it enable the applicants to understand in what respect the 'risk analysis' and 'mitigation' were not well defined in their tender.

93 Consequently, it must be concluded that the Commission's comments did not constitute an adequate statement of reasons, even if read in conjunction with the scores set out in the table.

94 The letter of 21 February 2012 did not therefore include the information enabling it to constitute an adequate statement of reasons for the decision rejecting the applicants' tender.

95 It follows from the foregoing that the Commission did not provide an adequate statement of reasons for the contested decision.

96 It must therefore be held that the Commission infringed its obligation to state reasons under Article 100(2) of the Financial Regulation and that the contested decision should be annulled.

The third plea in law, alleging, in essence, infringement of the general principle preventing contractual documents from being altered during the tendering procedure

97 In their third plea in law, raised for the first time in the reply, the applicants complain that the Commission essentially infringed the general principle preventing contractual documents from being altered during the tendering procedure by introducing a weighting between the award sub-criteria after the tenders had been submitted and by evaluating their tender on the basis of that weighting. Without prejudice to the admissibility of this new plea in law, the Court considers that its examination would be premature. On account of the inadequate statement of reasons for the contested decision, the applicants have been unable to assert their rights effectively and the Court is not in a position to give final judgment on whether the use of the weighting at issue by the evaluation committee may have had an effect on the award of the contract. Any application for annulment founded on infringement of the general principle preventing contractual documents from being altered during the tendering procedure can therefore be examined, if necessary, only in the light of the grounds of the decision which replaces the contested decision (see, to that effect, judgment of 20 October 2011 in Case T-57/09 *Alfastar Benelux* v *Council* [2011] not published in the ECR, paragraphs 38 to 41 and 51, and *Evropaïki Dynamiki* v *Court of Justice*, paragraph 62 above, paragraph 116).

Costs

98 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.

99 As the Commission has been unsuccessful in its pleadings and the applicants have applied for costs, the Commission must be ordered to pay the costs

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1) Annuls Commission decision CMS/cms D(2012)/00008 of 8 February 2012, rejecting the tender submitted by European Dynamics Luxembourg SA and Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE in the closed tendering procedure EuropeAid/131431/C/SER/AL.

2) Orders the European Commission to pay the costs.

Frimodt Nielsen Kancheva Buttigieg

Delivered in open court in Luxembourg on 13 December 2013.

[Signatures]