Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

29 October 2015 *

(Public contracts for services — Tender procedure — Supply of insurance services for property and persons — Rejection of a tender — Award of the contract to another tenderer — Equal treatment — Sufficiently serious infringement of a rule of law conferring rights on individuals — Non-contractual liability — Loss of an opportunity — Interim judgment)

In Case T-199/14,

Vanbreda Risk & Benefits, established in Antwerp (Belgium), represented initially by P. Teerlinck and P. de Bandt, and subsequently by P. Teerlinck, P. de Bandt and M. Gherghinaru, lawyers,

applicant,

v

European Commission, represented by S. Delaude and L. Cappelletti, acting as Agents,

defendant,

ACTION, first, for annulment of the decision of 30 January 2014 by which the Commission rejected the tender submitted by the applicant for Lot 1 in the context of call for tenders No OIB.DR.2/PO/2013/062/591 relating to the insurance of property and persons (OJ 2013/S 155-269617) and awarded that lot to another company, and, second, for damages,

THE GENERAL COURT (Sixth Chamber),

composed of S. Frimodt Nielsen, President, F. Dehousse (Rapporteur) and A.M. Collins, Judges,

Registrar: S. Bukšek-Tomac, Administrator,

further to the hearing on 3 June 2015,

gives the following

* Language of the case: French.

Judgment

Background to the dispute

1 On 10 August 2013, the European Commission published a call for tenders in the Supplement to the *Official Journal of the European Union* (OJ 2013/S 155-269617), under reference number OIB.DR.2/PO/2013/062/591, concerning a public contract for insurance of property and persons which was divided into four lots.

2 Lot 1, which is the only lot at issue in this action, related to insurance cover — from 1 March 2014 — for buildings and their contents, on behalf of the Commission and various other institutions and bodies of the European Union.

3 As regards Lot 1, the documents relating to the call for tenders comprised, in addition to the contract notice, a set of contract documents consisting of an invitation to tender to which the following documents were annexed: technical specifications (Annex I); list of buildings (Annex I.1); loss statistics (Annex I.2); financial tender form (Annex II); draft service contract (Annex III); and, '"Identification — Exclusion — Selection" questionnaire' (Annex IV) ('the IES questionnaire').

4 The call for tenders stated that an open procedure would be used and that the contract would be awarded to the tender offering the lowest price of those found to be admissible and in order (point 3.4.3 of the invitation to tender; Article 12 of the technical specifications).

5 The question of joint and several liability, where several insurers are involved in the performance of the contract, was dealt with in the following way.

6 The contract notice stated that if the contract was awarded to a group of economic operators, all members of the group were required to be 'jointly and severally liable for performance of the contract' (section III.1.3 of the contract notice).

7 Article 5.1 of the technical specifications provided:

'Where a tender is submitted by various joint and several insurers acting as a consortium or by various insurers acting as a consortium and represented by a joint and several leading insurer, the contract, if awarded, shall be signed by each insurer. In that case, the tenderer shall ensure that the contracting authority will be fully insured (100% cover) without interruption for the entire duration of the contract …

Where a tender is submitted by various joint and several insurers acting as a consortium and represented by a broker, the contract, if awarded, shall be signed jointly by each insurer and the broker. In that case, the insurer or insurers shall also undertake to ensure that the contracting authority will be fully insured (100% cover) without interruption for the entire duration of the contract …'

8 In the draft service contract, the section dealing with the identification of the contract signatories was followed by the words: 'The above-named parties hereinafter referred to together as "the contractor" shall be … jointly and severally liable for performing the contract with respect to the contracting authority.'

9 The invitation to tender stated that all tenders had to be accompanied by the IES questionnaire duly completed by the tenderer (eighth indent of point 2.1.2 of the invitation to tender). Section 1 of the IES questionnaire (Tenderer identification form) distinguished between tenderers acting 'as a member [of a] group' and those acting as a 'single tenderer'.

10 Section 3 of the IES questionnaire comprised a 'list of questions concerning joint tenders' which '[was] to be completed only if the tender [was] a joint tender'.

11 Question 5 and sub-question 5.1 of that list of questions stated that, 'in the case of a joint tender, [it was necessary to submit] an agreement/power of attorney drawn up in accordance with [a] standard form provided below, signed by the legal representatives of all partners to the joint tender [and] which, in particular[, a]cknowledged that all partners to the joint tender would be jointly and severally liable for the performance of the contract'.

12 That agreement/power of attorney provided that, 'as co-signatories to the Contract, all members of the group shall be jointly and severally liable towards the contracting authority for the performance of the Contract'. It also stated that those members 'shall comply with the conditions of the Contract and shall ensure the satisfactory performance of their respective part of the services as stipulated in the contract documents and the contractor's tender'.

13 On 31 October 2013, when the tenders were opened, the opening board recorded the receipt of two tenders for Lot 1. One tender was from the applicant, Vanbreda Risk & Benefits, and the other was from the company Marsh.

14 By letter of 8 November 2013, the applicant drew the Commission's attention to the importance, for determining whether a tender was in order, 'of the signed documents showing that, in the case of a tender involving several insurers, those insurers undertake to assume unrestricted joint and several liability'. In the applicant's experience, AIG Europe Limited ('AIG'), who was a participant in Marsh's consortium, refused as a matter of principle to agree to joint and several liability and it was almost certainly the case that Marsh's tender could not comply with the substantive and formal requirements of the contract documents.

15 The Commission replied by letter of 4 December 2013, stating that it could not provide information because the evaluation of the tenders was still ongoing.

16 In the tender evaluation record of 13 January 2014, the evaluation committee decided that the tenders submitted by the applicant and by Marsh were eligible for the financial assessment. It found that Marsh's tender ranked first, with an annual price of EUR 771 076.03, and the applicant's tender ranked second, with an annual price of EUR 935 573.58. The evaluation committee therefore decided to recommend that Lot 1 be awarded to Marsh.

17 By decision of 28 January 2014, the Commission decided to award the contract to Marsh.

18 By letter of 30 January 2014 ('the contested decision'), the Commission notified the applicant that its tender for Lot 1 had not been accepted because it did not offer the lowest price.

19 By email of 31 January 2014 and letter of 3 February 2014, the applicant asked the Commission for access to the full award report and requested copies of the signed documents showing that, in the case of a tender involving several insurers, those insurers agreed to assume unrestricted joint and several liability, in accordance with the contract documents. The applicant mentioned that that requirement was set out in page 8 of Annex IV to the invitation to tender.

20 By letter of 7 February 2014, the applicant reiterated its requests, expressing its concerns that Marsh's tender did not comply with the contract documents because at least one partner to the tender had not signed the standard form agreement/power of attorney required. The applicant stated that that was an essential element of the contract and that it itself had submitted a bid based on an insurance structure which was fully compliant with the contract documents, including as regards this key aspect of joint and several liability. Only tenders involving a single insurer (covering 100% of the risk) and those involving several insurers all of whom mutually declared themselves to be jointly and severally liable

when the tender was submitted could be regarded as being in order. The applicant called on the Commission to reconsider its decision to award the contract to Marsh in the light of that information and to suspend signature of the contract.

21 The Commission replied to the email of 31 January 2014 by letter of 7 February 2014, stating that it was unable, under the rules, to provide the applicant with information other than 'the characteristics and relative advantages of the selected tender as well as the name of the successful tenderer'. In that connection, the Commission stated that Lot 1 had been awarded to the tender found to be in order offering the lowest price, namely that submitted by Marsh.

22 By letter of 11 February 2014, the applicant complained that that reply did not address the questions raised and repeated its request for access to the information previously sought in its earlier correspondence.

23 By letter and email of 21 February 2014, the applicant claimed to be certain that the Commission had been without the agreement/power of attorney for each insurer participating in Marsh's tender since the date of submission of the tenders, with the result that the tender was not in order and had to be rejected. The applicant called on the Commission to reconsider its award decision and to suspend signature of the contract with Marsh.

24 By letter of the same date, the Commission replied that the points causing concern to the applicant had been duly examined throughout the tender evaluation stage, that the tenders had been found to be in order and that, consequently, the contract had been awarded to the tender offering the lowest price. The Commission did not send any of the requested documents to the applicant.

25 After two further emails of 25 and 28 February 2014, on 14 March 2014 the applicant sent the Commission a request for access to documents under Regulation 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. 331).

Procedure and new developments during the proceedings

26 By documents lodged at the Court Registry on 28 March 2014, the applicant brought the present action for annulment of the contested decision and for damages as well as an application for interim measures seeking suspension of the operation of the contested decision and the production of documents by the Commission.

27 By order of 3 April 2014 adopted in the context of the application for interim measures, the President of the General Court ordered the suspension of the operation of the contested decision and of the contract concluded with Marsh and the insurers, and also ordered the production of documents in the proceedings for interim measures.

28 By order of 10 April 2014 adopted in response to observations from the Commission in the context of the application for interim measures, the President of the General Court cancelled, with retroactive effect to 3 April 2014, the paragraph of the operative part of the order of 3 April 2014 relating to the suspension of the operation of the contested decision and of the contract concluded with Marsh and the insurers.

29 By order of 30 July 2014 in *Vanbreda* v *Commission* (T-199/14, not published in the ECR), delivered in the present action, the Court ordered the Commission to produce certain documents containing, according to the latter, confidential information, and stated that, under Article 67(3) of the Rules of Procedure of the General Court of 2 May 1991, those documents would not be disclosed to the applicant at that stage.

30 After the Commission had produced the requested documents by letter of 8 August 2014, the Court, by means of a measure of organisation of procedure sent to the Commission on 11 September 2014, asked the Commission to submit versions of some of those documents which precisely identified the parts it regarded as confidential by blacking them out.

31 The Commission complied with that request by letter of 29 September 2014.

32 After the applicant had stated that it had no objections to the Commission's application for confidentiality, the Court withdrew the confidential documents produced as an annex to the letter of 8 August 2014 from the case file.

33 By interim order of 4 December 2014 in *Vanbreda Risk & Benefits* v *Commission* (T-199/14 R, ECR (Extracts), EU:T:2014:1024), the President of the General Court ordered the suspension of the contested decision in respect of the award of Lot 1 (paragraph 1 of the operative part), stated that the effects of that decision were to be maintained until the period for bringing an appeal against the order had expired (paragraph 2 of the operative part) — in other words until 24.00 on 16 February 2015 — and reserved the costs.

34 The applicant claims that the Court should:

— annul the contested decision by which the Commission decided not to accept the applicant's tender for Lot 1 and to award that lot to Marsh;

— find that the European Union has incurred non-contractual liability and order it to pay the applicant the amount of EUR 1 000 000 as compensation for the loss of the opportunity to be awarded the contract, for the loss of references and for non-material damage suffered;

— in any event, order the Commission to pay the costs, including lawyers' fees provisionally set at EUR 50 000.

35 The Commission contends that the Court should:

— dismiss the action for annulment;

— dismiss the action for damages;

— order the applicant to pay the costs of the present proceedings and the proceedings for interim measures.

36 Following the order in *Vanbreda Risk & Benefits* v *Commission*, cited in paragraph 33 above (EU:T:2014:1024), the Commission launched a negotiated contract procedure under Article 134(1)(c) of Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ 2012 L 362, p. 1; 'the implementing regulation'), with a view to concluding an insurance contract that could enter into force on 17 February 2015 at 00.00. It also lodged an appeal (C-35/15 P) against that order.

37 By letter of 13 February 2015, the Commission notified Marsh that the existing contract would be suspended from 24.00 on 16 February 2015.

38 The Commission received only one tender in connection with the negotiated procedure, which was submitted by the applicant forming a group with the insurer AIG. It accepted that tender and signed the insurance contract resulting from that procedure, which came into force on 17 February 2015 at 00.00.

39 By order of 23 April 2015 in *Commission* v *Vanbreda Risk & Benefits* (C-35/15 P(R), ECR, EU:C:2015:275), the Vice-President of the Court of Justice annulled paragraphs 1 and 2 of the operative part of the order in *Vanbreda Risk & Benefits* v *Commission*, cited in paragraph 33 above (EU:T:2014:1024), on the ground that the President of the General Court had erred in law by holding that the easing — justified in public procurement matters — of the case-law requirement on the grant of interim measures relating to urgency applied without any limit in time (order in *Commission* v *Vanbreda Risk & Benefits*, EU:C:2015:275, paragraph 57). Adjudicating on the application for interim measures submitted by the applicant, the Vice-President of the Court of Justice rejected that application for the same reasons (order in *Commission* v *Vanbreda Risk & Benefits*, EU:C:2015:275, paragraph 61).

Law

The action for annulment

40 The applicant relies on a single plea for annulment divided into three parts alleging, first, infringement of the principle of equal treatment of tenderers, of Articles 111 and 113 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1; 'the financial regulation'), of Articles 146, 149 and 158 of the implementing regulation, and of the contract documents; secondly, infringement of the principle of equal treatment; and, thirdly, infringement of the principle of transparency.

The first part of the plea, alleging infringement of the principle of equal treatment of tenderers, of Article 111(5) and Article 113(1) of the financial regulation, of Article 146(1) and (2), Article 149(1) and Article 158(1) and (3) of the implementing regulation, and of the contract documents

41 The applicant submits that Marsh's tender does not comply with the requirements of the contract documents. It claims that the insurers who participated in the tender did not undertake to be jointly and severally liable for the performance of the contract and did not, therefore, sign the agreement/power of attorney required in the contract documents.

42 However, joint and several liability is an essential condition of the public contract in the present case and that condition has an impact on the tender price. If several insurers could choose to group together to cover, each to the extent of its respective undertaking, a risk of the scale of that envisaged in the contract at issue, there is no guarantee that a total loss would be paid in full. That is the reason why, in the circumstances, the Commission imposed a requirement for joint and several liability in the contract documents, which is a feasible solution but which entails significant extra costs.

43 By allowing Marsh to put forward a joint tender with a consortium of insurers which were not jointly and severally liable for performance of the contract, the Commission made it possible for that operator to offer a far lower price.

44 By doing so, the Commission infringed the principle of equal treatment, Article 111(5) and Article 113(1) of the financial regulation, Article 146(1) and (2) and Article 158(1) and (3) of the implementing regulation, and the contract documents. By ultimately awarding the contract to Marsh, the Commission also infringed Article 149(1) of the implementing regulation.

45 In its reply, the applicant states that it became aware of new information after reading the defence and the non-confidential documents produced by the Commission. It transpires that, in actual fact, Marsh submitted its tender as a single tenderer-broker and that the Commission and Marsh exchanged

extensive correspondence, after the opening of the tenders, concerning the requirement for joint and several liability. The Commission never mentioned those facts to the applicant, despite the latter's repeated requests. The applicant claims that it is therefore able to rely on that new information.

46 In that context, the applicant argues that Marsh's participation as a single tenderer is manifestly unlawful and at odds with the contract documents. Furthermore, the Commission — contrary to its assertions — treated Marsh's tender as a joint tender. Lastly, since Marsh's tender could only be a joint tender, it should have included the agreement/power of attorney required in Annex IV to the invitation to tender.

47 The Commission disputes the applicant's arguments which, it claims, are based on three incorrect assumptions: (i) that Marsh's tender was submitted on behalf of a group or consortium; (ii) that the tender did not contain the standard form agreement/power of attorney in breach of the contract documents; and (iii) that the insurers proposed by Marsh did not undertake to be jointly and severally liable for performance of the contract. The Commission claims that the third assumption is the result of a misinterpretation of the contract documents and disregard for the actual tender submitted by Marsh and for the conduct of the contract procedure.

48 As regards the first assumption, the Commission contends that Marsh submitted its tender as a single tenderer-broker and not as a member or as head of a group and that, consistently therewith, Marsh was awarded the contract as a single tenderer. The contract documents do not contain any provision preventing a broker from submitting, as a single tenderer, a tender for Lot 1 of the contract.

49 As regards the second assumption, the Commission argues that the provisions of the contract documents concerning joint tenders, including the standard form agreement/power of attorney set out in the IES questionnaire, do not apply where a tender is submitted by a single tenderer. Marsh was therefore under no obligation to include in its tender the signed agreement/power of attorney, as required in respect of joint tenders. What Marsh did attach to its tender were the mandates it had received from several insurers for the performance of the contract.

50 As regards the third assumption, the Commission contends that it duly checked, as is apparent from the correspondence exchanged with Marsh between the opening of the tenders and the award of the contract, that Marsh's tender fully complied with all of the obligations flowing from the contract documents, including the obligation set out in Article 5.1 of the technical specifications to ensure that the contracting authority was fully insured (100% cover) without interruption for the entire duration of the contract and the obligation under the draft contract relating to the joint and several liability of the signatories. Since the object of Lot 1 of the contract was a direct insurance contract covering the buildings of the contracting authority, the technical specifications specifically provided that, irrespective of the detailed rules on the submission of tenders, each insurer involved in the performance of the contract was required to sign jointly and severally with the other potential insurers or the broker, in order to ensure continuous 100% cover for the contracting authority.

51 According to the Commission, the applicant's arguments relating to price differences, depending on whether or not joint and several liability is offered, are therefore irrelevant. It claims that the signed contract indeed includes a clause establishing the joint and several liability of the signatories, that the inclusion of that clause was stipulated from the outset, that Marsh's tender therefore had to take into account the costs and risks arising from that clause, and that the tender price was at no point altered or called into question by Marsh.

52 The Commission contends that since Marsh submitted its tender as a single tenderer, there was no joint tender involved. Marsh's tender was thus treated as having been submitted by a single tenderer. When the tenders were opened, the Commission did not disclose the name of the insurers appearing in Marsh's tender. The tenders were examined on the basis of the exclusion and selection criteria laid

down in the contract notice in accordance with the prescribed procedure. Since Marsh's tender originated from a single tenderer, the Commission duly checked that Marsh satisfied the selection criteria on its own.

53 In its rejoinder, the Commission claims that the argument raised in the reply that Marsh's participation as a single tenderer was manifestly unlawful is based on a restrictive and incorrect interpretation of the contract documents and on a misinterpretation of Belgian law.

54 Although a restrictive reading of the contract documents should have led to the rejection of both tenders, the Commission states that it opted for a non-restrictive reading and did not confine itself to the legal form in which the broker/insurer(s) relations were structured, provided that the tenders ensured compliance with the contract. The Commission therefore considered that insurers as well as brokers could participate in the call for tenders and that there was nothing to prevent a broker from tendering as a single tenderer. In any event, the object of the contract was the conclusion of a direct insurance contract to be signed by each insurer, which effectively occurred in the contract that was ultimately signed.

55 As regards the interpretation of Belgian law, the Commission submits that the applicant wrongly applied the provisions of that law in the present case. It was never Marsh's intention to sign the insurance contract alone and there was never any question of that for the Commission. The applicant seemingly seeks to argue, wrongly, that because Marsh presented itself as a single tenderer, it did so as an insurer intending to sign the contract on its own. The Commission had no reason to consider that Marsh's tender was unlawful. That tender was not unlawful because a broker could not provide proof of a minimum of 100 000 m^2 insured. Indeed, the information required did not preclude account being taken of the conclusion of insurance policies involving a minimum of 100 000 m^2 insured for insurance companies and the provision of brokering services involving a minimum of 100 000 m^2 insured for brokers. Lastly, the Commission argues that it was logical that only the financial and economic capacity of Marsh would be checked, since it was a single tenderer. It was Marsh who, in that capacity, guaranteed the financial viability of its tender. Indeed, that was the same approach as that taken in respect of the applicant in the previous insurance contract. In any event, to avoid there being a direct contractual relationship between the Commission and the insurers, the contract documents required the insurers to sign the insurance contract.

56 As regards the argument that Marsh's tender was treated as a joint tender, the Commission claims that that argument is illogical and misconceived. It has been proven that Marsh submitted its tender as a single tenderer, that the Commission examined the exclusion and selection criteria on that basis, and that it awarded the contract to that single tenderer. The Commission fails to see how the applicant can argue that it treated Marsh's tender as a joint tender. For the sake of completeness, it states that the evidence relied on by the applicant does not prove otherwise.

57 As regards the argument that Marsh's tender ought to have included the standard form agreement/power of attorney required in the case of a joint tender, the Commission maintains that since the tender was submitted by a single tenderer, it was not required to contain a signed agreement/power of attorney.

– Admissibility of certain arguments raised in the reply

58 Without expressly raising a plea of inadmissibility, the Commission nonetheless claims that, following the evidence produced by the Commission showing that the contract signed on 27 February 2014 with Marsh and the insurers indeed established joint and several liability of the insurers, the arguments put forward by the applicant in its reply go beyond the original single plea in law as set out in the action, namely a plea concerning 'the requirement for joint and several liability stipulated in the contract documents in the case of a joint tender involving a consortium of insurers'.

59 It should be noted that, in its reply, the applicant formulated some new arguments relating to, in essence, the unlawfulness of Marsh's participation as a single tenderer and of the Commission's treatment of that tender as a joint tender.

60 However, as the applicant correctly points out in its reply, those new arguments arise from information which came to the applicant's attention only after reading the Commission's defence and the documents it produced at the Court's request.

61 Thus, only through the defence did the applicant discover that Marsh had participated in the call for tenders not by means of a joint tender submitted by Marsh and six insurers, but as a single tenderer-broker proposing six insurers. Only by reading the documents produced by the Commission on 29 September 2014 (see paragraph 31 above) did the applicant learn of the correspondence exchanged after the tenders had been opened between the Commission and Marsh, and subsequently between the Commission, Marsh and AIG, concerning the question of joint and several liability.

62 Therefore, in so far as the considerations of the Commission could be construed as including a plea of inadmissibility, pursuant to Article 84(1) of the Rules of Procedure of the General Court, directed against the new arguments put forward by the applicant in its reply, that plea is unfounded.

– The unlawfulness of Marsh participating in the call for tenders as a single tenderer-broker

63 Under Article 102(1) of the financial regulation, all public contracts financed in whole or in part by the budget of the European Union must respect the principle of equal treatment and, in accordance with Article 146(1) of the implementing regulation, the contracting authorities must draw up clear and non-discriminatory selection criteria. Furthermore, under Article 102(2) of the financial regulation, all public procurement contracts must be put out to tender on the broadest possible basis and, in terms of Article 111(1), (4) and (5) of that regulation, the arrangements for submitting tenders must be such as to ensure that there is genuine competition, any tender declared by the opening board not to satisfy the conditions laid down must be rejected, and all tenders declared as satisfying the conditions laid down must be evaluated on the basis of the criteria provided in the documents relating to the call for tenders. Lastly, Article 113(1) of the financial regulation provides that the authorising officer must decide to whom the contract is to be awarded, in compliance with the selection and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules.

64 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 competitors must be subject to the same conditions (judgments of 12 December 2002 in *Universale-Bau and Others*, C-470/99, ECR, EU:C:2002:746, paragraph 93, and 12 March 2008 in *Evropaïki Dynamiki* v *Commission*, T-345/03, ECR, EU:T:2008:67, paragraph 143).

65 Tenderers must therefore be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority (see, to that effect, judgment of 18 October 2001 in *SIAC Construction*, C-19/00, ECR, EU:C:2001:553, paragraph 34 and the case-law cited). The contracting authority is required to comply, at each stage of the procedure, with the principle of equal treatment and, in consequence, with the principle of equality of opportunity for all tenderers (see, to that effect, judgments of 29 April 2004 in *Commission* v *CAS Succhi di Frutta*, C-496/99 P, ECR, EU:C:2004:236, paragraph 108; 24 February 2000 in *ADT Projekt* v *Commission*, T-145/98, ECR, EU:T:2000:54, paragraph 164; 17 March 2005 in *AFCon Management Consultants and Others* v *Commission*, T-160/03, ECR, EU:T:2005:107, paragraph 75; and 22 May 2012 in *Evropaïki Dynamiki* v *Commission*, T-17/09, EU:T:2012:243, paragraph 65).

66 It is in the light of the foregoing that the first part of the single plea for annulment must be examined, alleging that Marsh's participation in the call for tenders as a single tenderer-broker was unlawful.

67 The possibility for a broker to participate in the call for tenders as a single tenderer seems to be inconsistent with the wording of the call at issue.

68 First, the word 'broker' indeed appears in some passages of the call for tenders (in section III.2.3 of the contract notice relating to technical capacity; in the annex to the invitation to tender relating to the technical specifications as a condition for participation; and in the boxes relating to information on the authorisation to be supplied). However, those passages are at least common to tenders submitted by a single tenderer and to joint tenders.

69 Beyond those references in passages which are common to tenders submitted by a single tenderer and to joint tenders, the word 'broker' is expressly used only in the context of joint tenders (in Article 5.1 of the technical specifications, relating to the signature of the insurance contract; in the questionnaire concerning joint tenders in Annex IV to the invitation to tender; and in the standard form agreement/power of attorney in that annex).

70 Therefore, although the wording of the call for tenders relating to tenders submitted by a single tenderer does not expressly exclude the word 'broker', it does not provide for it either. The presence of that word in the sections of the call for tenders which are common to tenders submitted by a single tenderer and to joint tenders is more easily explained by the fact that brokers are expressly envisaged as being tenderers in the context of a joint tender than by the fact that they may be single tenderers.

71 Secondly, the Commission's assertion that there is nothing in the contract documents which precludes a broker from submitting a tender for Lot 1 as a single tenderer may reasonably be called into question.

72 First of all, it is apparent from the first indent of point 5 of the invitation to tender, entitled 'Follow-up to tenders', that 'these tendering instructions are in no way binding on the Commission' and 'the Commission's contractual obligation commences only upon signature of the contract with the successful tenderer'. Similarly, the words 'in the event that the contract cannot be concluded with the successful tenderer' appear in the first paragraph of the third page of the contested decision.

73 In the present case, as demonstrated by the documents before the Court and the assertions of the Commission itself, the 'successful tenderer' is Marsh alone, to the exclusion of everyone else.

74 As the Commission makes clear in its correspondence with Marsh dated 18 December 2013 and 12 February 2014, a broker cannot be the only signatory to the disputed service contract.

75 Next, according to Article 5.1 of the technical specifications, where the contract has to be signed by several joint and several insurers, only three tendering situations are envisaged, just one of which provides for the presence of a broker. That situation is described as 'where a tender is submitted by several joint and several tenderers acting as a consortium and represented by a broker'. Therefore, the presence of a broker is contemplated only in the case of joint tenders.

76 In the light of the foregoing, it must be concluded that, contrary to the arguments put forward by the Commission, an analysis of the wording of the contract documents shows that not only is no provision made for the situation where a broker submits a tender as a single tenderer, but also that that situation could even be regarded as excluded.

77 The Commission itself indeed admits that the contract documents do not formally provide for the situation where a single tenderer-broker submits a tender. However, it contends that, motivated by a concern to open the contract up to competition on the broadest possible basis, it took the view that the contract documents should not be interpreted as excluding tenders from a single tenderer-broker who had obtained mandates from several insurers undertaking to sign and perform the contract should it be awarded. The Commission states that it also took into account, in that respect, the second subparagraph of Article 121(5) of the implementing regulation.

78 As regards the reference to the second subparagraph of Article 121(5) of the implementing regulation, it should be noted that that provision applies to tenders submitted by consortia of economic operators. Under that provision, the contracting authority may not demand that consortia must have a given legal form. However, the present case does not involve the submission of a tender by a consortium of economic operators, but rather the submission of a tender by a single tenderer-broker, the only successful tenderer for the public contract.

79 As for the Commission's proposed interpretation of the contract documents as not excluding single tenderer-brokers, that is at odds not only with the provisions of the contract documents, but also with the rationale of the system.

80 The submission of a tender by a single tenderer-broker, which the Commission views as possible, has different implications, in terms of checking whether the tender is in order, from those flowing from a tender submitted by an insurance company acting as a single tenderer. Nonetheless, in both cases, the contracting authority is under the obligation to satisfy itself that the tender complies with the contract documents. Consequently, the contracting authority must be able to be in a position to carry out that task.

81 It is apparent from point 3.4 of the invitation to tender that tenders had to be evaluated in three stages and that only tenders fulfilling the requirements of each stage of the evaluation could be admitted to the next stage. The aim of the first and second stages was to check, respectively, the criteria for the exclusion and for the selection of tenderers. The evaluation of the tenders and the award of the contract formed part of the third stage.

82 As regards, more particularly, the second stage of the evaluation involving the assessment of the selection criteria, point 3.4.2 of the invitation to tender shows that the evaluation committee is required to examine whether the tenderers have sufficient economic and financial capacity, on the one hand, and sufficient technical and professional capacity, on the other. It should be recalled that, in the defence, the Commission expressly stated that it had duly checked that Marsh's tender satisfied on its own the selection criteria of the call for tenders, which also seems to transpire from the selection criteria evaluation grid annexed to the tender evaluation record of 13 January 2014.

83 As regards the assessment of economic and financial capacity, it should be pointed out that, in the case of joint tenders, the provisions of section 4 of Annex IV to the invitation to tender state that information must be supplied for each member individually.

84 That requirement makes it possible to ensure that the insurance companies, who are, *in fine*, responsible for insuring the risk, are sound. Owing to that requirement, it is not possible for a broker — expressly envisaged as being a potential tenderer in the context of a joint tender — to provide information only on its own economic and financial capacity. Indeed, it is necessary to avoid the situation whereby the evaluation committee focuses only on the soundness of an intermediary who does not insure the risk covered.

85 By contrast, where a tender is submitted by a single tenderer, the same provisions of section 4 of Annex IV to the invitation to tender state only that the evaluation covers the economic and financial capacity of the tenderer. Where a broker is admitted as a single tenderer (a scenario which the

Commission views as acceptable), it is possible — as occurred in the present case — to limit the evaluation to the information relating to the broker. The financial soundness of the insurance companies who will nonetheless be specifically entrusted with guaranteeing the risk is not, *de jure*, included in the assessment of the tender.

86 That finding is not called into question by Article 147(3) of the implementing regulation. Under that provision, an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them and, in that case, it must prove to the contracting authority that it will have at its disposal the resources necessary for performance of the contract, for example by producing an undertaking on the part of those entities to place those resources at its disposal. That provision applies only if the tenderer intends to rely on the capacities of other entities.

87 In the present case, the Commission clearly stated that the assessment of the selection criteria, of which the economic and financial criteria form part, had been carried out exclusively having regard to the situation of Marsh.

88 That statement, which is supported by the documents in the case, was clearly given first of all in the proceedings for interim measures (see, to the effect, order in *Vanbreda Risk & Benefits* v *Commission*, cited in paragraph 33 above, EU:T:2014:1024, paragraph 72), and was not called into question in that regard in the appeal which was lodged by the Commission (see paragraph 36, *in fine*, above) and resolved in the order in *Commission* v *Vanbreda Risk & Benefits*, cited in paragraph 39 above (EU:C:2015:275). The Commission thus confirmed that only the economic and financial capacity of Marsh, and not that of the represented insurance companies, had been checked. It stated that it sought, through the call for tenders, to conclude a contract with insurers without however having to check their economic and financial capacity. The Commission claimed that that approach was the result of a deliberate choice not to carry out an economic examination by not requiring proof in that regard, but instead to adopt a more legally oriented approach, seeking the tenderer's undertaking as regards the obligation to satisfy that criterion.

89 In the rejoinder in the present action, the Commission again confirmed that only the economic and financial capacity of Marsh, but not that of the insurers it proposed, had to be checked in the course of the tendering procedure.

90 However, it is sufficient to note that the Commission's approach and the explanations provided are inconsistent with the wording and scheme of the contract documents. In the context of joint tenders where the presence of a broker is expressly envisaged, the contract documents require evidence of the economic and financial capacity of each member individually, including, therefore, the insurance company or companies participating in the joint tender. If the original intention of the Commission had genuinely been to confine itself to checking the economic and financial capacity of brokers, it would not have required, where a joint tender was submitted with a broker, the production of documents relating to the economic and financial capacity of each member. Furthermore, if an insurance company had submitted a tender as a single tenderer, its economic and financial capacity would have been checked. Therefore, only where a broker had submitted a tender as a single tenderer would the economic and financial capacity of the entity insuring the risk not be checked. That is not consistent with the rationale of the system as a whole or with the principle of equal treatment of tenderers.

91 Lastly, according to the wording of the call for tenders (see section II.1.5 of the contract notice, Article 2 of the technical specifications and Article I.1.1 of the draft service contract), the object of that call was the conclusion of an insurance contract. In its letter of 18 December 2013, the Commission confirmed that it was to be a direct insurance contract. It must be stated that, even though it pursued that objective, the Commission confined itself to checking the economic and financial capacity of the broker Marsh, without examining that of its proposed insurers. Although

such an approach might be understandable within the framework of a call for tenders organised for the purpose of concluding a brokerage contract, it seems out of place within the framework of a call for tenders relating to an insurance contract, in the light of, in particular, the objective of protecting the financial interests of the European Union pursued by the financial regulation.

92 As regards the Commission's considerations concerning the approach allegedly taken in the tendering procedure preceding the call for tenders and the insurance contract forming the subject matter of this dispute, these are irrelevant to the assessment of the lawfulness of the contested decision.

93 It is apparent from the foregoing that permitting a broker to participate in a call for tenders as a single tenderer is contrary to the provisions of the call for tenders as well as the rationale of the system established by it. The considerations put forward by the Commission, relating to the objective it claims to pursue of maintaining a high level of competition in the participation in the disputed call for tenders, are in no way capable of justifying the failure to comply with the provisions of that call.

94 Furthermore, the documents in the case show that one of the essential conditions of the call for tenders was the undertaking, by the insurer or insurers, to ensure that the contracting authority had 100% cover of the risks stipulated in the contract documents.

95 According to the Commission, in the situation of a single tenderer-broker — which the Commission views as acceptable — it is for the broker to organise the practical arrangements for the performance of the contract. This approach would have entailed the Commission checking whether the cover requirement mentioned in paragraph 94 above was met only as regards the outcome and not the way in which that outcome was achieved.

96 In the present case, Marsh — upon submitting its tender — presented how the risks would be distributed between the insurance companies in order to achieve the objective of 100% cover. By letter of 14 February 2014, Marsh notified the Commission that one of the insurers due to participate in its tender, AIG, had refused to sign the contract. Following that refusal, Marsh proposed an alternative distribution of the risks, without altering the overall price of the successful tender, the consequence of which was that AIG's share of involvement would be covered by increasing the shares of the remaining insurance companies and by allocating a proportion of that share to two new insurance companies not among those originally mentioned in Marsh's tender.

97 Therefore, when Marsh had to renegotiate the increase in the shares of the insurance companies which had instructed it and negotiate the participation of two new insurers, not only was the competing tender known, but the award of the contract to Marsh was certain. If, however, when the original tender was drawn up and, therefore, without knowing that the contract would be awarded to them, the insurance companies instructing Marsh had had to assume higher shares, signifying the assumption of greater risks on their part, it is likely that they would have, in all economic probability, demanded increased remuneration in return. That could have, in consequence, increased the price of the tender. Similarly, the negotiation of the participation of two new insurers in a tender, when neither the price of the competing tender was known nor the award of the contract certain, would also have been capable of leading to a different outcome, potentially increasing the overall price of the tender submitted by Marsh. On the contrary, in the present case, those two new insurance companies were in a position to ascertain exactly how much maximum remuneration they could receive when they gave Marsh their agreement.

98 Therefore, although the overall price of the successful tender was not actually altered by the Commission, the negotiation conditions between the tenderer and the insurance companies undoubtedly were.

99 It follows from the foregoing that permitting a broker to participate in a call for tenders as a single tenderer instructed by a number of insurance companies, first, makes the assessment by the evaluation committee illusory when it examines the merits of a tender in relation to the conditions set out in the contract documents; secondly, in some circumstances, gives that broker a competitive advantage over the other tenderers; and, thirdly, entails unequal treatment in favour of the tenderer-broker in relation to, in particular, a competitor who submits a joint tender together with one or more insurers.

100 The interpretation of the contract documents by the Commission as not excluding single tenderer-brokers is thus not only inconsistent with the provisions of the call for tenders, but also with the rationale of the system. The applicant was therefore right to claim that Marsh's participation in the call for tenders as a single tenderer-broker was unlawful.

101 Quite apart from that finding, based on the wording and the scheme of the call for tenders, it is necessary to examine whether, in the present case and as the applicant contends in its reply, the Commission also infringed the principle of equal treatment by corresponding with Marsh after the tenders had been opened.

– Infringement of the principle of equal treatment by reason of the correspondence exchanged between the Commission and Marsh after the opening of the tenders

102 It is apparent from the case-law mentioned in paragraphs 64 and 65 above that the contracting authority must treat all tenderers equally and must, to that end, check that the tenders comply with the requirements of the contract. The contracting authority may not accept a tender and sign a contract if it has, or ought reasonably to have, grounds for believing that the tender which is under examination or has already been accepted does not comply with the requirements of the contract.

103 Against that background, it is necessary to examine the correspondence exchanged between Marsh and the Commission, as transpires from the documents in the case and, in particular, the information produced by the Commission in reply to the measure of organisation of procedure of 11 September 2014.

104 On 25 October 2013, Marsh submitted its tender to the Commission as a single tenderer-broker.

105 That tender contained solemn declarations from six insurers in which each insurer expressed its agreement with the content of Marsh's tender, gave notice of its share of the undertaking to provide insurance cover for the contract, and stated that it would comply with all of the contract specifications 'for its respective share'. One of the statements — from AIG — contained the following written note:

'Except concerning the solidarity [sic] clause (Annex IV, p. 9, paragraph 1). We do not accept this clause.'

106 In the technical section of its tender, Marsh stated that since it (broker-tenderer) and the insurers it proposed 'neither [took] the form of a group nor [were] subject to any subcontracting arrangement, some of the conditions set out in Annex IV [to the invitation to tender] such as joint and several liability of the insurers, [did] not apply for the purpose of this contract'.

107 By fax of 13 November 2013, the Commission acknowledged receipt of Marsh's tender. In that fax, the Commission did not make any remarks or ask any questions about the documents and notes in Marsh's tender concerning the nature of the insurers' undertaking.

108 The Commission only informed Marsh (although as regards other aspects) that its tender did not include all of the required documents and information (technical capacity, previous insurance references and insured surface areas). Marsh supplied the requested information by fax on 15 and 18 November 2013.

109 By fax of 27 November 2013, the Commission informed Marsh that its tender required additional information.

110 In that fax, the Commission stated that 'the contracting authority has taken note that [section] 3 of Annex IV to the invitation to tender [did] not apply because the tender [was] not a joint tender or a tender submitted by a group of undertakings'.

111 The Commission explained that the contracting authority had placed on the record that Marsh's tender offered 100% cover of the insured risks, but that an inconsistency had been identified as regards the proportional involvement of two insurers. In order to correct that inconsistency, the Commission asked Marsh to send corrected mandates countersigned by the different insurers setting out each insurer's participation.

112 In addition — and of more direct relevance to this dispute — the Commission asked Marsh to 'confirm that the risks to be insured will have 100% cover under the joint and several liability of all insurers involved, in accordance with the last paragraph of page 1 of the draft framework contract'.

113 Marsh replied by fax of 28 November 2013 seeking 'clarification as to what is meant in the draft framework contract by *the joint and several liability of all insurers involved*' (Marsh's emphasis).

114 Marsh stated that, 'having regard to insurance practice in tenders involving a leading insurer and co-insurers, [its] understanding of that concept is that all designated co-insurers must authorise the leading insurer to act on their behalf in all activities relating to the contract'. Marsh mentioned that 'this includes, inter alia, statements; amendments; loss notifications; negotiations on, rules applicable to and indemnification for loss and associated expenses; all legal proceedings; and the exercise of all rights of subrogation and remedy' and that '[it] is also understood that all co-insurers will automatically and definitively follow any decision or action taken by the leading insurer, thereby resulting in the unanimous consent of all insurers under the contract'. Marsh therefore asked the Commission to confirm that its understanding was correct.

115 By fax of 2 December 2013, the Commission stated that it 'wish[ed] to provide the following clarifications in order to reply to the questions' raised by Marsh:

'First of all, it must be recalled that the future contractor will be bound by an obligation to achieve a certain result consisting in the provision of insurance in accordance with the provisions of the contract documents (100% cover) without interruption for the entire duration of the contract.

In that situation, it will be for the tenderer to organise the practical arrangements for the performance of the contract, which might include, in particular, the arrangements mentioned in your letter.

As regards the concept of joint and several liability, please refer to the definition set out in Article 5.1 of the technical specifications (below).

As you can see, this article does not impose any particular requirements concerning the arrangements for the performance and management of the contract by leading insurers, brokers or co-insurers.

" ***5.1 General provisions*** *The performance of the contract shall commence on the date of its entry into force in accordance with Article 1.2.1 of the draft contract. Where a tender is submitted by various joint and several insurers acting as a consortium or by various insurers acting as a consortium and represented by a joint and several leading insurer, the contract, if awarded, shall be signed by each insurer. In that case, the tenderer shall ensure that the contracting authority will be fully insured (100% cover) without interruption for the entire duration of the contract. If the tenderer is a leading insurer, it shall act as the contact point for the contracting authority and as contract manager during the performance of the contract.* ***Where a tender is submitted by various joint and several insurers acting as a consortium and represented by a broker, the contract, if awarded, shall be signed jointly by each insurer and the broker****. In that case, the insurer or insurers shall also undertake to ensure that the contracting authority will be fully insured (100% cover) without interruption for the entire duration of the contract. In that situation, the broker shall act as the contact point for the contracting authority and as contract manager during the performance of the contract. The broker shall be remunerated directly by the insurer or insurers. The broker may receive payment of the premiums and act as intermediary in the reimbursement of claims for loss.*"

In the light of the foregoing, please confirm compliance with the clause on joint and several liability as defined above and in the first page of the draft framework contract' (Commission's emphasis).

116 By email of 6 December 2013, Marsh stated that it was, 'regrettably, … at the present stage, not yet sure [it] clearly underst[ood] the undertaking that [the Commission] was asking [it] to provide' concerning the question of joint and several liability of the insurers.

117 Marsh added that 'the matters at stake were too important not to take the time necessary to ensure that both parties fully understood the contractual provisions with which [they were required] to comply'. Marsh requested a meeting 'to discuss [the] mutual understanding of this clause on joint and several liability', stating that the meeting '[would] be immediately followed by a definitive answer … as regards the undertaking and [would] enable [it], without any doubt, to clarify the matters which [were] currently holding up the reply to be given [to the Commission]'.

118 Marsh continued as follows:

'For the record, we recall — as previously stated in our request of 28 November 2013 — that Marsh submitted the tender on its own, as a broker; it did not form part of a group or consortium and the tender was not a joint tender submitted with one or more insurers (who did not form part of a group, either). This principle, which was acknowledged in your fax of 27 November 2013, does not appear in Article 5.1 of the terms of performance of the contract, to which you refer in your latest fax (neither of the two situations described actually reflect the situation of our tender), even though the call for tenders is indeed open to insurers and brokers.

The submission of a tender by Marsh as a single tenderer, supported by undertakings from insurers ensuring 100% cover, does not require, and is not, in our view, on the same footing as a group within the meaning of Article 5.1, since this requires a joint tender from all members of the group, all of whom thus become tenderers together by means of joint and several undertakings.

We consider that this distinction has an effect on the necessity of having to confirm whether or not the insurers undertake to be jointly and severally liable.

We would also like to clarify whether Marsh, a single tenderer, is regarded as a (single?) contractor, bearing in mind that the definition of contractor refers to "the insurance company or undertaking with which the contract is signed …". Or, *a contrario*, might you regard the (single) tenderer as not even being a co-contractor (because it is a broker), which, from a legal standpoint, seems to be extremely complex?

Lastly, returning to the concept of joint and several liability, what does it actually cover, bearing in mind, for example, that under Article 47 of the Law on supervision of 9 July 1979 (as amended) (transposition of European directives), the [Financial Services and Markets Authority] may, in any case, impose reorganisation measures affecting the rights of third parties (the creditors of an insurer)? When considering the financial situation of a Belgian insurer, the [Financial Services and Markets Authority] might impose reorganisation measures affecting the undertaking on joint and several liability, for instance, because such an undertaking would endanger the insurer's own ordinary undertakings.'

119 The Commission replied by fax of 18 December 2013, stating that it was not possible to arrange the requested meeting because contact of that kind was not permitted and that, 'as regards [Marsh's] queries concerning joint and several liability …, the following clarifications could be provided':

'It should be recalled that the object of this call for tenders is the conclusion of insurance contracts for each contract lot, in accordance with the conditions laid down in the documents relating to the call. These are direct insurance contracts which must cover the assets or liabilities of the contracting authorities as from signature, without the subsequent signature of an insurance policy. For that purpose, Article 5.1 of the technical specifications provides that "the performance of the contract shall commence on the date of its entry into force in accordance with Article 1.2.1 of the draft contract".

Requiring only a broker to sign an insurance contract on its own behalf without the joint and several undertaking of the insurance companies would exceed the scope of the undertakings that a broker is lawfully able to assume. That is why provision was not made for such a situation in the present contract.

Accordingly, the documents relating to the call for tenders stipulate that the contracts must be signed by the insurance companies and, as the case may be, by the broker, in accordance with the conditions laid down in Article 5.1 of the technical specifications. In those circumstances, the liability of the signatories to the contract will be joint and several liability as provided for in the standard form contract annexed to the contract documents.

As indicated in our fax of 27 November 2013, it is for the tenderer to organise the practical arrangements for the performance of the contract, as well as the division of tasks between the different insurance companies in order to ensure that the contract is performed satisfactorily. Thus, the future contractor/s is/are subject to an obligation to achieve a certain result consisting in the provision of insurance in accordance with the provisions of the contract documents (100% cover) without interruption for the entire duration of the contract. In that context, joint and several liability represents an additional guarantee for the contracting authorities in the event of unsatisfactory performance of the contract, without this resulting in the imposition on the signatories to the contract of other obligations regarding its performance.

In the light of the foregoing, please confirm compliance with the clause on joint and several liability as defined in the documents relating to the call for tenders and, in particular, in the first page of the draft framework contract, and as clarified above.

I also note that in your letter you state that you have mandates from the insurers confirming 100% cover. I should be grateful if you would send them to us.'

120 By fax of 24 December 2013, Marsh replied in the following terms:

'In view of the clarifications contained in the fax, particularly concerning the additional guarantee that joint and several liability represents for the contracting authorities in the event of unsatisfactory performance of the contract, without that resulting in the imposition on the signatories to the contract of other obligations regarding its performance, we hereby confirm 100% cover.

For that purpose, please find attached as an annex the mandates signed by the insurers confirming, as a whole, 100% cover, each insurer covering its share. The "superimposition" of the 6 signed mandates clearly confirm 100% cover for the entire duration of the contract.

Under this structure (which, we recall, is identical to the structure in place in the current interinstitutional contract), Marsh therefore submits a tender composed of 6 insurers assuming shares in the form of co-insurance subject to the ranking clearly set out in the diagrams included in the signed mandates.

These insurers have not formed a group with Marsh nor have they arranged themselves in a group, which was also made clear.

Since the insurers do not take the form of a group, they declare that they agree with all of the contractual terms, for the part of the contract they will perform ("I declare that xxx will comply with all the terms of the tender specifications, for the part of the contract xxx will perform").

We believe that these declarations address the contracting authorities' calls for guarantees as regards the satisfactory performance of the contract. However, despite the efforts made on both sides to understand and clarify matters, we regretfully inform you that we are still not fully convinced we can meet the requirements of the contract, since the insurers do not recognise the concept of joint and several liability, as you would perhaps wish to construe it. The consequence of that concept could be that each insurer would be required to give an undertaking not in respect of the part of the contract it will perform, but in respect of up to 100% of that contract, which is contrary to the principle of co-insurance, under which the insurance cover has to be 100% rather than 600%.

In order to achieve the aim you pursue by imposing a joint and several undertaking on insurers, we can confirm that each insurer was asked and agreed to give an undertaking to perform 100% of its share. Therefore, there is no need to require joint and several liability either as a matter of fact or of law.

Thank you in advance for final clarification on this point.'

121 By fax of 8 January 2014, the Commission thanked the applicant for the clarifications and information provided in its letter of 24 December 2013 and requested information in the following terms:

'As previously explained, the undertaking of your company and of the insurance companies whose mandates were provided with your tender will have to be placed on record by signing the insurance contract annexed to the contract documents.

The fact that the tender was submitted individually or by a group of tenderers is irrelevant at this stage, since the insurance contract must be signed by the insurance companies who confirm, by means of their mandate, performance of the contract should it be awarded. It is not clear from your letter if that will occur.

Consequently, please confirm that, if the contract is awarded, the contractual undertaking will be signed by your company as well as by the co-insurers included in your tender.'

122 By email of 10 January 2014, Marsh replied in the following terms:

'[W]e can confirm that, should the contract be awarded, Marsh and the co-insurers included in our tender (whose mandates were reconfirmed in our letter of 24 December 2013) will sign the service contract attached to the contract documents, in so far as our original tender, the mandates forming part thereof and the various additional clarificatory documents concerning, in particular, joint and several liability form an integral part of the constituent elements of the contract.

Precisely as regards page 1 of the contract, you will recall from our earlier correspondence that the insurers declare in the mandates attached to our tender that they agree with all of the contractual terms, for the part of the contract they will perform ("I declare that xxx will comply with all the terms of the tender specifications, for the part of the contract xxx will perform").

We trust that this reply meets your expectations.'

123 In its report of 13 January 2014, the evaluation committee found that, in the light of all the replies, Marsh satisfied the non-exclusion and selection criteria stipulated in the contract notice. As regards the financial evaluation, the evaluation committee considered that Marsh had supplied the information and documents requested and that its tender, for Lot 1, as clarified by the tenderer, complied with the provisions of the contract documents and was eligible for the financial evaluation.

124 On 30 January 2014, the Commission adopted the contested decision.

125 However, it is apparent from the foregoing description of the correspondence between Marsh and the Commission that the latter must have quickly become cognizant of the fact that Marsh's tender, of 25 October 2013, had not been drawn up — or costed — on the basis of a joint and several undertaking, that is to say an undertaking from each insurer to provide, if necessary, all of the insurance cover.

126 After receiving Marsh's fax of 24 December 2013 (see paragraph 120 above) at the latest, and even more so after receiving the email of 10 January 2014 (see paragraph 122 above), the Commission ought to have realised that Marsh's tender only specifically included, as Marsh itself conceded, provision for joint liability of the insurers, each insurer for its share. The Commission should therefore have found that Marsh's tender did not comply with the requirements of the contract and that the principle of equal treatment with respect to the other tenderer would be infringed were it to sign the contract with Marsh.

127 The fact that, in the end, after AIG's withdrawal and replacement by two other insurers, the insurance cover provided under the contract signed by the Commission, Marsh and the insurers ultimately proposed by Marsh included a joint and several undertaking on the part of those insurers in no way affects the finding set out in paragraph 126 above. On the contrary, these developments simply confirm what can already be inferred from the correspondence exchanged prior to the contested decision.

128 It must be noted that what matters in this action is not that the insurance cover ultimately provided by Marsh and the insurers included, as a result of such developments, joint and several liability as required by the contract documents without alteration of the price set out in Marsh's tender of 25 October 2013, but that Marsh's tender, in the form in which it was submitted, did not provide for joint and several liability and, therefore, did not comply with the contract documents.

129 The Commission's argument as to the existence of unusual circumstances, particularly the presence of a handwritten note on AIG's mandate, mentioned in paragraph 105 above ('Except concerning the solidarity [sic] clause …. We do not accept this clause.'), then the later submission of a mandate from AIG which did not include that note (see paragraph 120 above), is not capable of calling into question the fact that the Commission could not be mistaken about the absence of provision for joint and several liability in Marsh's tender.

130 Although it is true that, at the request of the Commission, Marsh subsequently sent it a mandate from AIG which no longer included that handwritten note, the fact remains that that later mandate still contained a limit on the financial undertaking of the insurer and still provided that the insurer

undertook to comply with the terms of the tender 'for the part of the contract it will perform'. Thus, the mere removal of the handwritten note mentioned in paragraph 129 above did not mean that AIG had foregone the exclusion of joint and several liability.

131 Furthermore, and even more importantly, the mandate of AIG omitting the handwritten note (as well as the five other mandates, worded in the same terms, from the five other insurers proposed by Marsh) were annexed to Marsh's letter of 24 December 2013. That letter, as is apparent from its wording (see paragraph 120 above), expressly ruled out joint and several liability of the insurers. After reading it, the Commission could have no reasonable doubts in that regard. All in all, the removal of the handwritten note, rendering the wording used in all of the mandates of the insurers proposed by Marsh the same (each of which referred to the insurer's undertaking as being 'for the part of the contract it will perform'), viewed alongside the wording of the letter of 24 December 2013, ought to have convinced the Commission even further that there was a difficulty regarding Marsh's tender, being the issue of joint and several liability.

132 Lastly, following the letter of 24 December 2013, the email of 10 January 2014 (see paragraph 122 above) could only serve to confirm to the Commission the true position that Marsh's tender contained no provision for joint and several liability of the insurers. It was therefore impossible for the Commission to overlook the fact that the tender was not in order and that it had been drawn up on the basis of a financial undertaking bearing no relation to that set out in the applicant's tender. Consequently, by continuing to correspond with Marsh and by adopting the contested decision, rather than finding that Marsh's tender was not in order and rejecting it, the Commission clearly infringed the principle of equal treatment.

133 As a result of all of the foregoing considerations, the first part of the single plea for annulment is well founded.

The second part of the plea, alleging infringement of the principle of equal treatment because Marsh's tender was amended after the tenders had been opened

134 The applicant submits that the composition of the consortium organised by Marsh was amended after the tenders had been opened. At least one of the insurers, namely AIG, who refused to give a joint and several undertaking to perform the contract, was rejected.

135 It claims that that amendment of the composition of the consortium organised by Marsh after the tenders had been opened cannot be described as a 'clarification' concerning the content of the tender or the 'correction of a clerical error' for the purposes of Article 160(3) of the implementing regulation. By permitting such amendment, the Commission infringed the principle of equal treatment of tenderers, viewed alongside Article 112(1) of the financial regulation and Article 160 of the implementing regulation.

136 Lastly, according to the applicant, it is clear that if this irregularity in the award of the contract had not occurred, the outcome of the administrative procedure might have been different. If the Commission had rejected Marsh's tender as non-compliant, the contract would have been awarded to the applicant, as it was the only other undertaking to have tendered for the contract and its tender was in order.

137 In its reply, the applicant argues, based on new information, that there were three types of unlawful amendments to Marsh's tender.

138 In the first place, the identity of the insurers instructing Marsh and their financial situation was not a mere practical arrangement for the performance of the contract. The replacement of AIG by other insurers after the tenders had been opened amounted to an unlawful amendment of the tender.

139 In the second place, although the overall price of Marsh's tender remained the same, the negotiation conditions between Marsh and the existing and new insurers undoubtedly differed from those prevailing before the tender was submitted, because the price proposed by the applicant was already known and the insurers were sure that the contract would be awarded to Marsh. Thus, the rejection of AIG and the proposed new distribution of shares between the insurers placed Marsh at a competitive advantage.

140 In the third place, the Commission allowed Marsh to 'convert' the tender it had unlawfully submitted as a single tenderer without joint and several liability to a joint tender with joint and several liability. Since the insurers expressly refused all joint and several liability and gave an undertaking only as regards their part of the contract, the Commission was not able to contact Marsh to seek subsequent 'clarifications' or 'corrections'.

141 By accepting documents and substantive amendments to Marsh's tender after the tenders had been opened, the Commission infringed the fundamental rule that a contract is to be awarded on the basis of the tenders submitted within the stipulated time limits and not on subsequent information.

142 The Commission disputes the applicant's position.

143 In the first place, it claims that Marsh presented itself as a single tenderer-broker and not as a consortium. Consequently, there was no 'amendment of the consortium'.

144 In the second place, the contacts between the Commission and the tenderers (both Marsh and the applicant) before the contract award decision took place in full compliance with the applicable rules on public procurement. In the case of Marsh, those contacts consisted in requests to complete the supporting documents relating to the selection criteria, to correct identified clerical errors and to provide clarifications on compliance with some of the obligations flowing from the contract documents, all in a manner which was fully consistent with Article 158(3) and Article 160(3) of the implementing regulation. The terms of Marsh's tender — 100% cover of the risks stipulated in the contract documents and the price — were not amended in any way.

145 In the third place, after the contract had been awarded and even after two counterparts of the draft contract had been sent to Marsh for signature, AIG, which was one of the insurers that had originally instructed Marsh for the contract at the same time as the insurer grouped with the applicant, refused to sign the contract as stipulated in the contract documents. However, contrary to what the applicant appears to suggest, no insurer was 'rejected' by the Commission or Marsh. It was the insurer itself which refused to sign the insurance contract.

146 The Commission argues that it was for Marsh, which had submitted its tender as a single tenderer-broker, to organise the practical arrangements for performance of the contract, as well as the division of tasks between the various insurance companies, in order to ensure that the contract was properly performed, it being understood that any amendment to the terms of its tender was precluded. In addition, Marsh proposed (and the Commission accepted) that AIG be replaced by the other insurers who had already given Marsh a mandate and by two new insurers. It was therefore possible for the insurance contract to be signed on 27 February 2014.

147 The Commission insists that the replacement of AIG did not entail any amendment to the conditions of the contract or the terms of Marsh's original tender, which is prohibited under Article 112(1) of the financial regulation, given that (i) Marsh submitted its tender as a single tenderer; (ii) it satisfied on its own the selection criteria for the contract; (iii) the terms of its tender (100% cover and price) were not amended in any way; and (iv) the contract signed by it and the insurers was fully compliant with (and even identical to) the draft contract included in the contract documents.

148 Furthermore, it must be noted that, even after the signature and entry into force of the contract, the successful tenderer was bound by the obligation to perform the contract in accordance with its tender and the contract documents. If any of the insurers which signed the contract were to withdraw or default, the successful tenderer would be required to propose an alternative to the Commission without any amendment to its tender and the contract documents. The applicant itself provided in its tender for the possibility of substituting an insurer forming part of its group, stating that 'if an insurer finds it necessary, for reasons beyond our control, to terminate the policy, Vanbreda will employ its best efforts to ensure the cover is guaranteed on the conditions originally agreed to'.

149 In its rejoinder, the Commission addresses the arguments that it unlawfully amended Marsh's tender in three respects (identity and shares of the insurers, and nature of the tender) by referring to its defence, subject to the following clarifications. As regards the replacement of one of the insurers, the Commission claims that that occurred without any amendment to the terms of the tender (100% cover, joint and several undertaking of the insurers, and price). As regards the shares, these fell within the scope of the internal relations between the insurers who instructed Marsh for the performance of the contract and not within the scope of the contract itself. As for the alleged conversion of the single tender without joint and several liability to a joint tender with joint and several liability, the Commission refers to its arguments on the absence of any conversion.

150 Under Article 112(1) of the financial regulation, while the procurement procedure is under way, all contacts between the contracting authority and candidates or tenderers must satisfy conditions ensuring transparency and equal treatment. They are not to lead to amendment of the conditions of the contract or the terms of the original tender.

151 Under Article 160 of the implementing regulation, contacts between the contracting authority and tenderers during the contract award procedure may take place by way of exception. If, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender have to be corrected, the contracting authority may contact the tenderer, although such contact may not lead to any alteration of the terms of the tender.

152 In the present case, it is apparent from the information examined in the context of the first part of the single plea that the contacts between Marsh and the Commission after the tenders were opened concerned, in particular, the condition of joint and several liability, which is an essential condition in the contract documents.

153 Those contacts indicate that Marsh's tender of 25 October 2013 did not include, in essence, the joint and several undertaking stipulated in the contract documents and that, therefore, the price of Marsh's tender could not be regarded as having been drawn up on a basis which complied with the conditions of the contract.

154 Even though the Commission should have immediately drawn the appropriate conclusions therefrom and should not have awarded the contract to Marsh, all the more so because, in this instance, the award had to go to the tender offering the lowest price, the Commission proceeded with the award. Following the refusal of one insurer to assume joint and several liability and sign the insurance contract, that insurer was replaced by two new insurers, the shares were reallocated, and the contract was finally signed by the Commission, on the one part, and Marsh and seven insurers, on the other.

155 In order to justify its position, the Commission refers to the successful tenderer's obligation to propose an alternative to it if one of the insurers defaults or withdraws, without any amendment to the tender and the contract documents.

156 Suffice it to note that the present case did not involve the withdrawal or default of an insurer after signature of the insurance contract, which indeed triggers a contractual obligation requiring the successful tenderer to find a solution to ensure the continuity of the services under the contract. Rather, it involved the withdrawal of an insurer before signature of the contract, which is therefore subject to the rules on public procurement.

157 It follows from the foregoing that the contacts between the Commission and Marsh led, in essence, to an essential amendment of the terms of Marsh's original tender, infringing the rules on public procurement and, in particular, the principle of equal treatment of tenderers.

158 It must therefore be held that the second part of the plea for annulment is also well founded.

Conclusion on the action for annulment

159 It follows from all of the above considerations that, without it being necessary to rule on the third part of the plea, alleging infringement of the principle of transparency, the plea must be upheld and, therefore, the contested decision must be annulled.

The action for damages

160 The applicant claims to have shown that the Commission committed several irregularities which, individually or at the very least taken together, are capable of constituting a sufficiently serious infringement of EU law.

161 According to the applicant, the damage suffered consists in the loss of the opportunity, or even the certainty, of being awarded the contract, as well as a loss of references and non-material damage.

162 The applicant contends that this damage can be quantified *ex aequo et bono* in the lump sum amount of EUR 1 000 000.

163 In its view, it is obvious that, if the Commission had not committed any irregularities during the contract award, the administrative procedure might have had a different outcome. If the Commission had rejected Marsh's tender, the contract would have been awarded to the applicant, as it was the only other undertaking to have tendered for the contract and to have submitted a tender which complied with the contract documents.

164 Furthermore, it is undeniable that a contract covering fire insurance policies, the related risks of building stock and its contents, for all EU institutions concerned, is a very important reference for similar calls for tender. Beyond mere references, certificates of satisfactory performance would be crucially important in the technical selection stage of future calls for tender. Such certificates were indeed required in the present award procedure. It is clear that, since the contract was not awarded to it, the applicant lost the benefit of certificates of satisfactory performance relating to this contract covering several EU institutions.

165 Lastly, the fact that the Commission did not accept the applicant's tender, even though it was the only tender in order submitted in the procedure, is contrary to the legitimate expectations of the applicant that it would be awarded the contract and caused it non-material damage.

166 In its reply, the applicant recalls that, above all, it seeks specific performance of the contract. Thus, only in so far as the applicant does not secure such performance pending the judgment of the Court does it seek full compensation of equivalent value.

167 The applicant contends that it has already adduced ample evidence of the Commission's wrongful conduct. The damage suffered is real and certain. As regards the legal possibility of abandoning the award procedure and launching a fresh procedure, this was purely theoretical in the light of the circumstances of the present case. The applicant would almost certainly have been awarded the contract. In purely financial terms, the value of the contract over four years is EUR 3 742 000. The applicant claims that it suffered non-material damage due to the loss of references and reputation. It thus maintains that this damage could be quantified in the amount of EUR 1 000 000.

168 The Commission argues that it did not commit any irregularity. In the alternative, it submits that it did not commit any serious and manifest infringement of the limits on its discretion. On the contrary, it is clearly apparent from the facts of the present case that the Commission diligently made every effort, in good faith, to ensure that the procurement procedure complied with all the relevant rules, to check that the tenders received were fully compliant with the contract documents, and to satisfy itself that the new insurance contract would come into force on time providing the contracting authority with 100% cover.

169 As regards damage, the Commission submits that the applicant very briefly claims reparation for three types of damage it claims to have suffered. It has not demonstrated that that damage is real and certain.

170 First, as regards the loss of the opportunity to be awarded the contract, the Commission contends that the applicant has not lost anything; its tender did not offer the lowest price and the Commission had no reason to exclude Marsh's tender or consider it not to be in order.

171 Secondly, as regards the loss of references, there is no real and certain damage. The absence of a new reference is not capable, on its own, of altering the applicant's capacity to participate in similar contracts in the future. Furthermore, this damage is hypothetical: the applicant cannot claim that it would definitely have received a certificate of satisfactory contractual performance since the receipt of that certificate is tied to the actual performance of the contract and is not a foregone conclusion.

172 Thirdly, the Commission maintains that the applicant does not identify any non-material damage and simply confines itself to stating that the fact it was not awarded the contract is contrary to its 'legitimate expectations'. Moreover, at no point in time did the contracting authority give the applicant a legitimate expectation that it would be awarded the contract.

173 In its rejoinder, the Commission submits that the applicant achieved the suspension of the contract and the organisation of a negotiated procedure at the end of which they concluded a contract together for a maximum of 18 months as from 17 February 2015. These considerations should be taken into account when quantifying the damage.

174 That being the case, the Commission claims that the alleged damage is neither real, nor certain, nor specific. Thus, if the contract documents had been interpreted narrowly, or if Marsh's tender had to be regarded as a joint tender, it would not have been possible for the applicant's tender to be regarded as valid.

175 Furthermore, the Commission could easily have decided to abandon the disputed procurement procedure.

176 As regards the amount of damage claimed, this is disputed by the Commission. In its view, the alleged economic loss is not that of the applicant, which is a mere broker acting on its own account.

177 Concerning the non-material damage flowing from the allegedly exceptional nature of the contract, the Commission denies that the contract was exceptional in nature.

178 Pursuant to the second paragraph of Article 340 TFEU, in the case of non-contractual liability, the European Union must, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

179 In accordance with settled case-law, for the European Union to incur non-contractual liability, within the meaning of the abovementioned provision, for unlawful conduct on the part of its bodies, a set of conditions must be fulfilled, namely the unlawfulness of the acts alleged against the EU institution or body concerned, the fact of damage and the existence of a causal link between that conduct and the damage complained of (judgments of 29 September 1982 in *Oleifici Mediterranei* v *EEC*, 26/81, ECR, EU:C:1982:318, paragraph 16; 9 September 2008 in *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, ECR, EU:C:2008:476, paragraphs 106 and 164 to 166; 9 September 2010 in *Evropaïki Dynamiki* v *Commission*, T-300/07, ECR, EU:T:2010:372, paragraph 137; and 16 October 2014 in *Evropaïki Dynamiki* v *Commission*, T-297/12, EU:T:2014:888, paragraph 28). Furthermore, as regards the condition relating to the unlawful conduct, the case-law requires there to be a sufficiently serious breach of a rule of law intended to confer rights on individuals. The decisive test for finding that a breach is sufficiently serious is whether the EU institution or body concerned manifestly and seriously disregarded the limits on its discretion (see, to that effect, judgments of 4 July 2000 in *Bergaderm and Goupil* v *Commission*, C-352/98 P, ECR, EU:C:2000:361, paragraphs 42 to 44; 10 December 2002 in *Commission* v *Camar and Tico*, C-312/00 P, ECR, EU:C:2002:736, paragraph 54; *AFCon Management Consultants and Others* v *Commission*, cited in paragraph 65 above, EU:T:2005:107, paragraph 93; and *Evropaïki Dynamiki* v *Commission*, EU:T:2014:888, paragraph 29).

180 As regards the condition for incurring liability relating to unlawfulness, it has been found, in particular, that the Commission infringed the principle of equal treatment of tenderers. By infringing the principle of equal treatment, the observance of which is essential for the lawfulness of public procurement procedures, the Commission violated a rule of law whose purpose is to confer rights on individuals (see, to that effect, judgments in *AFCon Management Consultants and Others* v *Commission*, cited in paragraph 65 above, EU:T:2005:107, paragraph 91, and 2 March 2010 in *Arcelor* v *Parliament and Council*, T-16/04, ECR, EU:T:2010:54, paragraph 134).

181 It should also be pointed out that the infringement in the present case is sufficiently serious. By completing the public procurement procedure with Marsh in the circumstances described, in particular, in paragraphs 102 to 128 above and 151 to 156 above, the Commission manifestly and seriously disregarded the limits on its discretion.

182 As regards the conditions for incurring liability relating to the existence of damage and of a causal link between the wrongful conduct and the damage, the Commission submits, more particularly as regards the causal link, that if the contract documents had been interpreted restrictively, or if Marsh's tender had to be regarded as a joint tender, it would not have been possible for the applicant's tender to be regarded as valid.

183 This argument has two parts.

184 First, by means of this argument, the Commission claims that the non-restrictive interpretation of the call for tenders — which it upholds and according to which a tender submitted by a single tenderer-broker would be acceptable — also benefited the applicant, whose tender, were it not for that non-restrictive approach, could not, presumably, have been regarded as valid. Thus, in the Commission's view, the call for tenders, according to the restrictive interpretation upheld by the applicant, would in any event have excluded the applicant's tender. Thus, there could not be any causal link between the wrongful conduct of the Commission, which in actual fact served the interests of the applicant, and the rejection of the applicant's tender.

185 This argument must be dismissed.

186 Although (as held in the examination of the first part of the single plea for annulment) the wording and scheme of the call for tenders precluded the submission of a tender by a single tenderer-broker, in no way did they prevent the submission of a joint tender by a group composed of a broker and a single insurer.

187 Admittedly, it was conceivable that a joint tender, especially in the context — as in the present case — of cover against major risks, would be more likely to interest several insurers joining forces around a broker than a single insurer represented by a broker. However, while that might explain why the plural ('the insurers') is frequently used in the documents relating to the call for tenders, it cannot justify the exclusion of a tender submitted by a group composed of a broker and a single insurer.

188 Furthermore, the submission of a tender by such a group is not contrary to the rationale of the system established by the call for tenders. It is clear that, in the case of a joint tender, whether by one or by several insurers represented by a broker, the information to be provided in connection with the call for tenders concerns each member of the group, in stark contrast to the situation where a tender is submitted by a single tenderer-broker.

189 Furthermore, an interpretation of the contract documents which precludes the submission of a joint tender by a group composed of an insurer represented by a broker, but which permits the submission of a tender by a single tender-insurer or a joint tender by a group composed of two insurers represented by a broker, would be contrary, without objective justification, to the principle of equal treatment.

190 The Commission explains in its rejoinder that, when the contract documents were drawn up, it expected to receive tenders from single insurers or from several insurers acting as a consortium whether or not represented by a leading insurer or a broker. However, it provides no explanation, and far less a convincing one, as to how the submission of a joint tender by an insurer and a broker would have gone beyond the provisions of the call for tenders.

191 Lastly, and for the sake of completeness, it must be pointed out that, in the context of joint tenders, the third subparagraph of Article 5.1 of the technical specifications, relating to the signature of the insurance contract, provides that 'where a tender is submitted by various joint and several insurers acting as a consortium and represented by a broker, the contract, if awarded, shall be signed jointly by each insurer and the broker'. This provision goes on to state that, 'in that case, the insurer or insurers shall also undertake to ensure that the contracting authority will be fully insured (100% cover) without interruption for the entire duration of the contract' and that 'the broker shall be remunerated directly by the insurer or insurers'. In addition, the technical specifications define the 'contractor' as 'the insurance company or undertaking with which the contract is signed and which is appointed for that purpose in the special conditions'.

192 The use of the singular ('the insurer or insurers', 'the insurance company or undertaking') support the — already sufficient — considerations set out in paragraphs 185 to 190 above, according to which the call for tenders did not preclude the submission of a joint tender by a group composed of a broker and a single insurer.

193 Secondly, according to the argument set out in paragraph 182 above, if Marsh's tender had to be regarded as a joint tender, it would not have been possible for the applicant's tender to be regarded as valid, because the same insurer (AIG) would have been present simultaneously in two tenders.

194 Regardless of the fact that it is by no means proven that the situation envisaged by the Commission would have automatically led, in the circumstances of the present case, to the alleged consequences (see, to that effect and by analogy, judgments of 19 May 2009 in *Assitur*, C-538/07, ECR, EU:C:2009:317, paragraph 30; 23 December 2009 in *Serrantoni and Consorzio stabile edili*, C-376/08, ECR, EU:C:2009:808, paragraphs 38 to 42 and 46 and the operative part; and 13 December 2012 in

Forposta and ABC Direct Contact, C-465/11, ECR, EU:C:2012:801, paragraph 14), it must be stated that that situation does not reflect the true position. Marsh's tender is not a joint tender but a tender submitted by a single tenderer-broker. As such, it is not compliant with the contract documents and, for the reasons set out in the examination of the first part of the plea for annulment, should have been declared to be non-compliant by the Commission. The Commission's argument must therefore be rejected.

195 Over and above the foregoing, the Commission argues that the damage complained of is neither real, nor certain, nor specific to the applicant. In the alternative, it contends that the suspension of the contract with Marsh and the award of the replacement contract to the applicant should be taken into account.

196 In the first place, as regards the loss of the opportunity to be awarded the contract, it must be pointed out that the applicant's tender had been declared to be in order by the Commission, that it was the only tender besides Marsh's, and that it was rejected in favour of Marsh's tender because the latter offered the lowest price.

197 It follows that, if Marsh's tender had been declared to be non-compliant in so far as it was submitted, contrary to the requirements of the call for tenders, by a single tenderer-broker, or even in so far as it did not include provision for joint and several liability of the proposed insurers, the applicant would have been extremely well placed to secure the contract.

198 Moreover, the Commission does not seriously deny this. It merely repeats that it did not commit any irregularity, relies on arguments which have already been refuted in paragraphs 184 to 194 above, and recalls that it could have, in any event, abandoned the procurement procedure in dispute and launched a fresh procedure, with the result that the applicant could not have been sure that it would have been awarded the contract.

199 On this last point, it must be observed that although the contracting authority may, before the contract is signed, either abandon the procurement or cancel the award procedure without the candidates or tenderers being entitled to claim any compensation (Article 114 of the financial regulation), the fact remains that these situations of abandonment of the procurement or cancellation of the procedure did not actually materialise and that, in the circumstances of the present case, the chances of the applicant being awarded the contract were very high, had it not been for the irregularities committed by the Commission.

200 In the light of all the circumstances of the case, it seems possible to conclude that the applicant had a 90% chance of concluding the contract, had it not been for the irregularities committed by the Commission.

201 In its action, the applicant states that the overall damage caused to it, taking account of the loss of opportunity, loss of references and non-material damage, can be quantified *ex aequo et bono* in the amount of EUR 1 000 000.

202 The applicant does not apportion that amount between the three heads of damage claimed, but mentions, as a reference value, that of the lost contract, being EUR 3 742 300, explaining that that value is the annual price set out in the tender (EUR 935 574 per year) multiplied by the four years of the contract. The applicant draws attention to the extent of the non-material damage suffered by it in the light of the scale of the contract in financial terms ('several million') and length (four years).

203 The Commission, starting from the premiss that the amount claimed is calculated by reference to the annual value of the contract, contends that that amount, which is close to the annual value, necessarily includes AIG's remuneration and thus only a limited part of it corresponds to the applicant's remuneration. The Commission therefore disputes that amount, claiming that, in the present action, the applicant acts only for itself and can only claim compensation for the damage caused to it.

204 The Commission also challenges the damage arising from the loss of references. It argues that the absence of a new reference is not capable, on its own, of altering the applicant's capacity to participate in similar contracts in the future. As regards the loss of certificates of satisfactory performance, that, by definition, depends on the satisfactory performance of the contract. As for the non-material damage complained of, that is not real and certain.

205 First of all, it must be pointed out that the premiss on which the Commission bases its first objection, mentioned in paragraph 203 above, is inconsistent with the documents in the case lodged before the Court. It is apparent from the applicant's written pleadings that the amount claimed is calculated not by reference to the annual value of the contract, but by reference to the total value of the contract, for four years. That is also apparent from the link which the applicant establishes between the amount claimed and that latter value, as well as from the reference made to the fact that the contract is for a duration of four years and is worth several million euros (see paragraph 202 above).

206 Accordingly, since the amount claimed represents only slightly more than one quarter of the value of the contract over four years and since the applicant also invokes the loss of the virtual certainty that it would have been awarded the contract, the amount claimed can only logically correspond to the damage that this party claimed to have suffered itself. Otherwise, the applicant — considering itself to have lost the virtual certainty of being awarded the contract — would have logically sought, for itself and for the insurer, far higher damages relative to the value of the contract over four years.

207 As regards, next, the question whether the applicant was right to refer to the four years of the contract in order to calculate the damage caused to it, it must be pointed out that the contract notice stated that the duration of the contract was to be 48 months (section II.3 of the contract notice, paragraph 4 of Lot 1). Similarly, it was stated that the next contract notice would be published 36 months after the award (section VI.1 of the contract notice). The draft service contract attached to the invitation to tender stated that 'the contract is concluded for a period of 12 months' (Article I.2.3 of the draft contract) and that '[it] shall be renewed automatically no more than three times, each for a period of performance of 12 months …, unless the contracting authority notifies the contractor of its intention not to renew the contract and provided that such notification [is given] 6 months before the completion of the tasks from the previous period' (Article I.2.4 of the draft contract). Furthermore, the draft contract addressed the issue of the review of prices and of the annual premium by referring to the 'first year of performance of the contract', the 'second year of performance of the contract' and 'each year of performance of the contract' (Article I.3.2 of the draft contract). The technical specifications followed suit (see Article 9.2 thereof).

208 It is apparent from reading these provisions together that the applicant was right, in its action, to use the full duration of the contract as the basis for its action for damages, since the contract at issue was for four years and included, at most, a power of annual non-renewal exercisable only by the contracting authority under certain strict procedural conditions. Nonetheless, in determining compensation, account should be taken of the uncertainty arising from that power of annual non-renewal.

209 Furthermore, it must be pointed out that it is not apparent from the applicant's written pleadings that it took account of the costs of performing the contract which it would have incurred had it been awarded the contract as a factor that ought to reduce its claim for damages. It is not possible, based on the material in the file, to calculate those costs. Moreover, although the wording of the action

justifies the conclusion that the applicant only seeks compensation for the damage caused to it alone, the documents before the Court do not contain any information which can be used to ascertain the applicant's share in the total value of the contract.

210 It must also be noted that, although the applicant indeed lost the opportunity in 2014 to secure a four-year contract, the fact remains that on 17 February 2015, approximately eleven months and two weeks after the entry into force of the disputed contract, it was awarded the insurance contract forming the subject matter of the negotiated procedure launched by the Commission following the order in *Vanbreda Risk & Benefits* v *Commission*, cited in paragraph 33 above (EU:T:2014:1024). It must also be pointed out, as the applicant did, that that second contract was concluded for a maximum period of 18 months, until 17 August 2016, while the contract forming the subject matter of this dispute would have expired as a matter of course in March 2018.

211 These factors are also capable of affecting the quantification of the damage caused to the applicant, which moreover stated in its written pleadings that its claim for compensation of equivalent value exists only in so far as it does not secure the specific performance of its claim and, if it does secure such performance but with delay, the damage will have to be quantified in the light of that delay.

212 It follows from the foregoing that, even though, as regards the loss of the opportunity to be awarded the contract, there is in principle sufficient proof of the existence of damage capable of being compensated, the quantum of such damage cannot be determined to a sufficient degree, as matters stand, to enable the Court either to rule on the basis of the amount claimed by the applicant, or to fix another amount.

213 In the second place, as regards the loss of references — which, according to the applicant, encompasses the loss of certificates of satisfactory performance — this head of claim must, at the outset, be dismissed in so far as it relates to such certificates. The issuance of these documents does not depend on the award of the contract, but on the future and hypothetical satisfactory performance of the contract.

214 By contrast, as regards the contract award references themselves, which would have flowed *de facto* from the award of the contract to the applicant, it is undeniable that the applicant, by the same measure as its loss of opportunity to be awarded the contract, lost the opportunity to possess such references. However, once again, the Court does not have sufficient information to determine how much of the amount claimed by the applicant corresponds to the loss of the opportunity to be awarded the contract and how much corresponds to the loss of the opportunity to secure references.

215 In the third place, as regards the non-material damage said to result from the fact that the Commission, in violation of the legitimate expectations of the applicant who submitted the only compliant tender, awarded the contract to a third party, the Commission argues that the applicant simply claimed that its conduct was unlawful and that at no point in time did the applicant entertain the legitimate expectation that it would be awarded the contract. The applicant does not address this last consideration in its reply, but equates the non-material loss it suffered to a loss of references and reputation.

216 It must be pointed out that the Commission did not, at any time, give the applicant a legitimate expectation relating to the award of the contract. As regards the non-material damage claimed to result from the unlawfulness of the contested decision, it is settled case-law that such damage is generally adequately compensated by a finding of such unlawfulness by a court (see, to that effect, judgment of 6 June 2006 in *Girardot* v *Commission*, T-10/02, ECR-SC, EU:T:2006:148, paragraph 131). As regards the non-material damage claimed to result from a loss of references and reputation, this is partly indissociable from the loss of references examined above and the loss of reputation is not real and certain.

217 In view of the foregoing considerations — from which it is apparent that the Court, although able to decide on a number of points concerning the action for damages, is not in possession of sufficient information to confirm the amount claimed or quantify itself the damage caused — it is appropriate to uphold the applicant's claim for damages in so far as it seeks compensation for the loss of the opportunity to be awarded the disputed contract and to secure the corresponding contract award references, and to dismiss that claim as to the remainder. As regards the amount capable of being compensated in respect of the loss of opportunity, it is appropriate to invite the parties, subject to a subsequent decision of the Court, to reach agreement on that amount in the light of the grounds of this judgment and to inform the Court, within a period of six months from the date of delivery of the present judgment, of the amount to be paid, arrived at by agreement, failing which they are to send it, within the same period, a statement of their views with supporting figures together with the evidence necessary to enable the Court to assess the merits.

Costs

218 Costs are reserved.

On those grounds,

THE GENERAL COURT (Sixth Chamber),

hereby:

1. **Annuls the decision of 30 January 2014 by which the European Commission rejected the tender submitted by Vanbreda Risk & Benefits for Lot 1 in the context of call for tenders No OIB.DR.2/PO/2013/062/591 relating to the insurance of property and persons (OJ 2013/S 155-269617) and awarded Lot 1 to another company;**

2. **Orders the European Union to pay compensation for the damage suffered by Vanbreda Risk & Benefits for the loss of the opportunity to be awarded the abovementioned contract and to obtain the corresponding references for the award of the contract;**

3. **Dismisses the claim for compensation as to the remainder;**

4. **Orders the parties to inform the Court, within six months from the delivery of the present judgment, of the amount of compensation arrived at by agreement for that damage suffered;**

5. **Orders that, in the absence of agreement, the parties shall transmit to the Court, within the same period, a statement of their views with supporting figures;**

6. **Reserves the costs.**

Frimodt Nielsen Dehousse Collins

Delivered in open court in Luxembourg on 29 October 2015.

[Signatures]

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