JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

13 September 2011 *

In Case T-8/09,

Dredging International NV, established in Zwijndrecht (Belgium),

Ondernemingen Jan de Nul NV, established in Hofstade-Aalst (Belgium),

represented by R. Martens and A. Van Vaerenbergh, lawyers,

applicants,

v

European Maritime Safety Agency (EMSA), represented by J. Menze, acting as Agent, assisted by J. Stuyck and A.-M. Vandromme, lawyers,

defendant,

APPLICATION for (i) annulment of EMSA's decision of 29 October 2008 rejecting the tender submitted by the applicants in negotiated procedure EMSA/NEG/3/2008 relating to the conclusion of public service contracts for stand-by oil spill recovery

* Language of the case: English.

vessels (Lot 2: North Sea) and awarding the contract to D.C. International; (ii) a declaration that the contract concluded between EMSA and D.C. International is null and void; and (iii) damages,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and M. van der Woude, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 15 December 2010,

gives the following

Judgment

Background to the dispute

1. *The contract*

1 By contract notice published in the Supplement to the *Official Journal of the European Union* on 8 March 2008 (OJ 2008 S 48), the European Maritime Safety Agency (EMSA)

opened a negotiation procedure, under reference number EMSA/NEG/3/2008, concerning a services contract for the operation of stand-by oil spill recovery vessels. At the same time as the contract notice, EMSA published on its website an invitation to apply, to which were annexed the application specifications and draft tender specifications. Section VI.3 of the contract notice referred to that publication in connection with the additional information which it was possible to obtain.

2 Lot 2 of the services contract related to operations in the North Sea.

3 Under point II.2.1 of the contract notice, point 3.4 of the application specifications and point 5 of the draft tender specifications, the maximum total value for Lot 2 was EUR 4 000 000.

4 Under point II.3 of the contract notice, point 3.3 of the application specifications and point 3.3 of the draft tender specifications, the duration of the contract was to be 36 months, as from the award of the contract. The application specifications and the draft tender specifications stated that that term could be renewed once, for a maximum of three years.

5 Under point 12.2 of the draft tender specifications, the submission of a tender above the budget ceiling laid down for each lot was a ground for exclusion from the procurement procedure.

2. *The applicants' participation in the negotiation procedure*

6 The applicants — Dredging International NV and Ondernemingen Jan de Nul NV — together set up Joint Venture Oil Combat ('JVOC') and submitted an application on 29 April 2008 in respect of Lot 2.

7 On 30 May 2008, at the end of the invitation to apply phase, EMSA sent the applicants an invitation to tender, to which the final tender specifications were attached.

8 On 18 June 2008, a clarification meeting was held between the applicants and EMSA. At that meeting, EMSA explained that, if the contractual obligations were performed satisfactorily, a three-year extension would be proposed to the co-contractors. EMSA also emphasised the importance of observing the budget ceilings.

9 JVOC submitted its tender on 15 July 2008.

10 By letter of 14 August 2008, EMSA made some preliminary comments on the applicants' tender. It pointed out in particular that, in so far as JVOC's tender exceeded the budget ceiling laid down for Lot 2, it had to be amended as it would otherwise be excluded from the procurement procedure.

11 By letter of 1 September 2008, the applicants pointed out to EMSA that their tender was based on a six-year period, in accordance with the option provided for, in their view, in the tender specifications. Consequently, the applicants argued, the average cost for a three-year period was below the budget ceiling laid down for Lot 2. The

applicants also explained in that regard that a six-year tender was a mutually advantageous solution.

12 In a letter which the applicants state they received on 12 September 2008, EMSA pointed out that, according to the tender specifications, the tenders submitted were to be based on a three-year period. EMSA invited the applicants to propose a price meeting that requirement.

13 By letter of 29 September 2008, the applicants contested EMSA's interpretation of the tender specifications. They maintained their tender, based on a contractual period of six years, reiterating that that period was the optimum solution in the circumstances.

3. *EMSA's decisions and subsequent communications*

14 By letter of 29 October 2008, EMSA informed the applicants that, in so far as they had not met a condition which must be satisfied, on pain of exclusion from the tendering procedure, their tender had not been accepted. EMSA stated that the applicants could request the name of the successful tenderer and additional information concerning the reasons for the rejection of their tender, which the applicants did by letter of 3 November 2008.

15 By letter of 6 November 2008, EMSA replied to the applicants' request, stating that the contract had been awarded to D.C. International ('DCI') and that the reason why JVOC's tender had been rejected was that it did not observe the budget ceiling laid down for Lot 2.

16 By letters of 7 and 13 November 2008, the applicants contested the rejection of their tender, asked to be sent a copy of the evaluation committee's report and expressed doubts as to whether DCI did not fall within one of the grounds for exclusion provided for in the tender specifications and whether it had complied with some of the technical requirements set out in those specifications. By letter of 13 November 2008, the applicants also asked EMSA to observe a standstill period and to refrain from signing the contract with DCI until the applicants had received the information concerning the tender evaluation procedure. Those requests were reiterated in the applicants' letter of 21 November 2008.

17 By letter of 19 November 2008, which the applicants state they received on 24 November 2008, EMSA replied that only tenderers whose bids were admissible were entitled to receive information on the relative advantages of the successful tender. As it was, according to EMSA, in so far as JVOC's tender fell within one of the grounds for exclusion — that is to say, it did not observe the budget ceiling laid down for Lot 2 — it was inadmissible. In response to the doubts expressed by the applicants, EMSA added that the vessels proposed by DCI did not fall within the ground for exclusion to which the applicants had referred.

18 By letter of 27 November 2008, the applicants contested the finding that JVOC's tender was inadmissible and reiterated their request for a copy of the evaluation committee's report.

19 By letter of 28 November 2008, EMSA replied that it would consider the applicants' request. On 16 December 2008, it sent them a further letter reaffirming that JVOC's tender exceeded the budget ceiling laid down for Lot 2 and that it therefore had to be rejected at the evaluation phase. In those circumstances, EMSA stated, the applicants could only receive information concerning the grounds for the rejection of their tender, not details of the successful tender.

20 Since the applicants did not receive the letter of 16 December 2008 until 5 January 2009, they reiterated their requests in the meanwhile, by letter of 17 December 2008.

4. *Signature of the contract with DCI*

21 EMSA signed the contract with DCI on 17 November 2008.

Procedure and forms of order sought

22 By application lodged at the Court Registry on 6 January 2009, the applicants brought the present action.

23 Owing to a change in the composition of the chambers of the Court, the Judge-Rapporteur was assigned to the Fourth Chamber, to which, in consequence, the present case was assigned.

24 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided on 19 October 2009 to open the oral procedure. By way of measures of organisation of procedure under Article 64 of its Rules of Procedure, the Court put written questions to the parties, asking them to reply in writing. The parties complied with that request.

25 At the hearing on 15 December 2010, the parties presented oral argument and answered the questions put to them by the Court.

26 The applicants claim that the Court should:

— annul EMSA's decision of 29 October 2008 'to reject the tender from JVOC and to award the contract to DCI';

— declare that the contract between EMSA and DCI is null and void;

— award JVOC damages as compensation for the damage it has suffered as a consequence of the contested decision, estimated at EUR 725 500, with default interest;

— order EMSA to pay the costs.

27 EMSA contends that the Court should:

— declare the action for annulment unfounded;

— declare the application for compensation inadmissible or, at the very least, unfounded;

— order the applicants to pay the costs.

Law

1. *The application for annulment*

28 The applicants are seeking the annulment of EMSA's decision of 29 October 2008 rejecting JVOC's tender and awarding the contract to DCI. In support of their application, they raise four pleas in law.

29 The first plea is in two parts. The first part alleges infringement of Article 100(2) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1; 'the General Financial Regulation'), Article 135(2) of the Regulation of the European Maritime Safety Agency of 9 December 2003 laying down detailed rules for the implementation of the Financial Regulation applicable to EMSA ('the EMSA Implementing Rules'), the obligation to state reasons, the principle of respect for the rights of the defence and the right to effective judicial protection, in the context of the failure to disclose certain documents to the applicants and of the allegedly inadequate statement of the reasons for the rejection of JVOC's tender.

30 The second part of the applicants' first plea alleges infringement of Article 105(2) of the General Financial Regulation, Article 158a(1) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the General Financial Regulation (OJ 2002 L 357, p. 1; 'the General Implementing Rules') and the principle of respect for the rights of defence. According to the applicants, that infringement arose in the context of EMSA's refusal to suspend

the signing of the contract with DCI until the documents sought by the applicants had been disclosed to them.

31 The second plea alleges infringement of the principles of equal treatment and non-discrimination in the context of a manifest error of assessment in the evaluation of DCI's tender.

32 The third plea alleges infringement of the principles of proportionality, equal treatment and non-discrimination in the context of a manifest error of assessment in the evaluation of JVOC's tender.

33 The fourth plea alleges that the budget ceiling laid down for Lot 2 is manifestly inadequate and unreasonable.

34 It may nevertheless be remarked that the rejection of JVOC's tender did not take place during the same phase of the procurement procedure as the award of the contract to DCI. JVOC's tender was rejected before the remaining tenders were compared. The award of the contract to DCI came about as a result of that comparison.

35 In those circumstances, and the terms of the application notwithstanding, it must be held that the rejection of JVOC's tender and the award of the contract to DCI are two distinct decisions ('the rejection decision' and 'the award decision', respectively) and the applications for their annulment must be considered separately.

36 The first part of the first plea concerns the rejection decision, as do the third and fourth pleas. The second part of the first plea, on the other hand, concerns the legality of the award decision and its implementation, as does the second plea.

37 The application for annulment of the rejection decision must be considered first. That was the decision by which the EMSA rejected the applicants' tender for the contract at issue. Accordingly, it is that decision which put an end to their chances of obtaining the contract for which they had tendered.

38 The admissibility of the application for annulment of the award decision — and, if appropriate, its merits — must then be considered.

The rejection decision

39 In considering the lawfulness of the rejection decision, the Court will address, first, the question whether JVOC's tender observed the budget ceiling laid down for Lot 2, an issue which is referred to in the third plea and in some of the arguments put forward in the context of the first part of the first plea. The Court will then move on to consider the fourth plea, concerning the issue as to whether the budget ceiling is appropriate. Lastly, the Court will consider the arguments, put forward in the context of the first part of the first plea, concerning the failure to disclose certain documents to the applicants and the allegedly inadequate reasons given for the rejection of JVOC's tender.

The third plea, alleging infringement of the principles of proportionality, equal treatment and non-discrimination in the context of a manifest error of assessment in the evaluation of JVOC's tender, and the first part of the first plea, to the extent that it concerns the issue as to whether JVOC's tender observed the budget ceiling laid down for Lot 2

— Arguments of the parties

40 As a preliminary point, the applicants have stated that they reserve the right to develop and expand their arguments depending on the contents of EMSA's file to which they might obtain access by virtue of the measures of organisation of procedure.

41 With regard to the substance of the case, the applicants maintain that EMSA made a manifest error of assessment and as a consequence infringed the principles of proportionality, equal treatment and non-discrimination, in considering that JVOC's tender had to be rejected for failure to observe the budget ceiling laid down for Lot 2.

42 In that regard, the applicants maintain, first, that failure to observe the budget ceiling for Lot 2 does not constitute a ground for exclusion for the purposes of Articles 93 and 94 of the General Financial Regulation, inasmuch as that ceiling does not concern the reliability or general suitability of the tenderers but is an essential aspect of their tender. Consequently, failure to observe that ceiling does not make the tender concerned inadmissible.

43 Secondly, failure to observe the budget ceiling for Lot 2 was not designated as a ground for exclusion in the contract notice or in the application specifications, as is required under Article 116(3)(a) of the EMSA Implementing Rules and Article 130(3)(a) of the General Implementing Rules. Mere reference to the ceiling in those documents and the application specifications is not sufficient in that regard. Similarly, according to their own terms, the draft tender specifications give only general guidance on the documents to be submitted by tenderers.

44 Thirdly, the applicants argue that they observed the budget ceiling for Lot 2. They explain that, in order to be able to offer the most economically advantageous solution, the applicants opted for an operating period of six years, which would enable the investment costs to be offset over a long period and thus reduce the unit price. According to the applicants, a six-year contractual period appears to meet EMSA's expectations, given that point 3.3 of the tender specifications expressly provided for the contract to be extended by a period of three years and that EMSA confirmed at the clarification meeting that it was seeking a long-term partnership.

45 According to the applicants, when the total price of the contract proposed by JVOC is divided by two, in order to reduce it to a period of three years, it is considerably lower than the budget ceiling for Lot 2.

46 The applicants further state that, if the initial three-year contract signed with DCI is renewed, EMSA will have failed to fulfil its obligation to select the most advantageous tender and will have infringed the principle of equal treatment in so far as it rejected JVOC's tender for the whole six years. JVOC's tender is the most advantageous in relation to such a period.

47 Fourthly, the applicants submit that the rejection of JVOC's tender is discriminatory and disproportionate. According to the applicants, EMSA was not under an obligation to exclude any tender exceeding the budget ceiling for Lot 2 but was required to examine whether there were reasons for not directly excluding the tender and, in particular, to consider any advantages connected with the specific configuration proposed.

48 EMSA disputes the merits of the applicants' arguments.

— Findings of the Court

49 As a preliminary point, it should be observed that the access to the EMSA file sought by the applicants in the context of measures of organisation of procedure does not concern information relating to the rejection of JVOC's tender, but solely information relating to DCI's tender and its assessment by the evaluation committee. Accordingly, any access to the latter information is unlikely to affect the pleas and arguments concerning the rejection decision, including the third plea and the first part of the first plea.

50 With regard to the substance of the case, it should first be noted that, in the rejection decision, EMSA relied on the non-observance by JVOC's tender of the budget ceiling for Lot 2 as the specific ground for rejecting that tender.

51 However, as is clear from the applicants' arguments and the documents before the Court, the alleged exceeding of that budget ceiling is merely a consequence of the fact that JVOC's tender was based on a contractual period of six years.

52 That being so, it is necessary to consider, in addition to the question whether the tender observed the budget ceiling for Lot 2, the question whether the tender was consistent with the contractual period provided for in the documents calling for tenders. Accordingly, it must be determined whether the applicants were entitled to submit a tender, and offer a price, on the basis of a contractual period of six years.

53 As was pointed out in paragraph 4 above, Section II.3 of the contract notice, point 3.3 of the application specifications and point 3.3 of the draft tender specifications stated that the duration of the contract was to be 36 months, as from the award of that contract. The application specifications and the draft tender specifications stated that that term could be renewed once for a maximum of three years. Furthermore, Section V.2 of the draft vessel availability contract, annexed to the draft tender specifications, stated that renewal was subject to the express written agreement of the parties.

54 It is certainly true in the present context that point 4 of the introduction to the draft tender specifications stated that the information contained therein was provided to tenderers solely to assist them in preparing their potential participation in the tendering phase. In point 5 of the introduction, however, EMSA stated that although the tender specifications were presented as a draft, major amendments were not envisaged. Moreover, the definitive tender specifications carried over the contents of the draft as regards the duration of the contract.

55 It is apparent from the minutes of the clarification meeting held with the applicants that EMSA stated that it was seeking a long-term partnership. However, its representatives expressly made renewal of the contract conditional on satisfactory performance of the contractual obligations, thereby making clear that such renewal depended on the will of the parties — EMSA's, in particular — and was not automatic.

56 In addition, in the letter received by the applicants on 12 September 2008, EMSA specifically drew their attention to the fact that the desired contractual period was three years and informed them that all tenders submitted had to be based on that period so as to permit comparison in accordance with the principle of equal treatment. EMSA expressly asked the applicants to review their financial offer on the basis of a three-year contractual period and the budget ceiling for Lot 2.

57 In the light of the foregoing, it must be concluded that it emerges in a clear and precise manner from the contract notice, from the documents published at the same time, to which the notice referred, and from EMSA's subsequent statements that the desired contractual period was 36 months and that renewal of the contract — thereby doubling that period — was not automatic but, on the contrary, subject to EMSA's approval.

58 Accordingly, the applicants were not entitled to submit a tender, and offer a price, on the basis of a period of six years, which means that, as regards the contractual period, JVOC's tender is not in conformity with the documents in the call for tenders.

59 With regard to the consequences of that finding, the applicants correctly maintain that neither the fact that JVOC's tender was inconsistent with the contractual period provided for nor the fact that it exceeded the budget ceiling for Lot 2, which was a consequence of the failure to comply with that contractual period, constitutes grounds for exclusion for the purposes of Articles 93 to 96 of the General Financial Regulation. Those circumstances are extraneous to the purpose of those provisions, which is to ensure that tenderers are generally reliable and of sound morality, and that there are no conflicts of interest.

60 Similarly, the circumstances concerned do not fall within the scope of selection criteria for the purposes of Article 97(1) of the General Financial Regulation and Articles 135 to 137 of the General Implementing Rules, since they do not directly bring into play the financial, economic, technical and professional capacity of the applicants.

61 Those findings are corroborated by the fact that, at the end of the invitation to apply phase — which involved, in particular, verification as to whether the selection criteria had been satisfied and whether any grounds for exclusion applied — EMSA invited the applicants to tender.

62 On the other hand, the question whether a tender is consistent with the desired contractual period and whether, in consequence, it observes a budget ceiling is not related to comparison with the other tenders submitted and therefore does not make it possible to determine which of those tenders is the most advantageous economically or the cheapest, as the case may be. Consequently, those circumstances do not fall within the scope of the award criteria for the purposes of Article 97 of the General Financial Regulation and Article 138 of the General Implementing Rules.

63 The circumstances in question relate to the conditions which a tender must satisfy in order to meet the needs of the contracting authority. Consequently, their relevance relates to the definition of the subject of the contract.

64 Thus, the desired duration of a contract for the provision of services is a factor which helps to determine the subject of the contract for such services inasmuch as it serves as the basis for calculating prices and, in particular, for calculating the amortisation of the initial investments.

65 Similarly, by fixing a budget ceiling, that is to say, an absolute parameter for the price, the contracting authority lays down a condition which is a *sine qua non* for performance of the contract, thereby defining the subject of the contract more precisely.

66 The definition of the subject of the contract is referred to in Article 92 of the General Financial Regulation, which provides that '[t]he documents relating to the call for tenders shall give a full, clear and precise description of the subject of the contract and specify the exclusion, selection and award criteria applicable to the contract'. It follows from that provision that the definition of the subject of the contract is distinct from the selection and award criteria, and the grounds for exclusion.

67 With regard to the consequences of a tender being inconsistent with the subject of the contract, the first subparagraph of Article 146(3) of the General Implementing Rules provides that '[r]equests to participate and tenders which do not satisfy all the essential requirements set out in the supporting documentation for invitations to tender or the specific requirements laid down therein shall be eliminated'.

68 It should be added in that regard that the purpose of the procurement procedure is to meet the needs of the contracting authority under the best possible conditions. Consequently, the contracting authority must be able to define the subject of the contract freely, which means that it cannot be required to take account of a tender dealing with a subject other than that which it has in mind, as described in the documents relating to the call for tenders.

69 Similarly, as a general rule, failure to respect the subject of the contract precludes effective comparison of the tenders submitted inasmuch as it causes their common point of reference to disappear.

70 In addition, if a contracting authority departs from the documents relating to the call for tenders by accepting tenders which are inconsistent with the subject of the contract, as defined in those documents, that would be incompatible with the principles of transparency and equal treatment.

71 Moreover, it is clear from the case-law that it is essential that the contracting authority be able to determine precisely the content of the tender and, in particular, its conformity with the conditions laid down in the documents relating to the call for tenders. Thus, where a tender is ambiguous and the contracting authority does not have the possibility of establishing what it actually means quickly and efficiently, it has no choice but to reject that tender (Case T-211/02 *Tideland Signal* v *Commission* [2002] ECR II-3781, paragraph 34). The same consequence results *a fortiori* when, as in the present case, the tender is manifestly inconsistent with the subject of the contract.

72 Accordingly, it must be held that consistency with the subject of the contract, as described in the documents relating to the call for tenders, constitutes a *sine qua non* which all tenders must satisfy in order to be taken into account in the context of the procurement procedure. Failure to meet that condition must lead to the tender being eliminated by the contracting authority, without it being compared with the other tenders submitted.

73 As it is, in the present case, as is clear from paragraphs 58 and 63 above, JVOC's tender was not in conformity with the documents relating to the call for tenders as regards one of the factors material to the definition of the subject of the contract, namely the contractual period laid down. Consequently, EMSA did not commit an error of assessment by rejecting that tender without comparing it with the other tenders before awarding the contract.

74 With regard to the question whether the desired contractual period and the budget ceiling for Lot 2 were validly defined in the relevant documents, it has been found above that those conditions relate to the definition of the subject of the contract. Consequently, Article 92 of the General Financial Regulation falls to be applied, which provides that '[t]he documents relating to the call for tenders shall give a full, clear and precise description of the subject of the contract'. On the other hand, Article 130(3)(a) of the General Implementing Rules, relied on by the applicants, refers only to the selection criteria and the grounds for exclusion and is therefore not applicable in the present case.

75 With regard to the desired contractual period, it is sufficient to refer back to paragraphs 53 to 57 above, where it was found that it emerges clearly and precisely from the documents in the call for tenders that the contractual period desired by EMSA was 36 months and that renewal of the contract — thereby doubling that period — was not automatic but, on the contrary, subject to the approval of the parties, including EMSA.

76 With regard to the budget ceiling for Lot 2, it was pointed out in paragraph 3 above that, under point II.2.1 of the contract notice, point 3.4 of the application specifications and point 5 of the draft tender specifications, the maximum total value for Lot 2 was to be EUR 4 000 000. In addition, under point 12.2 of the draft tender specifications, the submission of a tender above the budget ceiling laid down for each lot was to be a ground for exclusion from the procurement procedure, as is stated in paragraph 5 above.

77 In so far as the applicants claim, in that regard, that the draft tender specifications were intended solely to assist the tenderers, it is sufficient to refer back to paragraph 54 above. With regard to the fact that, under point 5 of the part of the contract notice dealing with the description of Lot 2, the budget ceiling was an estimate, it must be observed that it was definitively fixed both in the draft tender specifications and in the definitive tender specifications.

78 Accordingly, it must be found that both the desired contractual period and the budget ceiling for Lot 2 were described clearly and precisely in the documents in the call for tenders, in accordance with the requirement laid down in Article 92 of the General Financial Regulation.

79 Moreover, the applicants do not put forward any specific arguments in support of their allegation that the rejection of JVOC's tender on the ground that it was inconsistent with the subject of the contract is discriminatory or disproportionate. On the contrary, it is clear from paragraphs 68 to 70 above that that was the only consequence compatible with the purpose of the procurement procedure and with the principles of transparency and equal treatment since, on the one hand, JVOC's tender did not meet EMSA's needs, as set out in the documents relating to the call for tenders, and, on the other hand, the failure to respect the desired contractual period made it impossible to compare that tender with the other tenders submitted.

80 In that context, inasmuch as it is clear from paragraphs 53 to 57 above that the contractual period desired by EMSA was three years, the claim that over a six-year period JVOC's tender was more favourable than DCI's tender is irrelevant.

81 Lastly, it must be held that the judgment of 12 November 2008 in Case T-406/06 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, on which the applicants rely, is not relevant to the present case. In that case, a tender which was consistent with the subject of the contract and which it was therefore possible to compare with the other tenders did not, in the context of that comparison, attain the minimum threshold of points defined in relation to the various award criteria. In the present case, on the other hand, JVOC's tender was rejected before the tenders were

compared, hence before the contract was awarded, on the ground that it was inconsistent with the subject of the contract.

82 In the light of all the foregoing, the third plea must be rejected, as must the first part of the first plea, in so far as they concern the question whether JVOC's tender observed the budget ceiling for Lot 2.

The fourth plea, alleging that the budget ceiling for Lot 2 is manifestly inadequate and unreasonable

— Arguments of the parties

83 The applicants submit that the budget ceiling for Lot 2 was excessively low and accordingly did not enable the tenderers to submit a bid which met all the requirements laid down by EMSA. They infer from this that any tender which observed that budget ceiling would not be in conformity with the other requirements. The applicants state in that connection that three of the four initial tenders exceeded the budget ceiling. They add that they contested the application of the budget ceiling for Lot 2 on two occasions.

84 EMSA disputes the merits of the applicants' arguments.

— Findings of the Court

85 It should be noted immediately that the applicants have not produced sound evidence in support of their allegations. The only specific fact put forward by them is the high price of purchasing oil recovery equipment, which in their case would amount to EUR 1 960 000.

86 However, the applicants have put forward no evidence to suggest that that cost is necessary in order to comply with all the requirements laid down by EMSA, or yet that that cost, in itself, made it impossible to observe the budget ceiling for Lot 2.

87 Similarly, the fact that three of the four tenders initially submitted did not observe the budget ceiling for Lot 2 does not, in itself, prove that the ceiling was excessively low or that the only tender consistent with it did not meet all the requirements laid down by EMSA. It is also perfectly possible that that tender was the only tender which both observed the budget ceiling and complied with the other requirements laid down.

88 Moreover, in any event, as was stated in paragraph 68 above, the contracting authority must be able to define the subject of the contract freely and, consequently, to choose the conditions which the tenders submitted must fulfil. Thus, the contracting authority can determine, inter alia, the duration of the contract to be concluded and the budget ceilings which the tenders must observe, in accordance with its budgetary constraints. In that regard, it is not required to consult potential tenderers as to the adequacy of the conditions which it lays down.

89 If the contracting authority actually does lay down a budget ceiling which is excessively low, it runs the risk that no satisfactory tender will be submitted, with the result that the procurement procedure will have to be repeated on the basis of amended conditions. Nevertheless, that does not mean that the contracting authority must take account of tenderers' observations, still less that it must adopt their suggestions.

90 It follows from that finding that the fact that the applicants raised with EMSA the allegedly inadequate level of the budget ceiling for Lot 2 is irrelevant.

91 In the light of all the foregoing, the fourth plea must be rejected.

The first part of the first plea in so far as it concerns the failure to disclose certain documents to the applicants and the reasons stated for the rejection of JVOC's tender

— Arguments of the parties

92 The applicants claim that EMSA infringed Article 100(2) of the General Financial Regulation, Article 135(2) of the EMSA Implementing Rules, the obligation to state reasons, the principle of respect for the rights of the defence and the right to effective

judicial protection, in that it did not disclose certain documents to the applicants or state reasons adequate in law for the rejection of JVOC's tender.

93 With regard to the first complaint, the applicants state that, despite a number of requests to that effect, EMSA refused to disclose to them the evaluation committee's report and DCI's tender or relevant extracts from those documents. However, under Article 135(2) of the EMSA Implementing Rules, read in conjunction with Article 100(2) of the General Financial Regulation and Article 149 of the General Implementing Rules, EMSA was required to forward information on the characteristics and relative advantages of the successful bid to a tenderer who had submitted an admissible tender and made a request to that effect.

94 According to the applicants, the purpose of that obligation to forward information is to enable an unsuccessful tenderer to understand the basis on which his bid has been rejected and to satisfy himself that he has not been discriminated against vis-à-vis other tenderers. A tenderer whose bid has been rejected on the ground that it does not comply with the tender specifications is entitled to all the information necessary to enable him to prove that the other tenderers' bids also failed to comply with the tender specifications and should also have been rejected.

95 The applicants state that, even if JVOC's tender has not actually been compared with DCI's tender, with the result that there is no information concerning the relative advantages of DCI's tender, the characteristics of the successful tenderer's bid and their assessment by the contracting authority should always be disclosed.

96 With regard to the reasons for the rejection of JVOC's tender, the applicants maintain that, in the rejection decision, EMSA did not give the reason for the rejection of JVOC's tender; nor did it mention the remedies available to the applicants for the purposes of contesting the decision.

97 The applicants state in that context that the mere reference in the rejection decision to the fact that the tender fell within the scope of one of the grounds for exclusion is not a sufficient reason, in that it did not enable them to assess the reason for which JVOC's tender had been rejected. The specific reason for the rejection decision was not explained until the letter of 6 November 2008.

98 Lastly, the applicants claim that the infringements of the obligation to disclose relevant information and the obligation to state reasons also constitute an infringement of the rights of defence and of their right to effective judicial protection.

99 EMSA disputes the merits of the applicants' arguments.

— Findings of the Court

100 Under the first subparagraph of Article 100(2) of the General Financial Regulation, '[t]he contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the

characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded'.

101 Article 149 of the General Implementing Rules, which is identical in content to Article 135 of the EMSA Implementing Rules, adds the following details:

'1. The contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the award of the contract …

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

3. In the case of contracts awarded by the Community institutions on their own account, … the contracting authority shall inform all unsuccessful tenderers or candidates, simultaneously and individually, by mail, fax or e-mail, that their application or tender has not been accepted …

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

…

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

102 In order to determine the extent of EMSA's obligations towards the applicants under Article 100(2) of the General Financial Regulation, Article 149 of the General Implementing Rules and Article 135 of the EMSA Implementing Rules, it must therefore be ascertained whether JVOC's tender was admissible for the purposes of those provisions.

103 The third subparagraph of Article 146(3) of the General Implementing Rules provides that '[r]equests to participate and tenders which are not excluded and which meet the selection criteria shall be considered admissible.'

104 However, in so far as it merely mentions the selection criteria and grounds for exclusion, that provision disregards the fact, explained in paragraphs 59 to 72 above, that consistency with the subject of the contract is a *sine qua non*, failure to comply with which justifies rejection of the tender concerned without it being compared with the other tenders submitted.

105 Thus, the wording of the third subparagraph of Article 146(3) of the General Implementing Rules does not reflect the purpose of the obligation, laid down in Article 100(2) of the General Financial Regulation, to disclose the characteristics and relative advantages of the successful tender.

106 That purpose consists in enabling a tenderer whose bid has reached the phase preceding the award of the contract, has been compared with other tenders and judged less advantageous, to ensure that the comparison was carried out correctly and, if necessary, to challenge that comparison. Such verification cannot be made without the relevant information concerning the successful tender.

107 On the other hand, where the tender is rejected before the award phase, that rejection does not — by definition — come about as a result of comparison with the successful tender. Consequently, verification as to whether the rejection was well founded does not depend on being given access to the information concerning the successful tender.

108 In that regard, it must once again be held that, contrary to the assertions made by the applicants, the disclosure obligation under Article 100(2) of the General Financial Regulation is not intended to enable a tenderer to verify that all the other tenders meet the selection criteria, that they do not fall within the grounds for exclusion and that they are consistent with the subject of the contract. If that had been the intention, that provision would not have provided for disclosure solely of information concerning the successful tender.

109 Moreover, it is open to a tenderer whose bid has been excluded before the phase preceding the award of the contract to submit observations to the contracting authority concerning irregularities which, in his opinion, are to be found in the bids put in by other tenderers but which have not been discovered. If he considers that the contracting authority has failed to take account of the observations submitted and that the award of the contract has in consequence given rise to financial fraud or a financial irregularity, he can inform the competent authorities and, in particular, the European Anti-Fraud Office.

110 In the light of the foregoing, it must be held that a tender which is inconsistent with the subject of the contract is not admissible for the purposes of Article 100(2) of the Financial Regulation, Article 149 of the General Implementing Rules and Article 135 of the EMSA Implementing Rules.

111 In the present case, it is clear from paragraphs 53 to 73 above that JVOC's tender was inconsistent with the subject of the contract as regards the desired contractual period.

112 Consequently, under the obligation to state reasons, as expressed in the first subparagraph of Article 100(2) of the General Financial Regulation, Article 149 of the General Implementing Rules and Article 135 of the EMSA Implementing Rules, EMSA was required only to inform the applicants of the grounds for the rejection of their tender and the remedies available to them.

113 With regard to the grounds for rejecting JVOC's tender, EMSA stated the following in the rejection decision:

'The Evaluation Committee considered that your bid, as presented, was, within the terms of the tender, not acceptable. The Committee was of the opinion that an Exclusion Criteria was not satisfied and accordingly the bid did not qualify with respect to requirements indicated for this procurement procedure.'

114 In that regard, it should be borne in mind that the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the authority which adopted the measure so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the Court to exercise its supervisory jurisdiction (see Case T-89/07 *VIP Car Solutions* v *Parliament* [2009] ECR II-1403, paragraph 60 and the case-law cited).

115 In addition, according to the case-law, the scope of the obligation to state reasons depends on the nature of the measure at issue and the context in which it was adopted (see Joined Cases T-376/05 and T-383/05 *TEA-CEGOS and STG* v *Commission* [2006] ECR II-205, paragraph 48 and the case-law cited). Accordingly, the rejection decision must be placed in the context of the previous exchanges between EMSA and the applicants in the context of the procurement procedure.

116 As it is, the desired contractual period and the importance of observing the budget ceiling for Lot 2 were discussed by the applicants and EMSA at the clarification meeting on 18 June 2008. The fact that JVOC's tender was inconsistent with that period, and with the consequential budget ceiling, was subsequently raised in the letters of 14 August, 1 September, 12 September and 29 September 2008.

117 Accordingly, it must be held that, on reading the rejection decision, the applicants were in a position to understand that the statements to the effect that JVOC's tender was unacceptable in the light of the conditions of the contract, that there had been a failure to fulfil a condition which entailed exclusion from the procurement process and that the stated requirements had not been fulfilled referred, very precisely, to the failure to observe the desired contractual period and the consequential budget ceiling for Lot 2.

118 Moreover, in reply to the applicants' request of 3 November 2008, EMSA sent them a letter dated 6 November 2008, in which it expressly explained that the rejection of JVOC's tender was the result of the failure to observe the budget ceiling for Lot 2, which came about as a result of the failure to respect the length of the contractual period provided for. That explanation was repeated in EMSA's letter of 19 November 2008.

119 In addition, the statement of reasons provided enabled the applicants to assert their rights since, as is clear from the present action, they raised pleas and arguments concerning the budget ceiling for Lot 2 and the underlying issue concerning observance of the desired contractual period. By the same token, the Court is able to assess those pleas and arguments in a satisfactory manner on the basis of the statement of reasons provided.

120 It must accordingly be concluded that EMSA did not infringe the obligation to state reasons with regard to the stated grounds for rejecting JVOC's tender.

121 On the other hand, it must be held that EMSA did not indicate, either in the rejection decision or in its later written communications, the remedies available to the applicants.

122 The argument put forward by EMSA in that connection, to the effect that it did not believe that there were any such remedies, cannot succeed. If that had been the position, EMSA should at least have said so in the correspondence exchanged with the applicants.

123 Nevertheless, in so far as the indication of the available remedies is independent of the object of the rejection decision, it must be considered that failure to indicate them cannot affect the lawfulness of that decision. At the very most, that fact could be relevant as regards the applicants' exercise of a right of action, particularly with regard to compliance with the time-limits for bringing an action.

124 However, it should be noted that the applicants have, within the prescribed time-limits, brought the present action for, inter alia, annulment of the rejection decision and that they have not put forward any argument or evidence which supports a finding that the failure to indicate the available remedies in that decision prevented them from effectively exercising their right of action.

125 Accordingly, it must be concluded that, although EMSA failed to mention the available remedies in the rejection decision, that fact is irrelevant to the present case.

126 Lastly, in so far as it has been held above that EMSA was not required to disclose to the applicants information concerning DCI's tender, that it had provided an adequate statement of reasons for the rejection of JVOC's tender, and that the failure to indicate the available remedies is irrelevant to the present case, it is not clear how EMSA infringed the applicants' rights of defence or their right to effective judicial protection. The applicants' allegations to that effect, which are unsupported by more precise arguments, must therefore be rejected.

127 In the light of all the foregoing, the first part of the first plea must be rejected in so far as it concerns the failure to disclose certain documents or information to the applicants and the statement of the reasons for rejecting JVOC's tender.

128 Since all the pleas and arguments directed against the rejection decision have been rejected, the application for annulment of that decision must be dismissed.

The award decision

129 First of all, it is necessary to consider whether the applicants have a right of action in respect of the award decision, since the lack of a right of action constitutes an absolute bar to proceedings which the European Union judicature may raise of its own motion (see Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 45 and the case-law cited).

Arguments of the parties

130 The applicants submit that, inasmuch as they applied for annulment of the rejection decision, they also have a right of action in respect of the award decision. They argue in that regard that, if the award decision is not annulled, annulment of the rejection decision would be pointless.

131 Furthermore, the applicants claim that they also have an interest in showing that all the other tenders should have been eliminated from the competitive bidding procedure.

132 According to EMSA, a tenderer whose bid has been eliminated before the phase preceding the adoption of the award decision has no interest in seeking annulment of the decision awarding the contract.

Findings of the Court

133 It is settled law that an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure. In order for such an interest to be present, the annulment of the contested measure must of itself be capable of having legal consequences and the action must be likely, if successful, to procure an advantage for the party who has brought it

(see Case T-195/08 *Antwerpse Bouwwerken* v *Commission* [2009] ECR II-4439, paragraph 33 and the case-law cited).

134 However, where a tenderer's bid is rejected before the phase preceding the award decision and accordingly was not compared with the other tenders, the interest of the tenderer concerned in bringing proceedings is conditional upon the annulment of the decision rejecting his tender. It is only if the latter decision is annulled that annulment of the award decision could possibly have legal consequences for the tenderer whose tender was rejected before the phase preceding the award decision and procure an advantage for him by removing a decision adopted following a comparison which, wrongly, failed to include his tender.

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

136 Moreover, it is clear from paragraphs 108 and 109 above that, under the scheme of the General Financial Regulation and the General Implementing Rules concerning public contracts, it is not for a tenderer whose bid has been rejected before the phase preceding the award decision to verify that all the tenders admitted to that phase met the selection criteria, did not fall within the grounds for exclusion and were consistent with the subject of the contract. Consequently, the tenderer concerned cannot base his right of action in respect of the award decision on the need to carry out such a verification.

137 In the present case, the application for annulment of the rejection decision was dismissed in paragraph 128 above. Accordingly, it is clear from paragraphs 133 to 136 above that the applicants have no right of action in respect of the award decision, which means that their application for annulment of that decision is inadmissible.

2. *The application for a declaration that the contract signed with DCI is null and void*

138 The applicants claim that the consequence of the illegalities which they have alleged above in the context of the two parts of the first plea is that the contract signed by EMSA and DCI must be declared null and void.

139 First, however, consideration of the first part of the first plea revealed no illegality in the rejection decision. Consequently, as regards that part, the applicants' argument is based on a false premise.

140 Secondly, it should be observed that EMSA's signature of the contract with DCI is the result of the implementation of the award decision. It is clear from paragraphs 133 to 137 above that the applicants had no right of action in respect of that decision. Nor, accordingly, do they have any interest in obtaining a declaration that the contract signed by EMSA and DCI is null and void on the basis of allegations concerning the legality of the award decision, such as the allegations put forward in the context of the second part of the first plea (see paragraph 36 above).

3. *The application for damages*

Arguments of the parties

141 The applicants claim that the adoption of the rejection and award decisions caused them to sustain damage consisting in (i) loss of a substantial chance of being awarded the contract; (ii) the expenses incurred in the procurement procedure and in the proceedings before the Court; and (iii) loss of profile.

142 EMSA contends that the applicants' application is both inadmissible and not well founded.

Findings of the Court

143 It is settled law that, in order for a claim for damages brought under the second paragraph of Article 288 EC to be well founded, a number of conditions must be satisfied: the alleged conduct on the part of the institution must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the purported damage (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44). If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraphs 19 and 81, and Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37).

144 In the present case, it should first be recalled that, in paragraphs 34 and 35 above, it was held that the action for annulment related to two separate decisions, namely, the rejection decision and the award decision.

145 In the first place, however, consideration of the applicants' pleas and arguments concerning the rejection decision has shown that that decision was not vitiated by illegality. Consequently, the condition relating to the unlawfulness of the conduct complained of on the part of EMSA is not satisfied in the case of the rejection decision.

146 In the second place, the fact noted in paragraphs 133 to 137 above that the applicants have no right of action in respect of the award decision implies that the damage which they claim to have suffered, even if proved, cannot be the consequence of that decision but of the rejection decision. Accordingly, the condition relating to a relationship of cause and effect is not satisfied in the case of the award decision.

147 In consequence, the claim for damages must be dismissed as unfounded, without it being necessary to rule on its admissibility.

4. *The application for measures of organisation of procedure*

148 The applicants have asked the Court to adopt measures of organisation of procedure with a view to securing the production, first, of the evaluation committee's report and a copy of DCI's tender or relevant extracts from those documents and, secondly, of information concerning possible price increases in the context of the implementation

of the contract with DCI. However, inasmuch as those documents do not, in any event, call into question the examination carried out above, that request must be refused.

149 In the light of all the foregoing, the action must be dismissed in its entirety.

Costs

150 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by EMSA.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders Dredging International NV and Ondernemingen Jan de Nul NV to pay the costs.

Pelikánová Jürimäe Van der Woude

Delivered in open court in Luxembourg on 13 September 2011.

[Signatures]

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