Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

28 January 2016*

(Public service contracts — Tendering procedure — Operational technical assistance to set up and manage a network facility for the implementation of the European Innovation Partnership 'Agricultural Productivity and Sustainability' — Rejection of a tenderer's bid — Award of the contract to another tenderer — Abnormally low tender — Non-contractual liability)

In Case T-570/13,

Agriconsulting Europe SA, established in Brussels (Belgium), represented by R. Sciaudone, lawyer,

applicant,

v

European Commission, represented by L. Cappelletti and L. Di Paolo, acting as Agents,

defendant,

APPLICATION for compensation for the harm suffered as a result of alleged irregularities on the part of the Commission in the tendering procedure 'Establishing a network facility for the implementation of the European Innovation Partnership (EIP) "Agricultural Productivity and Sustainability"' (AGRI-2012-EIP-01),

THE GENERAL COURT (Sixth Chamber),

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

Registrar: L. Grzegorczyk, Administrator,

having regard to the written procedure and further to the hearing on 7 July 2015,

gives the following

* Language of the case: Italian.

Judgment

Background to the dispute

1 By contract notice published in the Supplement to the *Official Journal of the European Union* on 7 August 2012 (OJ 2012/S 61-150-249926), the European Commission launched a tendering procedure under reference AGRI-2012-PEI-01 seeking to establish a network facility for the implementation of the European Innovation Partnership 'Agricultural Productivity and Sustainability' ('the tendering procedure').

2 Under section 1 of the tender specifications for the contract ('the tender specifications'), the contractor was to assist in the establishment and management of the partnership network, consisting of and open to actors dealing with innovation and innovative actions related to the agricultural sector, such as farmers, researchers, advisors, businesses, NGOs, consumers and public bodies. The contractor was responsible for the setting up and functioning of the network facility, consisting of the team established by it to perform the tasks listed in the contract notice and the physical location where the team would work and provide services ('the InfoPoint').

3 The tasks to be performed by the contractor were described in section 2 of the tender specifications. There were nine main tasks: (1) managing the team allocated to the tasks and the InfoPoint; (2) animation of the partnership network; (3) networking and the development of communication tools; (4) updating and maintaining an exhaustive database; (5) maintaining a list of external experts; (6) coordination and information exchange activities; (7) compiling research needs from actors working in the field; (8) development of the annual work programme; and (9) archiving, stock management and backup of documents and information. The tender specifications set out the minimum staffing levels required to perform the main tasks and, to that end, stated that the team allocated to the tasks had to be composed of at least 10 'Full Time Equivalents', of whom at least 6 had to be fixed staff.

4 The tender specifications also provided for 27 additional tasks to be performed at the request of the Commission in any given year, at the rate of between 3 and 10 tasks per year. Additional tasks 24, 26 and 27 as a minimum would be requested in the first year. The additional tasks covered the organisation of focus groups, namely groups of experts who would examine and discuss questions specifically concerning the European Innovation Plan (additional tasks 1 to 6); the organisation of additional workshops (additional tasks 7 to 9); the organisation of field days (additional tasks 10 to 13); the organisation of additional seminars (additional tasks 14 to 17); assessment of the work of the operational groups (additional tasks 18 to 20); the organisation of conferences (additional task 21); the organisation of travel and accommodation arrangements for participants of the focus groups, workshops and seminars (additional task 22); missions to Member States (additional task 23); drawing up a list of experts (additional task 24); winding up InfoPoint (additional task 25); setting up InfoPoint (additional task 26); and the mapping of all relevant projects for the purpose of establishing a database (additional task 27).

5 According to the provisions of the tender specifications, the contractor also had to have sufficient staff so that, in addition to the main tasks, the team allocated to the tasks would be able to perform the activities under additional tasks 24 and 27, which were scheduled for performance in the first year of the contract.

6 Under section 6 of the tender specifications, the contract was to be concluded for a term of 10 months, with the possibility of renewal for a maximum of 12 months. The total maximum budget was stated to be EUR 2 500 000 per year for the combined performance of the main tasks and the additional tasks, the maximum annual budget being EUR 1 400 000 for the main tasks and EUR 1 500 000 for the additional tasks.

7 Pursuant to section 7.5 of the tender specifications, the contract procedure involved three stages: (1) the examination of tenders based on the exclusion criteria, followed by their examination based on the selection criteria; (2) the evaluation of tenders based on the award criteria (quality evaluation and price evaluation); and (3) the award of the contract to the tender offering best value for money. The exclusion, selection and award criteria applied by the Commission were set out in section 9 of the tender specifications.

8 The Commission received five tenders, including that submitted by the applicant. All tenderers passed the first stage of the contract procedure, involving the examination of their tender based on the exclusion and selection criteria, and were admitted to the second stage, involving the evaluation of the tenders based on the following four award criteria:

— award criterion 1: approach towards the link between science and practice;

— award criterion 2: approach towards the performance of the main and additional tasks;

— award criterion 3: practical organisation of the tasks;

— award criterion 4: proposed set-up of the InfoPoint based in Brussels (Belgium).

9 At the second stage of the procedure, only two tenderers, in this case the applicant and Vlaamse Landmaatschappij ('VLM'), obtained the minimum score required by the tender specifications for the award criteria. Those two tenderers were therefore admitted to the price evaluation stage. The price offered by the applicant was EUR 1320112.63, whilst that offered by VLM was EUR 2316124.83.

10 The record of the meeting of the evaluation committee held on 20 November 2012 shows that the applicant was ranked in first place and that, since the committee had concerns about the abnormally low nature of the tender, it decided to request information from the applicant concerning the prices for the additional tasks.

11 By letter of 22 November 2012, the Commission informed the applicant that the evaluation committee had found the prices stated for the additional tasks to be abnormally low. It asked the applicant for detailed explanations on the calculation of the prices offered for additional tasks 1 to 21 and 25, stating that the tender could be rejected if the explanations proved unconvincing.

12 The applicant replied to the Commission's request for information by letter of 29 November 2012, in which it provided general explanations and a list of the costs used to draw up its proposed prices for the additional tasks.

13 It is apparent from the final record of evaluation of the applicant's tender of 19 December 2012 that the evaluation committee considered the applicant's explanations and found, in particular, that there was an overlap of staff between the main tasks and the additional tasks, which did not comply with the requirements of the tender specifications. It therefore lowered the score given to the applicant's tender for award criterion 3 from 11.8 points to 7 points, the minimum required score being 7.5 out of 15. The evaluation committee therefore completed its evaluation by confirming its opinion that the applicant's tender was abnormally low and by finding that, based on the additional information provided by the applicant, its tender no longer reached the minimum score required by the tender specifications under award criterion 3. The committee therefore recommended that the contract be awarded to VLM.

14 By letter of 25 March 2013, the Commission notified the applicant that its tender had not been successful because it had failed to reach the minimum score required for award criterion 3 and had been found to be abnormally low as regards the prices offered for the performance of some additional tasks. On the same day, the Commission decided to award the tender to VLM.

15 By letter of 26 March 2013, the applicant requested the name of the successful tenderer as well as the characteristics and advantages of its tender. The Commission forwarded that information to the applicant by letter of 27 March 2013.

16 By letter of 29 March 2013, the applicant asked the Commission for further information concerning the evaluation of its own tender. The Commission replied by letter of 10 April 2013.

17 By letter of 12 April 2013, the applicant criticised the contracting authority for failing to provide the necessary clarifications concerning the evaluation of the first and second criteria, for altering its technical assessment after the financial tender had been opened, for incorrectly assessing the involvement of the team leader and his assistant in the additional tasks, and for reaching the wrong conclusions regarding VLM's tender.

18 By email sent on the same day, the applicant applied to the Commission for access to the records of the evaluation committee and to the contractor's tender, on the basis of Article 6 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

19 By an initial letter of 29 April 2013, the Commission informed the applicant that the record of the evaluation committee would be forwarded to it promptly. By a second letter of the same date, the Commission replied to the applicant's application for access by sending it partial copies of the record of evaluation of 20 November 2012, the record of final evaluation of its tender of 19 December 2012 and the overall record of evaluation of 6 February 2013. By contrast, the Commission refused to send it the contractor's tender and to that end invoked the protection of the commercial interests of the undertaking concerned, based on the first indent of Article 4(2) of Regulation No 1049/2001.

20 By email of 13 May 2013, the applicant submitted a confirmatory application for access under Article 7 of Regulation No 1049/2001. By email of 14 May 2013, the Commission acknowledged receipt of that confirmatory application and stated that it would reply within fifteen working days.

21 By a further letter of 13 May 2013, the applicant objected to the Commission's position set out in the second letter of 29 April 2013, which it considered to be insufficient. By letter of 31 May 2013, the Commission replied that the applicant was in possession of all the documents concerning the contract procedure on which the award decision was based and also referred to its letter of 29 April 2013.

22 As regards the confirmatory application for access, by letter of 4 June 2013, the Commission told the applicant that the deadline for replying had been extended to 26 June 2013. On 26 June 2013, the Commission informed the applicant that it was unable to reply to the confirmatory application for access by the abovementioned deadline. By email of 4 July 2013, the applicant asked for a reply to its confirmatory application for access. The Commission answered that email on 9 July 2013, informing the undertaking that the reply would be sent to it within a few days. The Commission replied to the applicant's confirmatory application by letter of 17 July 2013, in which it confirmed its earlier decision not to disclose some of the information contained in the evaluation records and not to grant access to the contractor's tender, pursuant to Article 4(1)(b) and the first indent of Article 4(2) of Regulation No 1049/2001.

Procedure and forms of order sought by the parties

23 The applicant brought the present action by application lodged at the Court Registry on 25 October 2013.

24 By decision of the President of the General Court of 18 November 2013, the case was assigned to the Sixth Chamber and, by decision of 8 January 2015, it was reassigned to a new Judge-Rapporteur.

25 On hearing the report of the Judge-Rapporteur, the General Court (Sixth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for under Article 64 of the Rules of Procedure of the General Court of 2 May 1991, asked the applicant to produce a document. The applicant did so within the prescribed time limit.

26 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 7 July 2015.

27 The applicant claims that the Court should:

— order disclosure of the contractor's tender;

— order the Commission to pay damages for the harm suffered as a result of the loss of the contract in question, the loss of the opportunity to conclude that contract and the expenses of participating in the tendering procedure, as well as damages for non-material harm, damages which should be increased to take account of monetary depreciation and compensatory interest;

— order that certain annexes be treated as confidential;

— order the Commission to pay the costs.

28 The Commission contends that the Court should:

— dismiss the application for compensation for harm suffered as unfounded;

— dismiss the request for the adoption of measures of inquiry as unfounded;

— order the applicant to pay the costs.

Law

The claim for damages

29 By the present action, the applicant submits that a number of illegalities were committed in connection with the tendering procedure which vitiate the decision to reject its tender. It asks that the Commission be ordered to pay damages, under Article 268 TFEU and Article 340 TFEU, for the harm suffered as a result of the loss of the contract in question, the loss of the opportunity to conclude that contract and the expenses of participating in the tendering procedure, as well as for non-material harm.

30 More specifically, the applicant contends that the Commission committed eight sufficiently serious breaches and argues that its tender was rejected unlawfully. It alleges (1) error of assessment of the tender and infringement of the principle of equal treatment in relation to award criterion 1; (2) misapplication and error of assessment of its tender in relation to award criterion 2; (3) breach of the contract procedure rules in relation to award criterion 3; (4) infringement of the principle of proportionality in relation to award criterion 3; (5) infringement of the principle that the stages of a tendering procedure should be kept separate; (6) error of assessment of the tender in relation to award criterion 3; (7) misinterpretation and misapplication of the concept of abnormally low tender; and (8) infringement of the principle of equal treatment in the application of the concept of abnormally low tender.

31 It should be recalled that, 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.

32 According to settled case-law, for the European Union to incur non-contractual liability, within the meaning of the abovementioned provision, on account of the unlawful conduct of its bodies, three conditions must be satisfied, namely that the alleged conduct of the institution be unlawful, that the damage be real and that there be a causal link between the conduct alleged 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; of 10 December 2002 in *Commission* v *Camar and Tico*, C-312/00 P, ECR, EU:C:2002:736, paragraph 54; of 17 March 2005 in *AFCon Management Consultants and Others* v *Commission*, T-160/03, ECR, EU:T:2005:107, paragraph 93; and in *Evropaïki Dynamiki* v *Commission*, EU:T:2014:888, paragraph 29).

33 Where one of the three conditions required for the European Union to incur non-contractual liability is not satisfied, the claims for damages must be dismissed without it being necessary to examine whether the other two conditions are satisfied (see, to that effect, judgments of 15 September 1994 in *KYDEP* v *Council and Commission*, C-146/91, ECR, EU:C:1994:329, paragraph 81, and in *Evropaïki Dynamiki* v *Commission*, cited in paragraph 32 above, EU:T:2014:888, paragraph 33).

34 Furthermore, according to settled case-law, the Commission has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a public contract following a tendering procedure (judgments of 17 December 1998 in *Embassy Limousines & Services* v *Parliament*, T-203/96, ECR, EU:T:1998:302, paragraph 56, and 20 September 2011 in *Evropaïki Dynamiki* v *EIB*, T-461/08, ECR, EU:T:2011:494, paragraph 137). Similarly, the Commission enjoys considerable latitude in determining both the content and the application of the rules applicable to the award of a contract, for its own account, following a tendering procedure (see, to that effect, judgments of 14 February 2006 in *TEA-CEGOS and Others* v *Commission*, T-376/05 and T-383/05, ECR, EU:T:2006:47, paragraphs 50 and 51; in *Evropaïki Dynamiki* v *EIB*, EU:T:2011:494, paragraph 137; and of 25 October 2012 in *Astrim and Elyo Italia* v *Commission*, T-216/09, EU:T:2012:574, paragraph 17).

35 The applicant's claim for damages for the harm it allegedly suffered as a result of the unlawful rejection of its tender must be examined in the light of the foregoing considerations. That claim is based, first, on illegalities relating to award criteria 1 and 2; secondly, on illegalities relating to the application of the concept of 'abnormally low tender'; and, thirdly, on illegalities relating to award criterion 3.

Claim for damages concerning the first two alleged illegalities, relating to award criteria 1 and 2

36 As regards award criterion 1, the applicant contends that the evaluation committee did not consider its tender with care, that the reasons for rejection are wrong, and that the principle of equal treatment was infringed. In its reply, it claims that the statement of reasons for the rejection of its tender is lacking or insufficient concerning the communication strategy aspect. As regards award criterion 2,

relating to the performance of the main and additional tasks, the applicant essentially argues that the evaluation committee's assessment is incorrect. In its reply, it asserts that its rights were infringed and that the reasons given in respect of award criterion 2 are lacking or insufficient.

37 The Commission disputes this line of argument without raising any plea of inadmissibility, as it acknowledged at the hearing.

38 As regards the alleged illegalities concerning award criteria 1 and 2, it is appropriate in the present case to examine whether or not the conditions relating to the harm claimed and the causal link between such harm and the illegalities complained of are satisfied.

39 Concerning the condition relating to harm, the liability of the European Union is triggered only if the applicant has indeed suffered 'actual and certain' harm, which it is for the applicant to prove (see judgments of 14 October 2014 in *Giordano* v *Commission*, C-611/12 P, ECR, EU:C:2014:2282, paragraph 36 and the case-law cited, and in *Evropaïki Dynamiki* v *Commission*, cited in paragraph 32 above, EU:T:2014:888, paragraph 30 and the case-law cited).

40 Concerning the condition relating to the existence of a causal link between the alleged conduct and the harm pleaded, it is settled case-law that the alleged harm must be a sufficiently direct consequence of the conduct complained of and such a causal link must be the determining cause of the harm, the burden of proof of which rests on the applicant (see judgments of 30 January 1992 in *Finsider and Others* v *Commission*, C-363/88 and C-364/88, ECR, EU:C:1992:44, paragraph 25 and the case-law cited, and in *Evropaïki Dynamiki* v *EIB*, cited in paragraph 34 above, EU:T:2011:494, paragraph 209 and the case-law cited).

41 In the present case, as regards the alleged illegalities concerning award criteria 1 and 2, the applicant made clear that it was pleading harm linked to the loss of the opportunity to conclude the contract in question as well as that linked to the expenses it incurred in order to participate in the tendering procedure.

42 The applicant contends that the condition relating to the causal link is satisfied because its tender was ranked in first place and it would have been awarded the contract had it not been for the alleged infringements.

43 Nonetheless, it must be stated that the rejection of the applicant's tender is based only on the assessments concerning award criterion 3 and the abnormally low nature of its tender. The applicant's tender was indeed ranked in first place following the examination of the tender from an economic standpoint. That ranking was altered for two reasons, namely the changes to the evaluation of the tender in the light of award criterion 3, which was considered to be insufficient, and the classification of the tender as abnormally low. The applicant also states in its application that the harm at issue is the direct result of the evaluation committee's decision to lower the score for award criterion 3 and to find that the tender was abnormally low.

44 Furthermore, as the Commission points out, the applicant has not, at any time, explained how the award of a higher score for award criteria 1 and 2 could have had a favourable impact on its chances of being awarded the contract.

45 The applicant is therefore wrong to assert that the contract would have been awarded to it if it had not been for the infringements and errors concerning award criteria 1 and 2. Even a higher score for those award criteria would not have affected the assessment of its tender in the light of award criterion 3 and the finding that the tender was abnormally low.

46 Accordingly, the alleged illegalities concerning award criteria 1 and 2, even if proven, have no direct causal link to the alleged harm, relating to the loss of the opportunity to conclude the contract and the expenses incurred in order to participate in the tendering procedure.

47 It follows that the claim for damages must be rejected in so far as it is based on illegalities concerning award criteria 1 and 2.

Claim for damages concerning alleged illegalities relating to the concept of 'abnormally low tender'

48 The applicant argues that the concept of 'abnormally low tender' was misinterpreted and misapplied in the present case. It also contends that the parameters used to apply the concept of 'abnormally low tender' were arbitrary and illogical and that the adversarial principle and the principle of equal treatment were infringed in the application of that concept.

49 The Commission disputes that line of argument.

– Alleged misinterpretation and misapplication of the concept of 'abnormally low tender'

50 The applicant disagrees with the approach taken by the evaluation committee to classify its tender as abnormally low. In its opinion, the committee's analysis is based solely on the assessment of the costs of the additional tasks and not on the tender as a whole. It thus argues that the evaluation committee did not examine the impact of that isolated aspect relating to the additional tasks on the tender as a whole, which is contrary to the relevant applicable principles.

51 It must be recalled that, under Article 97(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. l), as amended ('the financial regulation'), which applied in the present case to the tendering procedure, contracts are to be awarded by the automatic award procedure or by the best-value-for-money procedure. In this instance, the tender specifications provided that the contract would be awarded on the basis of the best-value-for-money criterion.

52 Furthermore, Article 139 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the financial regulation (OJ 2002 L 357, p. l), as amended ('the implementing rules'), provides:

'1. If, for a given contract, tenders appear to be abnormally low, the contracting authority shall, before rejecting such tenders on that ground alone, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements, after due hearing of the parties, taking account of the explanations received. …

The contracting authority may, in particular, take into consideration explanations relating to:

(a) the economics of the manufacturing process, of the provision of services or of the construction method;

(b) the technical solutions chosen or the exceptionally favourable conditions available to the tenderer;

(c) the originality of the tender.

…'

53 Similarly, Article 146(4) of the implementing rules provides that, in the case of abnormally low tenders, the evaluation committee is to request any relevant information concerning the composition of the tender.

54 It is apparent from these provisions that the concept of 'abnormally low tender' is not defined in either the financial regulation or the implementing rules.

55 However, it has been held that the abnormally low nature of a tender must be assessed by reference to the composition of the tender and the services at issue. Thus, the Court has stated that the contracting authority may, in the course of its examination of the abnormally low nature of a tender, take into consideration, for the purpose of ensuring healthy competition, not only the situations set out in Article 139(2) of the implementing rules, but also all the factors that are relevant in the light of the services at issue (see, by analogy, judgment of 18 December 2014 in *Data Medical Service*, C-568/13, ECR, EU:C:2014:2466, paragraph 50).

56 In the present case, it is apparent from the letter of the Commission of 25 March 2013 and the final evaluation report that the evaluation committee considered that, in view of the explanations provided by the applicant, the costs were not covered by the price offered for some of the additional tasks (particularly additional tasks 1 to 6 and 18 to 20). The evaluation committee also flagged up cost inconsistencies for additional tasks 14 and 15. Lastly, it found that there was an overlap of staff for the most important additional tasks (additional tasks 6 to 17, 21 and 25). It concluded that the tender was abnormally low as regards additional tasks 1 to 16 and 18 to 20. It stated that additional tasks 1 to 6 and 18 to 20 were priced at a loss based only on the costs of the work and that additional tasks 1 to 16 and 18 to 20 were priced at a loss if additional costs were taken into account. It also stated that the staffing overlap resulted in the tender being incompatible with the requirements of the tender specifications as regards the condition that there be at least ten 'Full Time Equivalents'.

57 It is therefore correct that the identified anomalies which led the evaluation committee to find that the applicant's tender was abnormally low should refer more specifically to some additional tasks.

58 However, the economic and financial significance of the additional tasks compared to the main tasks is clearly apparent from the material in the file. In particular, the tender specifications envisaged a total of 36 tasks, 27 of which were additional tasks. Furthermore, the maximum budget for the additional tasks set out in the tender specifications was slightly higher (EUR 1 500 000) than that for the main tasks (EUR 1 400 000). There is therefore no doubt as to the significance of the additional tasks in the context of the contract as a whole.

59 Of the 27 additional tasks envisaged, 19 were affected by the anomalies identified by the evaluation committee.

60 Accordingly, even though those anomalies only concerned the additional tasks, they did not, by any means, relate to a minor or isolated aspect of the tender and were thus liable to undermine the consistency of the overall price offered and, therefore, the tender as a whole.

61 Moreover, the fact that the anomalies only concerned additional tasks does not mean that the tender was not evaluated as a whole. In this respect, it was indeed the overall price of the applicant's tender which was considered to be abnormally low, including in relation to the budget set by the Commission for the entire contract and the overall price offered by the successful tenderer.

62 It follows that the evaluation committee conducted its assessment by reference to the composition of the tender and the services at issue, taking account of the factors that were relevant in the light of those services. Consequently, the applicant's complaint that the evaluation committee infringed the relevant applicable principles when it found the tender to be abnormally low must be dismissed.

– The claim that the parameters used to apply the concept of 'abnormally low tender' were arbitrary and illogical and that the adversarial principle and the principle of equal treatment were infringed

63 First, the applicant argues that the parameters used to assess whether or not its tender was abnormally low are inappropriate, arbitrary and unjustified. In particular, the cost unit used to calculate the cost of the experts is subjective and does not take account of the applicant's organisational and commercial abilities or of the fact that it was able to negotiate lower rates with the experts.

64 It must be pointed out that, as is apparent from the explanations contained in the annex to the evaluation report of 20 November 2012, the overall price of the applicant's tender was EUR 850 000 lower than the price the evaluation committee considered to be the minimum price for the additional tasks, even though the price offered for the main tasks was close the maximum price stipulated in the tendering procedure. By letter of 22 November 2012, the Commission therefore asked the applicant to provide detailed explanations on the calculation of the prices offered for some additional tasks and stated that the tender could be rejected if the explanations provided were unconvincing.

65 In its reply of 29 November 2012, the applicant set out a number of general considerations and gave specific explanations relating to the additional tasks at issue. In particular, in the general considerations it mentioned that it provided services that were similar to those involved in the additional tasks in the context of other projects and stated that it was in the best position to negotiate competitive prices with suppliers.

66 However, it must be noted that those assertions are not substantiated and the applicant does not supply any specific information concerning, in particular, the reductions it would have secured in connection with the tasks at issue. Although the applicant's organisational and commercial abilities were important factors in terms of their impact on service costs, they should have been clearly set out and substantiated in its initial tender or, at the very least, in its reply of 29 November 2012. In point of fact, they were not.

67 In addition, in its letter of 12 April 2013, the applicant objected to the cost unit used to calculate the experts' fees, because it had negotiated lower fees. It also stated that it could provide copies of the agreements with those experts. The fact remains, however, that it did not produce the agreements and did not substantiate its assertions any further. Similarly, the applicant refers to its organisational and commercial abilities but fails to provide any specific information in that regard.

68 Lastly, the applicant's argument that the cost unit used to calculate the cost of the experts is subjective must be dismissed. It does not provide any figures in that connection. Furthermore, the fact that it relies on certain circumstances and, in particular, negotiations on rates with experts of the same category as those to be used in the main tasks tends to support the conclusion that those costs were, as the Commission found, lower than normal, without any specific justification being provided, however.

69 It follows that the Court must reject the applicant's argument by which it calls into question the parameters used for the purpose of assessing whether or not its tender was abnormally low.

70 Second, the applicant submits that the Commission should have given it the opportunity to substantiate, at a later stage, the costs and rates regarded as excessively low, in accordance with the adversarial principle. It stated that the letter of 22 November 2012 simply requested the method of calculating the price contained in the tender and not the value of the factors under consideration.

71 It follows from Article 139(1) and Article 146(4) of the implementing rules that the contracting authority is obliged, when examining tenders which are abnormally low, to request the tenderer to furnish the necessary explanations to prove that those tenders are genuine (see, to that effect and by analogy, judgments of 27 November 2001 in *Lombardini and Mantovani*, C-285/99 and C-286/99,

ECR, EU:C:2001:640, paragraphs 46 and 51; of 29 March 2012 in *SAG ELV Slovensko and Others*, C-599/10, ECR, EU:C:2012:191, paragraph 28; and in *Data Medical Service*, cited in paragraph 55 above, EU:C:2014:2466, paragraph 47). The existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer, to enable the latter to demonstrate that its tender is genuine, constitutes a fundamental requirement in the award of public contracts, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings (see, to that effect and by analogy, judgments in *Lombardini and Mantovani*, EU:C:2001:640, paragraph 57; in *Data Medical Service*, cited in paragraph 55 above, EU:C:2014:2466, paragraph 48; and of 21 May 2008 in *Belfass* v *Council*, T-495/04, ECR, EU:T:2008:160, paragraphs 97 and 98).

72 In the present case, by letter of 22 November 2012, the Commission informed the applicant that the evaluation committee had found that the prices stated in its tender for some additional tasks were abnormally low. It asked the applicant for detailed explanations on the calculation of the prices offered for additional tasks 1 to 21 and 25 and pointed out that the tender could be rejected if the explanations proved unconvincing.

73 The applicant replied to the Commission's request for information by letter of 29 November 2012, in which it provided general explanations and a list of the costs used to draw up its proposed prices for all the additional tasks.

74 On 19 December 2012, the evaluation committee — taking account of the additional information provided by the applicant — found that its tender was abnormally low and recommended that the contract be awarded to VLM.

75 By letter of 25 March 2013, the Commission notified the applicant that its tender had not been successful because it had failed to reach the minimum score required for award criterion 3 and had been found to be abnormally low as regards the prices offered for the performance of some additional tasks.

76 It is apparent from the foregoing that the adversarial procedure was indeed observed in the present case and that the applicant had the opportunity to justify the costs and rates which had been regarded as excessively low.

77 The applicant's argument that the letter of 22 November 2012 simply requested the method of calculating the price contained in the tender and not the value of the factors under consideration must be rejected. The Commission asked the applicant for detailed explanations on the calculation of the prices offered for additional tasks 1 to 21 and 25 and pointed out that the tender could be rejected if the explanations proved unconvincing. The price calculation factors thus necessarily encompassed all of the factors contributing to the formation of the prices offered in the tender, including not only the calculation method but also the value of the factors under consideration. Contrary to what the applicant claims, the Commission did not therefore ask it only about the method of calculating the price contained in the tender.

78 In the light of the foregoing, the applicant's arguments relating to the infringement of the adversarial principle must be rejected.

79 Thirdly, the applicant submits that the Commission should have verified whether VLM's tender was abnormally low based on the same parameters, which would have resulted in it drawing similar conclusions as regards the main tasks. It therefore claims infringement of the principle of equal treatment. The applicant produces a simulation which it claims demonstrates that the values which the evaluation committee applied to its tender were too high and that the committee's conclusions were therefore wrong, which confirms the alleged difference in treatment.

80 It should be recalled that 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 (judgment of 29 April 2004 in *Commission* v *CAS Succhi di Frutta*, C-496/99 P, ECR, EU:C:2004:236, paragraph 110). Thus, tenderers must 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, judgments of 17 February 2011 in *Commission* v *Cyprus*, C-251/09, EU:C:2011:84, paragraph 39, and 16 September 2013 in *Spain* v *Commission*, T-402/06, ECR, EU:T:2013:445, paragraph 66).

81 In the present case, it must be recalled that the total maximum budget stipulated for the contract in question was EUR 2 500 000. The applicant submitted a tender for a total price of EUR 1320112.63, while VLM, as successful tenderer, submitted an overall tender in the amount of EUR 2316124.83.

82 Therefore, as the Commission points out, VLM's financial tender, calculated on the basis of the formula laid down in section 9.3.2 of the tender specifications, relating to the price criterion, was slightly lower than the budget ceiling provided for in those specifications for the performance of the contract and almost one million euros higher than the applicant's financial tender. It follows that, unlike the applicant's tender, VLM's tender was not abnormally low in the light of the total budget stipulated for the contract in question.

83 Since they were not in the same situation, the Commission was entitled, without infringing the principle of equal treatment, to verify whether the applicant's tender was abnormally low, without applying the same treatment to VLM.

84 Accordingly, the simulation produced by the applicant is irrelevant.

85 The complaint alleging infringement of the principle of equal treatment must therefore be rejected.

86 It follows from all the foregoing that the applicant's complaints by which it seeks to prove the existence of an illegality as regards the assessment that its tender was abnormally low must be rejected in their entirety. Its claim for damages in that regard must therefore be dismissed, without it being necessary to consider the conditions relating to the existence of harm and of a causal link.

Claim for damages concerning alleged illegalities relating to award criterion 3

87 As regards the Commission's assessment of award criterion 3, the applicant essentially submits that, in the present case, there was confusion between the selection criteria and the award criteria. In this connection, it alleges, first, breach of the contract procedure rules, secondly, infringement of the principle of proportionality and, thirdly, infringement of the principle that the stages of a tendering procedure should be kept separate. Lastly, it claims that the assessment of its tender was incorrect.

88 The applicant contends that it suffered four types of harm: harm linked to the loss of the contract in question; in the alternative, harm linked to the loss of the opportunity to conclude that contract; harm linked to the expenses it incurred in order to participate in the tendering procedure; and non-material harm.

89 It is appropriate to begin by examining whether the conditions relating to the existence of the alleged harm and the existence of a causal link between the unlawful conduct complained of and that harm are satisfied.

90 First, as regards the harm linked to the loss of the contract in question, which is the principal claim made, the applicant submits that this corresponds to the gross profit of which it was unfairly deprived. This harm essentially equates to loss of profit.

91 It should be recalled that, according to the case-law, an action founded on damage resulting from loss of profit must be dismissed because the damage at issue is not real and existing, but future and hypothetical (see, to that effect, judgments of 29 October 1998 in *TEAM* v *Commission*, T-13/96, ECR, EU:T:1998:254, paragraph 76; in *AFCon Management Consultants and Others* v *Commission*, cited in paragraph 32 above, EU:T:2005:107, paragraphs 113 and 114; and of 8 December 2011 in *Evropaïki Dynamiki* v *Commission*, T-39/08, EU:T:2011:721, paragraph 47).

92 The condition relating to damage requires that the harm for which compensation is sought be actual and certain, which it is for the applicant to prove (see judgment in *Evropaïki Dynamiki* v *Commission*, cited in paragraph 91 above, EU:T:2011:721, paragraph 46 and the case-law cited).

93 According to Article 101 of the financial regulation, 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.

94 Thus, even if the evaluation committee had recommended that the contract be awarded to the applicant, the contracting authority would not have been bound by the evaluation committee's proposal and it had a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award the contract (see, to that effect, judgments in *TEAM* v *Commission*, cited in paragraph 91 above, EU:T:1998:254, paragraph 76; *AFCon Management Consultants and Others* v *Commission*, cited in paragraph 32 above, EU:T:2005:107, paragraphs 113 and 114; and *Evropaïki Dynamiki* v *Commission*, cited in paragraph 91 above, EU:T:2011:721, paragraph 47).

95 Even if it were to be accepted that the applicant's tender ought to have been placed first and that the applicant should therefore have been awarded the contract, that would not have obliged the Commission to sign the contract with the applicant. Indeed, there is no principle or rule applicable to the Commission's tendering procedures which requires it to sign the relevant contract with the person designated as the contractor at the conclusion of the tendering procedure (see, to that effect, judgment in *Evropaïki Dynamiki* v *EIB*, cited in paragraph 34 above, EU:T:2011:494, paragraph 211).

96 Consequently, the harm corresponding to the applicant's loss of profit linked to the loss of the contract in question is not actual and certain, but hypothetical. It cannot therefore be the subject of compensation.

97 The applicant's arguments seeking a departure from the case-law, according to which the contracting authority is not required to sign the contract with the tenderer ranked first at the conclusion of the tendering procedure, do not cast doubt on that finding.

98 The applicant contends that although the contracting authority may decide to finalise the contract, it is not free to award it to other tenderers who failed to win the tendering procedure lawfully. However, that assertion is not inconsistent with the fact that the contracting authority remains free to finalise the contract or not and, therefore, to abandon it, so that harm based on loss of profit is never certain. Furthermore, the case-law does not draw a distinction between whether the contract was awarded or not. Harm linked to loss of profit, namely harm equivalent to the profit which could not be made from performance of the contract, presupposes the certainty of being awarded the contract. In view of the contracting authority's discretion under Article 101 of the financial regulation, such harm is never certain.

99 Contrary to the applicant's arguments, that case-law does not allow the contracting authority to take advantage of its own infringement of the rules without having to pay compensation for the resulting harm, since other types of harm are eligible for compensation if they are actual and certain. That is the case, in particular, with respect to harm linked to the loss of an opportunity or that linked to the charges and expenses incurred by a tenderer in order to participate in a tendering procedure, where an infringement of EU law has affected its chances of being awarded the contract. Paragraphs 80 to 82 of the judgment of 30 April 2009 in *CAS Succhi di Frutta* v *Commission* (C-497/06 P, EU:C:2009:273), cited by the applicant, specifically concern harm linked to the loss of an opportunity or to the charges and expenses incurred by a tenderer in order to participate in a tendering procedure, and not loss of profit.

100 In addition, the applicant submits that, according to that case-law, the unsuccessful tenderer — who is denied protection by way of precautionary measures on account of the very strict case-law on interim proceedings — is also denied protection by way of the right to compensation. However, once again, it must be pointed out that as a result of the wording of Article 101 of the financial regulation, contrary to the applicant's assertions, the applicant did not lose a contract but rather an opportunity to obtain the contract which was the subject of the Community tendering procedure (order of 20 July 2006 in *Globe* v *Commission*, T-114/06 R, ECR, EU:T:2006:221, paragraph 116).

101 Thus, the arguments which the applicant puts forward to challenge the applicable case-law, according to which harm corresponding to its loss of profit cannot be pleaded, must be rejected.

102 Furthermore, as regards the condition relating to the causal link, it should be recalled that, as is apparent from the letter of the Commission of 25 March 2013, the applicant's tender was rejected because the points given in respect of award criterion 3 were lower than the required minimum and because the tender was abnormally low. Moreover, the contracting authority found that the applicant's tender was abnormally low without committing any illegality (see paragraphs 50 to 86 above). The applicant therefore had no chance of securing the contract on account of its tender being abnormally low.

103 The harm based on the loss of the contract, assuming that it is actual and certain, is the consequence of the applicant's tender being rejected.

104 It follows that, since the rejection is justified, then even if the rejection of the tender based on the assessment of award criterion 3 were unlawful, the applicant's tender would still be abnormally low and it would therefore be right to reject it.

105 Consequently, no causal link can be established between any illegality committed in respect of the assessment of the tender in the light of award criterion 3 and the harm alleged by the applicant corresponding to the loss of the contract.

106 Therefore, the claim for damages seeking compensation for the harm pleaded by the applicant, corresponding to the gross profit of which it was unfairly deprived following the loss of the contract itself, must be rejected.

107 In view of the foregoing, it is not necessary to rule on the application for confidential treatment of the documents produced as annexes to the application for the purpose of assessing the harm linked to the loss of the contract.

108 Secondly, as regards the harm linked to the loss of the opportunity to be awarded the contract in question, it must be stated that this head of claim cannot succeed either.

109 Having regard to the reasons set out in paragraphs 102 to 105 above, it appears that the harm based on the loss of the opportunity to be awarded the contract is also the result of the applicant's tender being rejected on account of being abnormally low.

110 It follows that, even if the rejection of the applicant's tender based on the assessment of award criterion 3 were unlawful, the fact remains that the tender would still be abnormally low and the applicant could not in any event plead harm linked to the loss of the opportunity to secure the contract in question (see, to that effect, judgment of 23 November 2011 in *bpost* v *Commission*, T-514/09, EU:T:2011:689, paragraph 171 *in fine*).

111 Therefore, it is not possible to establish a causal link between any illegality committed in respect of the assessment of the tender in the light of award criterion 3 and the damage alleged by the applicant arising from the loss of the opportunity to be awarded the contract.

112 Thirdly, as regards the harm claimed in respect of the expenses incurred in connection with the tendering procedure, it should be recalled that economic operators are to bear the risks forming an integral part of their activities, having regard to the individual circumstances of each case. In a tendering procedure, those economic risks include, inter alia, the costs associated with the preparation of the tender. The expenses thus incurred therefore remain chargeable to the undertaking which chose to participate in the procedure, since the right to bid for the award of a contract does not signify that the contract will definitely be awarded to that undertaking (judgment in *CAS Succhi di Frutta* v *Commission*,paragraph 99 above, EU:C:2009:273, paragraph 79). Article 101 of the financial regulation provides that the Commission is free to decide not to make any award at all. Therefore, there was no guarantee that even the tenderer offering the most advantageous bid would win the contract.

113 It follows that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute harm which is capable of being remedied by an award of damages (judgments in *CAS Succhi di Frutta* v *Commission*, cited in paragraph 99 above, EU:C:2009:273, paragraph 81; *TEAM* v *Commission*, cited in paragraph 91 above, EU:T:1998:254, paragraph 71; and *Embassy Limousines & Services* v *Parliament*, cited in paragraph 34 above, EU:T:1998:302, paragraph 97).

114 It is true that the case-law also shows that this principle cannot, without potentially undermining the principles of legal certainty and of protection of legitimate expectations, apply in cases where an infringement of EU law in the conduct of the tendering procedure has affected a tenderer's chances of being awarded the contract (judgments in *CAS Succhi di Frutta* v *Commission*, cited in paragraph 99 above, EU:C:2009:273, paragraph 82; *TEAM* v *Commission*, cited in paragraph 91 above, EU:T:1998:254, paragraph 72; and *AFCon Management Consultants and Others* v *Commission*, cited in paragraph 32 above, EU:T:2005:107, paragraph 98).

115 However, that is not the case here. In so far as the assessment of the Commission, which considered the applicant's tender to be abnormally low, is not unlawful (see paragraph 86 above), it must be held that the applicant has no grounds for alleging loss of the opportunity to be awarded the contract, without it being necessary to examine its complaints in respect of the assessment of its tender in the light of award criterion 3 (see paragraphs 109 to 111 above).

116 Therefore, since the conduct of the tendering procedure did not affect the applicant's chances of being awarded the contract in the present case, the principle that the charges and expenses incurred in order to participate in the tendering proceeding cannot constitute harm which is capable of being remedied by an award of damages applies.

117 Moreover, it can be inferred that it is not possible to establish a causal link between any illegality committed in respect of the assessment of the tender in the light of award criterion 3 and the harm alleged by the applicant resulting from the charges and expenses incurred in order to participate in the tendering procedure.

118 It follows that the applicant's claim for reimbursement of the expenses it incurred in connection with the tendering procedure must be rejected.

119 In view of the foregoing, it is not necessary to rule on the application for confidential treatment of the documents produced as annexes to the application for the purpose of assessing the harm linked to the expenses of participating in the tendering procedure.

120 Fourthly, the applicant claims that unfair pressure was exerted on the undertaking and the staff involved in the tendering procedure and seeks compensation for non-material harm in the amount of EUR 5 000.

121 However, the applicant simply makes a claim of unfair pressure, linked to the disappointment of being unfairly excluded, without demonstrating that it in fact suffered actual and certain harm and without adducing any evidence whatsoever to prove the existence of such harm, for the purposes of the relevant case-law (see, to that effect, judgments of 14 October 2014 in *Giordano* v *Commission*, C-611/12 P, ECR, EU:C:2014:2282, paragraph 36 and the case-law cited, and in *Evropaïki Dynamiki* v *Commission*, cited in paragraph 32 above, EU:T:2014:888, paragraph 30 and the case-law cited).

122 The applicant's argument that it is not necessary to prove non-material harm, based in particular on the judgment in *Embassy Limousines & Services* v *Parliament*, cited in paragraph 34 above (EU:T:1998:302), must be rejected. In that judgment, the Court took account of the fact that it was clear from the file that the contracting authority had placed the applicant company in a position of uncertainty and had forced it to make useless efforts with a view to responding to an urgent situation with respect to performance of the contract. That is certainly not the case here. On the contrary, the Commission's letter of 22 November 2012 clearly warned the applicant that its tender could be rejected if its explanations concerning the tender proved unconvincing.

123 It follows that no proof of the non-material harm was furnished in the present case and that, in consequence, the claim based on this harm must also be rejected.

124 Furthermore, the non-material harm complained of is, in this instance, linked to the rejection of the applicant's tender, which was held to be justified on account of its abnormally low nature (see paragraph 86 above). Accordingly, no causal link can be established between any illegality committed in respect of the assessment of the tender in the light of award criterion 3 and the non-material harm alleged by the applicant.

125 It follows from all of the foregoing that, without it being necessary to examine whether the condition relating to the existence of the illegalities complained of by the applicant concerning the assessment of its tender in the light of award criterion 3 is met, it must be held that the other two conditions, relating to the existence of harm and the existence of a causal link between unlawful conduct on the part of the Commission and the harm claimed by the applicant, are not satisfied.

126 Therefore, the claim for damages must be dismissed in so far as it is based on illegalities concerning the assessment of the applicant's tender in the light of award criterion 3. In consequence, the claim for damages must be dismissed in its entirety.

The application for measures of inquiry

127 The applicant asks the Court to order the Commission to disclose the tender of VLM, the contractor, in order to verify whether the complaint concerning the difference in treatment as regards the abnormally low nature of the applicant's tender is well founded. It also states that the decision of the Commission delivered under Regulation No 1049/2001 cannot interfere with the powers of the Court to order measures of inquiry.

128 The Commission opposes that application.

129 It follows from all of the considerations set out above that the action must be dismissed in its entirety, without it being necessary to grant the application for measures of inquiry submitted by the applicant by which it seeks to obtain a copy of VLM's tender.

Costs

130 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

131 Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Sixth Chamber),

hereby:

1. Dismisses the action;

2. Orders Agriconsulting Europe SA to bear its own costs and to pay those incurred by the European Commission.

Frimodt Nielsen Dehousse Collins

Delivered in open court in Luxembourg on 28 January 2016.

[Signatures]