JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
25 February 2003 *

In Case T-4/01,

Renco SpA, established in Milan, Italy, represented by D. Philippe and F. Apruzzi, lawyers, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by F. Van Craeyenest and M. Arpio Santacruz, acting as Agents, assisted by J. Stuyck, lawyer,

defendant,

APPLICATION for compensation for damage allegedly suffered by the applicant as a result of the Council's decision not to award it the contract forming the subject-matter of invitation to tender No 107865 issued on 30 July 1999 (OJ 1999 S 146) for general renovation and maintenance works in the Council's buildings,

* Language of the case: French.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 7 February 2002,

gives the following

Judgment

Legal context

1 The award of public works contracts by the Council is governed by the provisions contained in the first section of Title IV (Articles 56 to 64a) of the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), last amended before this action was brought by Council Regulation (EC, ECSC, Euratom) No 2673/1999 of 13 December 1999 (OJ 1999 L 326, p. 1).

2 Under Article 56 of the Financial Regulation, 'each institution shall comply with the same obligations as are imposed upon bodies in the Member States' by the directives on public works contracts, when concluding contracts for which the amount involved is equal to or greater than the threshold provided for by those directives.

3 In the present case the relevant legislation is Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1).

4 Article 8 of Directive 93/37, as amended by Directive 97/52, provides:

'1. The contracting authority shall, within 15 days of the date on which a written request is received, inform any eliminated candidate or tenderer of the reasons for rejection of this application or his tender, and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.

...'

5 Article 18 of Directive 93/37, as amended, provides:

'Contracts shall be awarded on the basis of the criteria laid down [in Articles 30 to 32 of this Directive]...'

6 Article 30 of Directive 93/37 provides:

'1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the case referred to in paragraph 1(b), the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance.

3. ...

4. If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

...'

Facts

7 By Notice No 107865, published on 30 July 1999 (OJ 1999 S 146), the General Secretariat of the Council issued a restricted invitation to tender for general renovation and maintenance works in the Council's buildings in Brussels; that notice replaced a notice published on 4 June 1999 (OJ 1999 S 107). The procedure was to result in the conclusion of a five-year framework contract, renewable for 12-month periods. It was also stated in the notice that '[i]n 1998, the cost of the general renovation and maintenance work was in the order of EUR 5 000 000'.

8 The contract documents relating to the tendering procedure provided, in point IV.5 entitled 'Selection criteria':

'(a) The [General Secretariat of the Council] shall select from among the tenders submitted the one which it considers the most advantageous in the light of the information provided by the undertaking. The following criteria are regarded as especially important:

— the conformity of the tender;

— the price of the tender;

— the experience and competence of the permanent team in providing services similar to those described in the contract documents;

— the experience and technical competence of the undertaking;

— the proposal made with regard to the safety coordinator;

— the quality of any subcontractors and suppliers proposed;

— the technical quality of the equipment and materials proposed;

— the measures proposed for observing the prescribed time-limits for completion.

...'

9 The contract documents stipulated that the contract constituted a framework agreement which bound the two parties for general administrative and technical matters, and for the procedures for fixing prices, qualities and time-limits.

10 The contract documents provided for three kinds of services. First, the contractor was to set up a permanent 16-man team covering various skills. Its role was to prepare, manage and coordinate the renovation and maintenance work and also to carry out part of it. Tenderers were required to state in part A of a summary the hourly rate for each member of the permanent team and the overall amount for the services of the permanent team based on an assumed total of 1 800 hours per member. The contract also included, in particular, two types of work. The first type of work covered renovation and maintenance works which were not yet defined by the Council. For those works, the tenderers were required to state, in part B of the summary, their price for each item in an illustrative list of services relating to labour and supply of materials. The second type of work covered seven items of work which the Council had already defined when it issued the invitation to tender, but which it subsequently might or might not decide to carry out. Tenderers were required to put in a price for those jobs in part C of the summary.

11 According to the contract documents, the work carried out by the permanent team would be remunerated at the price determined by application of the contractual rates to the actual time worked, whereas the work on the various jobs under parts B and C of the summary would be remunerated according to the prices submitted. In the three above cases, tenderers were required to state their rates and prices taking account of the fact that at the time of invoicing a cost plus rate or multiplication factor would be applied for 'the undertaking's general office costs'.

12 The contract documents stated that the prices and rates for parts A, B and C of the summary did not include 'services provided in the contractor's office or connected with it, such as *(inter alia)*: indirect personnel costs in so far as they are not included in the rates; personnel management; general operating costs; general accounting costs; comprehensive site insurance and public liability insurance; the performance bond; the remuneration of company executives; staff training costs; the company's taxes [and] profits.' The 'general office costs' as listed above were

remunerated by a single cost plus rate or a multiplication factor which was to be fixed by the tenderers when they submitted their tenders and which would be applied to the prices and rates for the work covered by parts A, B and C of the summary. Furthermore, it is clear from the documents before the Court that, if the successful tenderer took on subcontractors to do the work, it was entitled to add to the prices charged by the subcontractors the cost plus rate quoted in its tender. The work in question could be the work provided for in the contract documents or work not so provided for.

13 It should be noted that the prices quoted for parts A and B represented only the approximate cost of the work concerned over one year, whereas the price quoted for part C was the price of certain projects identified in the contract documents to be carried out during the term of the contract.

14 On 28 October 1999, the candidates, eight in all, were informed that their applications to participate in the restricted tendering procedure had been accepted. Of those eight candidates, three submitted tenders conforming to the specifications: Strabag Benelux NV ('Strabag'), Entreprises Louis De Waele ('De Waele') and the applicant.

15 On 11 January 2000, the applicant submitted a tender in the amount of EUR 3 946 745.49 per annum. That tender was considered to conform to the provisions of the contract documents.

16 Following an initial examination of the applicant's tender, the Council considered that some of the prices it contained seemed 'abnormally low' and that others 'did not even [cover] the supply of materials and equipment'. By letter of 20 January

2000, it asked the applicant to check its calculations, specifying the items concerned. It also pointed out that the applicant had omitted to give certain prices for culinary equipment.

17 By letter to the Council of 24 January 2000, the applicant confirmed its prices, denied that they were abnormally low and stated:

'... we assessed and prepared our tender very carefully and involved our usual suppliers (with whom we have worked closely for many years) in the formulation of our prices; in this regard, our tender was designed to be extremely competitive (while complying with all the technical specifications) so that in the end we might be awarded the contract.'

18 By letter to the applicant dated 1 February 2000, the Council asked for details of certain prices omitted in its tender. It also stated that, although the applicant confirmed, in its letter of 24 January 2000, the prices for the items which the Council considered abnormally low, the letter did not give any justification for those prices, some of which, particularly in relation to plumbing, did not even cover the supply of the materials. The Council then asked for additional information about approximately a hundred items.

19 The representatives of the applicant and the Council met in Brussels on 9 February 2000 in order to clarify certain aspects of the tender. Following that meeting, the applicant, by letter of 11 February 2000, formally replied to the Council's letter of 1 February 2000, in general adhering to the prices quoted in its tender of

11 January 2000 and justifying them by the fact that the aggregation of the items made it possible for the various prices to offset each other. It stated *inter alia*:

'... our policy has been to assess each job on the basis of an inclusive price, splitting up the costs for the various items not always uniformly but in such a way as to save time in the preparation of the tender. That applies not only to the costs, but also to the profits anticipated in the tender. In the present case, we confirm our undertaking to carry out the work in whole or in part, in accordance with our tender and your requirements. We have assessed the risks connected with our decision.'

20 By decision of 12 April 2000, taken on the basis of an opinion of the Advisory Committee on Procurements and Contracts ('CCAM') dated 5 April 2000 and a report of the same date forwarded to the Committee ('the report to the CCAM'), the Council awarded the contract to De Waele, whose offer was EUR 4 088 938.10 per annum. That decision was the subject of Notice No 054869 published on 29 April 2000 (OJ 2000 S 84).

21 By letter of 14 April 2000, the Council informed the applicant that its tender had been rejected.

22 By letter of 26 April 2000, the applicant asked the Council to send it 'within 8 days the official reasons adopted by the Community authority for [eliminating] the applicant from the aforementioned contract'. By letter of 10 May 2000, the applicant repeated that request.

23 By letter of 11 May 2000, the Council gave the following answer to the applicant's request:

'In accordance with the provisions of Directive 93/37... , the criteria for awarding the contract were set out in the contract documents relating to the invitation to tender...

Consequently, the three tenders received on 11 January 2000 were analysed and compared in the light of those criteria. The outcome was that the contract was awarded to De Waele, which had submitted the most economically advantageous tender.

For your information, I would add that Renco's tender was not ranked higher than De Waele's for any of the eight criteria referred to in the contract documents.'

24 By letter of 15 May 2000, the applicant, after pointing out that it considered that its tender was more advantageous than De Waele's, asked for additional information from the Council in respect of the rejection of its tender.

25 By fax of 24 May 2000, the applicant asked for a reply to its letter of 15 May 2000 and, by letter of 2 June 2000, repeated the request contained in its letter of 26 April 2000. It also asked for a 'copy of the Committee's assessment reports on the tenders submitted in connection with the aforementioned contract'.

26 By letter of 14 June 2000, the Council replied to the applicant's letter of 15 May and 2 June 2000 and provided it with additional information in respect of the

rejection of its tender. It indicated the position of the applicant's tender in relation to those of De Waele and Strabag for each of the eight award criteria. With regard, more particularly, to the price of the tender, it stated that the applicant's offer was ranked third because of 'the large number of prices which were abnormally low and for which [it] had not provided adequate justification... , the high multiplication factor for general costs [and] the higher price of the contract when considered over the five-year term of the contract'. It concluded:

'Although the [applicant's] tender appears, in the short term, to be the lowest-priced, it has not been successful because of the amount of its quote over a five-year period and of the numerous questions regarding its prices, and because for other assessment criteria it is not ranked higher than De Waele.'

27 By letter of 21 June 2000, the applicant again asked the Council to send it a copy of the administrative file. By letter of 4 July 2000, the Council refused to accede to that request.

28 By application lodged at the Registry of the Court of First Instance on 3 August 2000 and registered under Case number T-205/00, the applicant brought an action for annulment of the Council's decision of 4 July 2000 refusing to grant it access to the administrative file relating to the assessment of the tenders.

29 By letter lodged at the Registry of the Court of First Instance on 5 February 2001, the applicant informed the Court that, since the Council had finally forwarded — through the Registry — the administrative file on the assessment of the tenders, when it lodged its defence on 12 October 2000, the applicant was abandoning its action in Case T-205/00.

Procedure and forms of order sought

30 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 5 January 2001.

31 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure. By way of measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure of the Court of First Instance, it posed written questions to the parties and asked the Council to furnish information, which was supplied within the time allowed.

32 The parties presented oral argument and their replies to the questions put by the Court at the hearing held on 7 February 2002.

33 The applicant claims that the Court should:

— declare the application admissible and well founded;

— order the Council to pay damages of EUR 26 063 000 together with compensatory interest thereon from 12 April 2000;

— order the Council to pay the costs.

34 The Council contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Law

35 The applicant claims damages of EUR 26 063 000 to compensate for the harm which it has allegedly suffered as a result of the unlawful conduct of the Council in the procedure to award the contract in question. It maintains that the Council has exceeded the limits of its authority and administered the procedure with a manifest lack of diligence. The infringements attributable to the Council arise from:

— the reference in the contract documents to vague selection criteria permitting too wide a discretion having regard to the subject-matter of the contract;

— the use, in the final choice of contractor, of criteria not specified in the contract documents, in breach, *inter alia,* of Article 18 of Directive 93/37, thus frustrating the applicant's legitimate expectations;

— the failure to state reasons for rejecting its tender.

36 The Council considers that the applicant's claim is unfounded and, in the alternative, that the amount of compensation claimed is excessive. It maintains that it has committed none of the infringements alleged and that, in any event, those 'infringements do not constitute sufficiently serious breaches' within the meaning of the case-law. In that regard, it recalls that, according to the judgment of the Court of Justice in Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, it is only where the Member State or the institution in question has only considerably reduced, or even no, discretion that the mere infringement of Community law may be sufficient to establish the existence of a breach sufficiently serious to give rise to non-contractual liability on the part of the Community under Article 288 EC. Furthermore, it is settled case-law that, like the other institutions, the Council has a wide discretion in assessing the factors to be taken into account for the purpose of the decision awarding a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error (Case 56/77 *Agence européenne d'interims* v *Commission* [1978] ECR 2215, paragraph 20, Case T-19/95 *Adia interim* v *Commission* [1996] ECR II-321, paragraph 49, Case T-203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II-4239, paragraph 56, and Case T-139/99 *AICS* v *Parliament* [2000] ECR II-2849).

Arguments of the parties

Use of vague selection criteria

37 The applicant criticises the Council for using too vague selection criteria in the contract documents. It states that 'it is apparent from the contract documents that

factors relating to the competence of the contractor or its subcontractors were to be considered most important... , criteria relating to the tender — other than its conformity and price — being, surprisingly, almost non-existent', whereas 'only objective factors, concerning the execution of the contract and, therefore, the tender, [would have been] able to maintain equality of opportunity between the tenderers and thus avoid value judgments which were difficult to justify'. Furthermore, Article 30(1)(b) of Directive 93/37 concerning 'the most economically advantageous tender' listed only factors relating to the tender itself, which do not cover, in the present case, some of the criteria in the contract documents, such as the experience and technical competence of the company and the quality of any subcontractors and suppliers, which are difficult to evaluate.

38 The Council considers that this view cannot be accepted. The invitation to tender clearly stated the eight criteria on the basis of which it was to take its decision awarding the contract (see paragraph 8 above). They make it clear that the conformity and price of the tender were not the only factors to be taken into account, but that the contract would be awarded 'to the most economically advantageous tender' within the meaning of Article 30(1)(b) of Directive 93/37 (see paragraph 6 above). The Council considers that that provision contains only an illustrative list of the criteria which may be taken into account and that these may vary depending on the contract in question. In the present case, the invitation to tender clearly stated eight criteria, amongst them the experience and technical competence of the company and the quality of any subcontractors and suppliers proposed. The Council adds that the applicant has not established that it seriously and manifestly exceeded its discretion by listing those criteria. It points out that it is also clear both from its correspondence with the applicant and from the report to the CCAM that it carried out an objective examination of the three tenders received in the light of the eight criteria set out in the contract documents.

Use of criteria not specified in the contract documents

39 The applicant claims that the Council did not base its choice of tenderer on the criteria stated in the contract documents. It maintains that its tender was in

conformity with the contract documents, that it adequately satisfied the other criteria laid down and that its price was very much lower than the other tenders. Therefore, by applying other criteria, of which the applicant was not advised, the Council frustrated the legitimate expectations which the applicant was entitled to have concerning the regularity of the procedure to award the contract and the observance of the conditions imposed, and infringed the general principle of diligence and rigour which the institutions are required by the Court to observe (Case T-73/95 *Oliveira* v *Commission* [1997] ECR II-381). The Council rejected the applicant's tender mainly on the basis of the abnormally low prices, a multiplication factor which was too high and overall prices which were too substantial over the whole five-year term of the contract. However, the applicant has given a satisfactory explanation of the way in which it determined each of those factors, showing that the criteria actually applied to guide the Council's choice were unjustified and had frustrated its legitimate expectations. The applicant adds that, if the Council had based its decision on the contract documents, there would be no justification for its elimination.

40 As regards the prices regarded as abnormally low, that assessment is explained by the fact 'that the prices thus referred to were overall prices, not unit prices, so that certain low prices could have been offset by increases' (see, in particular, paragraphs 17 and 19 above). Furthermore, in its letter of 24 January 2000 (see paragraph 17 above), the applicant mentioned the special relations it enjoyed with its usual suppliers. Article 30(4) of Directive 93/37 does not in any case require the contracting authority to reject any abnormally low price. It only requires it to ask for details of the composition of tenders which seem abnormally low. Therefore, the quoting of abnormally low unit prices, when the overall prices of the various items were not abnormally low, cannot justify the Council's decision.

41 As regards the multiplication factor for general costs, the applicant wonders why the Council described a coefficient of 20% as high instead of being surprised that De Waele and Strabag used a multiplier coefficient of 6% to 8% when, in the light of the contract documents, that coefficient was to include all the costs set

out in paragraph 12 above. The applicant applied the 20% coefficient taking account of the principles of sound company management. In the light of those principles, it would be impossible to contain the nine costs referred to in a margin of 6% to 8%. Furthermore, the contract documents did not, in any case, recommend that the coefficient should be as low as possible.

42 As for the calculation of the price of the tenders over the whole five-year term of the contract, the Council wrongly concluded that the applicant's tender was less competitive in the long term. The applicant points out that that criterion does not appear in the contract documents and that that method of calculation was therefore unforeseeable at the time the invitation to tender was issued. It also maintains that that method of calculation is incorrect, since it gives an overall price which cannot correspond to the actual cost over that term. It is undeniable that certain prices were likely to vary and that others were payable only once.

43 The applicant also points out that it was the only tenderer to conform to the contract documents and to allocate its profit margin to 'part A' of its price — as it was required to do by the official documents governing the invitation to tender —, whereas Strabag and De Waele had allocated it to headings B and C. It was therefore inevitable that the globalisation of only heading A would be to the detriment of the applicant and that its offer on that point would be higher than those submitted by the other two companies (see paragraphs 10 to 13 above). Furthermore, the Council should not have considered the multiplication factor for general costs and the term of the contract cumulatively, because those two factors are really only one.

44 The applicant also considers that the reasoning adopted by the Council for assessing the criterion of the company's experience and technical competence is neither described nor clear.

45 The Council maintains that the applicant's argument cannot be accepted. It based its final choice on the criteria set out in the invitation to tender and in the contract documents and carefully examined the conformity of the three tenders with each of those criteria.

46 The Council states that its examination of the applicant's tender gave rise to the following conclusions:

'— conformity: all three candidates equal... ;

— price of tender: [the applicant] third;

— qualitative criteria: for three criteria [the applicant] is ranked in final position, for one criterion it is equal last and for two criteria the three tenderers are ranked equal'.

47 The Council submits that the criterion of the conformity of the tender is an absolute criterion in that a company which does not meet it is excluded at the outset, without its being necessary to examine its tender. The criterion of the price of the tender is an objective criterion since it allows the tenders to be ranked. The Council points out that it is more interested in the lowest-priced tender provided, however, that its meets the qualitative criteria. The other criteria are all qualitative and make it possible to assess the quality and competence of the company and of the methods it proposes. Nevertheless, they are all less important than conformity and price, since the qualitative criteria have already been examined, in part, during the first stage of the tendering procedure on the basis of their presentation file.

48 As regards the abnormally low prices, the Council states that it is required, under Article 30(4) of Directive 93/37, to reject any abnormally low price which cannot be justified. It adds that the provision allows it to ask for details of the abnormally low prices and to reject the tender if those details are not convincing. In accordance with that provision, the Council twice questioned the applicant about a large number of abnormally low prices, but the applicant gave only vague explanations about the prices and merely stated that they were fair (see, in particular, paragraphs 16 to 19 above). The Council adds that the 'overall' method of replying to an invitation to tender used by the applicant is akin to speculation and therefore cannot be accepted.

49 Concerning the multiplication factor for general costs, the Council states that this is an important element of the organisation of the contract. That factor, according to the Council, was to be applied to the 'basic' prices for every job and, as it was part of the 'price of the tender' criterion, therefore appeared in the contract documents (see paragraphs 11 and 12 above). It points out that that coefficient was very high in the applicant's tender whereas it was significantly lower and in accordance with market practices in those of the other two tenderers. Therefore, the high percentage proposed by the applicant would have constituted a financial risk for the Council if the applicant, for tasks which were not provided for amongst the jobs specified in the summary, had had to call on subcontractors. In that situation, the actual cost for the Council would in fact have been made up of the price of the subcontracting or supply plus the aforementioned coefficient. In those circumstances, the actual cost for the Council would therefore have been significantly higher in the applicant's case than in the case of the other two tenderers. It is therefore for the applicant to show that the Council has seriously and manifestly exceeded its discretion by considering that the 20% coefficient which it proposed constituted a financial risk for the institution. Furthermore, the applicant has not adduced any evidence in support of its allegation that it was impossible to contain the nine costs referred to in the contract documents (see paragraph 12 above) within a margin of 6% to 8%, a margin which would have been in accordance with market practices.

50 The Council also points out that it was in its interest to compare the amount of the tenders not only over a year but also over the whole contractual period. It

considers that, since the contract documents stated that the contract was concluded for a five-year term, it was natural, and in its interest, to examine the costs of the various tenders over that period. The Council adds that, on the basis of that comparison, the applicant's tender was not the most economically advantageous because of its high cost plus rate. It states that the works in part C of the tender (the predefined projects) were to be carried out only once whereas those in parts A and B might be carried out during the whole of the term of the contract. The Council analysed the offers submitted by the candidates on a financial level using objective and identical criteria. Those two criteria '[are shown] clearly in the contract documents:

— theoretical volume of work over one year (= amount of tender), equals: A + B + 50% C;

— theoretical volume of work over five years (= term of contract), equals: 5A + 5B + 100 C'.

51 As for the applicant's argument that the Council considered a high multiplication factor and the term of the contract cumulatively (see paragraph 43 above), the Council declares that it does not understand what it means.

52 In respect of the qualitative criteria, the Council also points out that the applicant has not given a proper reply with regard to the fifth criterion (concerning the safety coordinator) and that its reply regarding the sixth criterion (concerning the subcontractors) is unsatisfactory.

Failure to state reasons

53 The applicant maintains that the Council blatantly disregarded the provisions of Article 8 of Directive 93/37, which required it to communicate within 15 days of the date of the request the reasons for the rejection of its tender. It maintains that it has also infringed the national provisions (the Belgian Law of 24 December 1993 on public procurement and certain works, supply and services contracts) applicable to the award of public contracts. Those rules require contracting authorities to state the reasons for their decisions and prohibit discriminatory practices. However, in the present case, the Council has merely formulated vague considerations, giving the applicant no opportunity to assess its real chances of obtaining the contract or the reasons for the decision taken.

54 The applicant considers that the application of the Belgian Law cannot be ruled out on the ground that Directive 93/37 alone governs the transparency and duty to state reasons of the Community contracting authority. In was stated, on page 32 of the contract documents, that, 'subject to specific provisions applicable to the European Communities, Belgian law is applicable to the contract'. The applicant also states that, by abandoning its application in Case T-205/00 (see paragraphs 28 and 29 above), it has not waived its right but only withdrawn the application. That application related only to the Council's decision to provide it with the administrative file requested and not the lawfulness of the Council's decision to reject its tender. The applicant claims that it may, in any event, still contest that latter decision as regards its statement of reasons under Article 8 of Directive 93/37.

55 The applicant claims that the Council's letter of 11 May 2000 (see paragraph 23 above), which is the first response to its request to be sent 'the official reasons adopted by the Community authority in order to eliminate it from the contract', cannot constitute the communication of the reasons for the rejection required by Directive 93/37, because that letter does not state any reasons. It adds that the

Council's letter of 14 June 2000 (see paragraph 26 above) likewise cannot constitute the required reasoning, because it was sent more than a month and a half after the applicant's first request and one month after its request for details of 15 May 2000 (see paragraph 24 above), and because it merely contains a classification of the three candidates according to the eight criteria, but without any reasons, except for the criterion concerning the price, the application of which is contested.

56 The Council considers that the applicant's claim alleging a lack of transparency is unfounded. It points out that the Belgian Law of 24 December 1993 is not applicable to the present case because the Council is required, as contracting authority for a public works contract, 'to comply with Directive 93/37, which alone governs the transparency and duty to state reasons of the Community contracting authority'.

57 The Council points out that the applicant brought an action for annulment, under Article 8(1) of that Directive, against its decision refusing to accede to its request for the 'administrative file' and that it abandoned that action because, during the proceedings before the Court of First Instance, the Council sent the file to it. It considers that it must be inferred from that abandonment that the applicant no longer contests — so far as concerns the reasons for the rejection decision — the lawfulness of that decision.

58 The Council states that it has fulfilled the duty to state reasons imposed by Directive 93/37 in that, first of all, by letter of 14 April 2000, it informed the applicant that its tender had been rejected, and then, by letter of 11 May 2000, replied to its express request of 26 April and 10 May 2000 to send it 'the official reasons adopted by the Community authority' in order to eliminate it from the contract. In the letter of 11 May 2000, the Council indicated to the applicant the procedure which had been followed, the reasons why its tender had been rejected and the reasons why De Waele's tender had been successful.

Findings of the Court

59 The second paragraph of Article 288 EC provides that, in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

60 In order for the Community to incur non-contractual liability, a number of conditions must be met: the conduct alleged against the institutions must be unlawful, the existence of damage must be shown, and there must be a causal link between the alleged conduct and the damage. With regard to the first of these conditions, case-law requires it to be shown that there has been a sufficiently serious breach of a rule of law intended to protect individuals (see to this effect *Bergaderm and Goupil* v *Commission*, cited above, paragraph 42, and Case T-210/00 *Biret and Cie* v *Council* [2002] ECR II-47, paragraph 52). 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 for non-contractual liability (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 19).

61 In the present case, as regards the condition relating to the unlawfulness of the Community's conduct, the applicant complains that the Council has infringed the provisions of Directive 93/37 by disregarding the limits of its power and manifestly failing to administer with diligence the procedure to award the contract, on account of the infringements stated in paragraph 35 above.

62 In that regard, it should be remembered that, according to settled case-law, the Council has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender (*Agence européenne d'interims* v *Commission*, paragraph 20, *Adia interim* v *Commission*, paragraph 49, and *Embassy Limousines & Services* v *Parliament*, paragraph 56).

63 When the institution has a discretion, the decisive test for finding that a breach of Community law is sufficiently serious is whether the institution concerned manifestly and gravely disregarded the limits on its discretion (see to this effect Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Others* [1996] ECR I-1029, paragraph 55; Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 25, and *Bergaderm and Goupil* v *Commission*, cited above, paragraph 43). It follows that the first condition for the Community to incur non-contractual liability is fulfilled only if it is established that the Council has committed the errors and infringements stated in paragraph 35 above and that they constitute a manifest and serious infringement of the limits on its discretion with regard to tendering procedures.

Preliminary observations

64 As a preliminary point, the Court considers it appropriate to recall some of the specific characteristics of the contract forming the subject of the invitation to tender in question. First, the contract was to be awarded not to the tender with the lowest price but to the most economically advantageous tender, which necessitates the application of various criteria which vary according to the

contract in question (see, in particular, paragraph 65 below). Secondly, the procedure was to lead to the conclusion of a framework agreement for a term of five years renewable for 12-month periods. Thirdly, the contract was mixed and consisted of three different types of work for which the methods of determining the price varied. Furthermore, part B of the contract consisted of a large number of jobs to be defined and remunerated only during the execution of the contract. In the light of the specific characteristics of the contract in question, the comparative assessment of the tenders which the Council had to carry out necessarily meant that it not only had to check the accuracy and reliability of the unit prices given in the tenders but also had to estimate the total cost of the types of job covered by the contract over a five-year period on the basis of the contract terms and the prices stated in the tenders.

Use of vague criteria

65 As regards the alleged vagueness of the award criteria, it should be pointed out, first of all, that the Council, when applying Article 30(1) of Directive 93/37, did not state in its invitation to tender 'the lowest price only' but 'the most economically advantageous tender'. In that regard, Article 30(1)(b) of Directive 93/37, concerning the most economically advantageous tender, provides that the applicable criteria shall be 'various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit'.

66 Under Article 30(2) of Directive 93/37, when a contract is awarded to the most economically advantageous tender, all the criteria on which the Council intends to base the award must be stated in the contract documents. Furthermore, the

provision leaves it to the Council to choose the criteria on which it proposes to base its award of the contract, provided that the criteria chosen are aimed at identifying the offer which is economically the most advantageous. In order to determine the economically most advantageous tender, the Council must be able to exercise its discretion, taking a decision on the basis of qualitative and quantitive criteria that vary according to the contract in question (see to this effect Case 274/83 *Commission* v *Italy* [1985] ECR 1077, paragraph 25).

67 In that regard, the Court recalls that, in connection with similar provisions in Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), the Court of Justice has held that Article 36(1)(a) of that directive cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature, because it cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority (Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 55).

68 It follows that Article 30(1)(b) of Directive 93/37 cannot be interpreted as meaning that each of the award criteria used by the Council to identify the most economically advantageous tender had necessarily to be either quantitative or related solely to the prices or rates contained in the summary. Various factors which are not purely quantitative may affect the execution of work and, as a result, the economic value of a tender. For instance, the experience and technical competence of a tenderer and its team, the familiarity with the kind of work covered by the contract in question and the quality of the subcontractors proposed are all qualitative factors which, if they do not reach the level required by the contract, may cause delays in the execution of the work or make additional work necessary. It follows that, even if some of the criteria mentioned in the contract documents for assessing a tenderer's competence to carry out the works are not expressed in quantitative terms, they may be applied objectively and

uniformly in order to compare the tenders and are clearly relevant for identifying the most economically advantageous tender.

69 In the present case, as the Council has stated (see paragraph 47 above), the eight criteria referred to in the contract documents, apart from the first criterion concerning the conformity of the tender, are qualitative and quantitative. Since the criterion concerning the conformity of the tender is absolute, a tender must be rejected if it does not conform with the contract documents. The second criterion, namely the price of the tender, is quantitative and serves as an objective basis for comparing the respective costs, prices and rates of the tenders. The other six criteria are qualitative and their principal role is to ensure that each tenderer has the competence and skill needed for executing the work of the contract. The Court considers that, although those six criteria, amongst them the experience and technical competence of the company and the quality of any subcontractors proposed, are not absolute or quantitative like the first two, they are nevertheless not vague and can all be evaluated objectively and specifically. Furthermore, it should be pointed out that criteria like the experience and technical competence of the company and the quality of any subcontractors proposed are factors which may affect the value of the tender and, contrary to what the applicant claims, it is appropriate that they should appear amongst the criteria of the contract documents.

70 The Court also notes that the applicant merely asserts that the award criteria mentioned in the contract documents did not make it possible to maintain equality of opportunity between the tenderers, without adducing the slightest evidence in that regard and without alleging that it had suffered discrimination itself. In any event, it is clear from the documents before the Court and the report to the CCAM that the three tenders in the case were examined with all due care and that the award criteria were applied without discrimination.

71 Consequently, it must be held that the eight award criteria listed in the contract documents were transparent and relevant in relation to the nature of the contract and that they sought to identify the most economically advantageous tender.

72 It is evident from the foregoing that the Council did not infringe the limits of its discretion when formulating the award criteria in the contract documents.

Use of criteria not specified in the contract documents

73 The applicant also considers that the Council did not base its choice of tenderer on the criteria indicated in the contract documents, but on other criteria of which the applicant was not advised, thus frustrating its legitimate expectations that the award procedure would be properly conducted. It rejected the applicant's tender on three grounds, namely the quoting in its tender of abnormally low prices, a multiplication factor which was too high and overall prices which were too substantial over the full five-year term of the contract. However, according to the applicant, it has given a reasonable explanation of the way in which it decided each of those elements, thus showing that the criteria actually applied to guide the Council's choice were unjustified and had frustrated its legitimate expectations.

74 With regard to the prices which the Council considered to be abnormally low, it is not disputed that the applicant, instead of providing individual prices for each item specified in the contract documents, as required, used overall rather than unit prices for certain items. According to the report to the CCAM, if a tenderer's prices were less than half as much as the prices of the other tenderers and of architects' estimates, they were regarded as abnormally low, which means that the prices in question were dubious. It is apparent from the file that the Council asked the applicant for details on several occasions about many prices which it considered did not even cover the supply of the materials and equipment. However, in spite of numerous contacts between the parties on that point, the applicant continued to retain the same prices in its tender. It stated that its practice was to give an overall price which allowed it to gain time when preparing its tender, and confirmed that its prices were correct. It also stated that it had

prepared its tender in liaison with some of its usual suppliers and confirmed its undertaking to execute the work in accordance with its tender (see paragraph 17 above).

75 The Court finds that the applicant cannot criticise the Council for checking many of the prices quoted in its tender. It is apparent from the wording of Article 30(4) of Directive 93/37 that the Council is under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders (Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 55). The Court notes, for example, that the Council, in its defence, stated that it had questioned the applicant about very many of the abnormally low prices, namely the price of 319 items in the summary out of a total of 1 020. It also asked the applicant for clarification regarding a series of very blatant anomalies and particularly about the price of the doors, which are the same for single doors, double doors or glass doors. The applicant has not provided adequate explanations for those anomalies either in its reply or at the hearing.

76 In that regard, the Court observes that, although Article 30(4) of Direcrtive 93/37 does not require the Council to check each price quoted in each tender, it must examine the reliability and seriousness of the tenders which it considers to be generally suspect, which necessarily means that it must ask, if appropriate, for details of the individual prices which seem suspect to it, *a fortiori* when there are many of them. Furthermore, the fact that the applicant's tender was considered to conform to the contract documents did not relieve the Council of its obligation, under the same article, to check the prices of a tender if doubts arose as to their reliability during the examination of the tenders and after the initial assessment of their conformity.

77 The Court finds that the Council correctly followed the procedure laid down by Article 30(4) of Directive 93/37 and, in particular, satisfied the requirements relating to the *inter partes* nature of the procedure by providing the applicant, on several occasions, with the opportunity to demonstrate that its tender was serious. In that regard, it is apparent from the correspondence between the parties and, in particular, from the applicant's letters to the Council of 24 January and 11 February 2000 (see paragraphs 17 and 19 above) that the applicant, in spite of specific requests from the Council, merely confirmed generally that the prices quoted in its tender were reasonable, without adducing the slightest evidence to establish the reliability of the individual prices.

78 The Council did not manifestly and seriously disregard the limits of its discretion in the matter by taking into consideration, when assessing the applicant's tender, the quoting of many abnormally low prices and the failure to give a convincing explanation which persisted even after the *inter partes* procedure laid down in Article 30(4) of Directive 93/37.

79 Therefore, the applicant's arguments relating to the abnormally low prices must be rejected.

80 The applicant considers that the Council was wrong to regard as too high the multiplication factor of 20% given in its tender for the 'general office costs' listed in paragraph 12 above. It maintains that it was impossible to contain those costs within a margin of 6% to 8% as De Waele and Strabag did in their tenders.

81 It should be observed that the applicant merely states that it was impossible without adducing any proof or evidence in that regard.

82 It should also be noted that the multiplication factor for the 'general office costs' proposed by the applicant was markedly higher than that of the other tenderers and, according to the Council, represented a financial risk for it if the applicant, for jobs which were not included in the jobs specified in the summary of the contract documents, had had to call on subcontractors. In reply to a written question posed by the Court before the hearing with the aim of establishing the genuineness of the alleged financial risk, the Council made an extrapolation — on the basis of the work carried out on one of its buildings during the first year of the contract with De Waele — from the figures and multiplication factor given by the applicant in its tender, in order to determine what the work would have cost if it had been done by the applicant. The Council then compared that cost with the cost of the work carried out by De Waele over a period of one year and over a period of five years, the term of the contract. Given that a significant part of the work in question was carried out by subcontractors, the result of that simulation was that the Council might have had to pay the applicant a sum considerably higher than that paid to De Waele for doing the same work. It follows that the Council was right, when carrying out the assessment designed to obtain the most economically advantageous tender over the five years of the term of the contract, to take into consideration the potential effect of the difference between the multiplication factor of 20% proposed by the applicant and that proposed by the other tenderers.

83 The Court therefore considers that the applicant has not established that the Council committed a manifest and serious error of assessment by considering, when assessing its tender, that the multiplication factor of 20% represented a financial risk. Furthermore, the fact that the Council did not recommend, in the contract documents, that that factor should be as low as possible is irrelevant, because the very purpose of the summary is to require tenderers to quote all their prices, including the multiplication factor, whether they are high or not, which, depending on the circumstances, will bind the parties.

84 The applicant's arguments relating to the multiplication factor for the 'general office costs' must therefore be rejected.

85 As regards the calculation, made by the Council when assessing the tenders, of their price over a five-year term, the applicant considers that the Council incorrectly concluded that its tender was less competitive in the long term. It points out *inter alia* that 'the formula' of '5A + 5B + C' used by the Council does not appear in the contract documents and that that calculation method was unforeseeable at the time of the invitation to tender. It also maintains that the calculation method is misconceived because it gives an overall price which cannot correspond to the actual cost of the work over the five-year period.

86 The Court makes the preliminary point that, in regard to that matter, the Council had a wide discretion and the review of the Court must be limited to verifying the lack of a serious and manifest error. First of all, although the contract documents did not contain the formula in question, the invitation to tender and the contract documents clearly specified that the term of the contract was normally five years (see, in particular, paragraph 7 above). In fact, the application of the formula in question permitted an extrapolation, on the basis of the terms of the offers submitted by the three tenderers, of the total cost to the Council of the contract over five years taking into consideration the different characteristics of the jobs in parts A, B and C of the summary. Although the tender price of EUR 3 946 745.49 per annum submitted by the applicant (see paragraph 15 above) was lower than the annual price of the other two tenders, the extrapolation made by the Council enabled it to compare the overall economic advantages of the three tenders in the light of the five-year term of the contract and the specific characteristics of the jobs specified in parts A, B and C of the summary. That enabled the Council to judge that the applicant's tender was the most expensive in the long term. The Court finds that, although the formula stated in paragraph 85 above was not given in the contract documents, the use of such a formula was nevertheless foreseeable and reasonable, particularly in the light of the duration of the contract in this case.

87 The Court considers that the applicant's arguments set out in paragraph 43 above are incomprehensible. The applicant's replies to the questions put to it before and during the hearing were not sufficient to elucidate those arguments for the Court. They must therefore be rejected pursuant to Article 44(1)(c) of the Rules of Procedure (Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-1703, paragraph 49).

88 It is apparent from the foregoing that the applicant has not established that the Council committed a manifest and serious error in the assessment of the price of the tenders over the term of the contract. Consequently, the applicant's arguments relating to the evaluation of the tender prices must be rejected.

Failure to state reasons

89 As regards the alleged infringement of the duty to state reasons in this case, the Court points out that the claim for damages in the amount of EUR 26 063 000 lodged by the applicant (see paragraph 33 above) includes *inter alia* a claim for EUR 24 000 000 by way of compensation for the harm resulting from the loss of the chance of being awarded the contract in issue. It must be observed that, even if it were to be considered that the Council did not give adequate reasons for rejecting the applicant's tender, that does not mean that the award of the contract to De Waele constituted an error or that there is a causal link between that fact and the loss alleged by the applicant.

90 With regard to the Council's arguments set out in paragraph 57 above, the Court finds that the action brought by the applicant in Case T-205/00 sought the annulment of the Council's decision refusing to grant it access to the administrative file relating to the assessment of the tenders and was therefore brought

against a decision other than the contested decision. That action, since the applicant has abandoned it, has no bearing on the present action.

91 As regards the applicant's argument set out in paragraph 54 above relating to the Belgian legal provisions on invitations to tender, the Court finds that the inclusion, in paragraph 26(a) of the contract documents, of the words 'Belgian law is applicable to the contract' was intended to submit the eventual conclusion of the contract and the execution of the work to which it related to the relevant provisions of Belgian law. On the other hand, it does not cover the procedures prior to conclusion of the contract, which are governed exclusively by Directive 93/37. Consequently, it is necessary to determine the extent of the Council's duty to state reasons in respect of a tenderer who has not been successful in the award procedure under Article 8(1) of Directive 93/37, as amended by Directive 97/52.

92 It is apparent from this last provision and from the judgment in *Adia interim* v *Commission*, cited above, that the Council fulfils its obligation to state reasons if it first informs eliminated tenderers immediately of the fact that their tender has been rejected by a simple unreasoned communication and then subsequently, if expressly requested to do so, informs tenderers of the relative characteristics and advantages of the successful tender and the name of the successful tenderer within 15 days of receipt of a written request.

93 Such a manner of proceeding satisfies the purpose of the duty to state reasons enshrined in Article 253 EC, according to which the reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to 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 power of review (Case T-166/94 *Koyo Seiko* v *Council* [1995] ECR II-2129, paragraph 103, and *Aida interim* v *Commission*, cited above, paragraph 32).

94 Consequently, in order to determine whether the Council fulfilled its obligation to state reasons, the Court considers that it is necessary to examine the letter of 11 May 2000 sent to the applicant in response to its express request of 26 April 2000.

95 Clearly, in its letter of 11 May 2000, the Council gave a sufficiently detailed statement of the reasons for which it had rejected the applicant's tender and stated the characteristics and advantages of De Waele's tender. That letter clearly indicates the procedure which was followed to evaluate the tenders of the three tenderers and the fact that De Waele's tender was successful because it was the most economically advantageous. The Court considers that the applicant could immediately identify the specific reason for the rejection of its tender, namely the fact that it was economically less advantageous than that of De Waele. The Council added that the applicant's tender was not ranked higher than De Waele's for any of the eight criteria referred to in the contract documents.

96 In any event, and contrary to what the applicant claims (see paragraph 55 above), the Council's letter of 14 June 2000 may also be taken into consideration in order to examine whether the statement of reasons in this case was adequate, because the duty to state reasons must be assessed in the light of the information available to the applicant at the time the application was brought. If, as in the present case, the applicant, before bringing an action but after the date laid down by Article 8(1) of Directive 93/37, asks the institution concerned for additional explanations about a decision and receives those explanations, it cannot ask the Court not to take them into consideration when determining whether the statement of reasons is adequate; however, the institution is not permitted to substitute an entirely new statement of reasons for the original statement of reasons, but that is not the position in this case. In its letter of 14 June 2000, the Council, supplementing its letter of 11 May 2000, provided explanations which were more detailed but which correspond to the explanations given in the letter of 11 May as regards the rejection of the applicant's tender. Moreover, the Court considers that the fact that fuller information was given in the letter of 14 June 2000 does not mean that the reasons stated in the letter of 11 May 2000 were inadequate.

97 It follows that the applicant cannot rely on the alleged infringement of the duty to state reasons.

98 It is apparent from the foregoing considerations that the applicant has not established that the Council disregarded the limits of its discretion or, therefore, that it committed a sufficiently serious infringement of Community law.

99 The first condition for Community liability, namely the unlawfulness of the conduct of the institution complained of, not having been satisfied, the applicant's claim for damages must be dismissed, without there being any need to consider whether the other conditions are satisfied.

Costs

100 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Council has applied for costs, the applicant must be ordered to pay its own costs and those incurred by the Council.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay its own costs and those incurred by the Council.

Cooke García-Valdecasas Lindh

Delivered in open court in Luxembourg on 25 February 2003.

H. Jung J.D. Cooke

Registrar President