JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
29 October 1998 *

In Case T-13/96,

TEAM Srl, a company incorporated under Italian law, represented by Antonio Tizzano, Gian Michele Roberti and Francesco Sciaudone, of the Naples Bar, 36 Place du Grand Sablon, Brussels,

applicant,

v

Commission of the European Communities, represented by Marie-José Jonczy, Legal Adviser, and Lucio Gussetti, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION, at the stage ultimately reached in the proceedings, for compensation in respect of the damage suffered by the applicant as a result of the Commission decision, contained in a letter of 16 November 1995, annulling the tender-

* Language of the case: Italian.

ing procedure for a feasibility study for the modernisation of a railway junction in Warsaw on the E-20 line, and of the restricted invitation to tender of 4 December 1995 for a feasibility study for the modernisation of the Warsaw railway node on the E-20 TEN line,

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

composed of: P. Lindh, President, K. Lenaerts and J. D. Cooke, Judges,

Registrar: M. Johansson, Legal Secretary,

having regard to the written procedure and further to the hearing on 25 June 1998,

gives the following

Judgment

Legal background and facts of the case

1 The applicant, TEAM Srl, is an engineering consultancy company incorporated under Italian law specialising in the construction, management and maintenance of civil engineering, industrial and infrastructure projects.

2 The PHARE programme, based on Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic (OJ 1989 L 375, p. 11), as amended by Council Regulations (EEC) No 2698/90 of 17 September 1990 (OJ 1990 L 257, p. 1), No 3800/91 of 23 December 1991 (OJ 1991 L 357, p. 10), No 2334/92 of 7 August 1992 (OJ 1992 L 227, p. 1), No 1764/93 of 30 June 1993 (OJ 1993 L 162, p. 1) and No 1366/95 of 12 June 1995 (OJ 1995 L 133, p. 1), and designed to extend economic aid to other countries of central and eastern Europe, is the framework within which the European Community channels economic aid to the countries of central and eastern Europe in order to implement measures intended to support the process of economic and social reform under way in those countries.

3 Article 3(2) of Regulation No 3906/89 provides as follows:

'Account shall be taken, *inter alia*, of the preferences and wishes expressed by the recipient countries concerned in the choice of measures to be financed pursuant to this regulation.'

4 Article 23 of the General Regulations for Tenders and the Award of Service Contracts financed from PHARE/TACIS Funds, in the version thereof applicable at the material time in the present case, provides as follows:

'Annulment of the tendering procedure

1. The Contracting Authority may, prior to awarding the contract, without thereby incurring any liability to the Tenderers, and notwithstanding the stage in the procedures leading to the conclusion of the contract, either decide to close or annul the tender procedure in accordance with paragraph 2, or order that the procedure be recommenced, if necessary, on amended terms.

2. A tender procedure may be closed or annulled in particular in the following cases:

(a) if no tender satisfies the criteria for the award of the contract;

(b) if the economic or technical data of the project have been significantly altered;

(c) if, for reasons connected with the protection of exclusive rights, the services can only be provided by a particular firm;

(d) if exceptional circumstances render normal performance of the tender procedure or contract impossible;

(e) if every tender received exceeds the financial resources earmarked for the contract;

(f) if the tenders received contain serious irregularities resulting in interference with the normal play of market forces; or

(g) if there has been no competition.

3. In the event of annulment of any tender procedure, Tenderers who are still bound by their tenders shall be notified thereof by the Contracting Authority. Such Tenderers shall not be entitled to compensation.'

5 On 13 June 1995 the Commission issued a restricted invitation to tender for a feasibility study for the modernisation of a railway junction in Warsaw on the E-20 line ('the invitation to tender of 13 June 1995'). That invitation to tender was sent to, amongst others, the applicant and Centralne Biuro Projektowo-Badawcze Budownictwa Kolejowego (Kolprojekt) (hereinafter 'Kolprojekt'), a Polish public-owned company providing railway engineering consultancy services. Having formed a consortium to take part jointly in the procedure ('the consortium'), with Kolprojekt acting as the lead tenderer, the two undertakings submitted their tender.

6 By fax of 16 November 1995 from the Head of Unit 2 (Poland and the Baltic States) of Directorate B (Relations with Central Europe) in Directorate-General IA (External Relations: Europe and the new independent States, common foreign and security policy and external missions) ('Unit IA. B.2'), the Commission informed the tenderers that the invitation to tender had been cancelled due to the introduction of new objectives and modified terms of reference ('the contested decision').

7 On 4 December 1995 the Commission issued, 'on behalf of the Government of Poland', a new restricted invitation to tender for a feasibility study for the modernisation of the Warsaw railway node on the E-20 TEN line ('the contested invitation to tender'). The shortlist of undertakings invited to submit tenders included the applicant, but not Kolprojekt. The terms of reference stated, under the heading 'Staff and local participation', that the successful tenderer would be required to work with Kolprojekt and that the budget allocated for the participation of the latter company was to be 25% of the financial offer.

8 By letter of 11 December 1995 addressed to the Head of Unit IA. B.2, the applicant expressed astonishment that the terms of reference contained in the contested invitation to tender were exactly the same as those contained in the invitation to tender of 13 June 1995, in response to which it had submitted a project in the context of the consortium with Kolprojekt.

9 By letter of 12 December 1995, also addressed to the Head of Unit IA. B.2, Kolprojekt informed the Commission that it had received requests for cooperation from various undertakings invited to submit tenders in response to the contested invitation to tender, in relation to which it had apparently been appointed to act as a local subcontractor. It stated that it had entered into 'a standing and valid cooperation agreement' with the applicant concerning the feasibility study in question, and requested information in that regard.

10 By fax of 21 December 1995, the Head of Unit IA. B.2 announced that, in response to questions and remarks from several tenderers pointing to a lack of clarity in the terms of reference as regards available data, data collection and the involvement of the Polish institutions, the Commission would clarify the matter with the Polish authorities with a view to issuing more precise terms of reference during January and setting a new deadline for the submission of bids. The fax stated that the submission of bids was, in the meantime, deferred and the deadline postponed.

Procedure and forms of order sought

11 By application lodged at the Registry of the Court of First Instance on 26 January 1996, the applicant and Kolprojekt brought the present action, claiming that the Court should:

— annul the Commission decision contained in the letter of 16 November 1995 from the Head of Unit IA. B.2 and the contested invitation to tender;

— award them compensation for the damage suffered;

— order the Commission to pay the costs.

12 By fax of 28 May 1996, the Ministry of Transport and Maritime Economy of the Republic of Poland asked the Commission to withdraw the Warsaw railway junction study from the PHARE PL 9406 programme and to replace it with other urgent railway projects. It pointed out that the tendering procedure had been suspended for several months and that the study could not be undertaken. The ministry also mentioned external factors relating to the planned modernisation of the junction, in particular the improvement of the Warsaw-Terespol section of the E-20 railway line and new priority pre-investment activities for the E-65 line (Warsaw-Gdynia section, Crete Corridor VI).

13 By letter of 3 June 1996, the Deputy Director-General of DG IA informed the Polish ministry that the Commission had acceded to its request. He further explained that, since there was no longer any reason to proceed with the invitation to tender for the study, the Commission had decided to annul the whole procedure on the basis of Article 23(2)(d) of the General Regulations.

14 By letter of the same date, the Director of Directorate IA. B informed the applicant and Kolprojekt of the Polish ministry's request and of the Commission's consequent decision to annul the whole tendering procedure on the basis of Article 23(2)(d) of the General Regulations.

15 By document received at the Court Registry on 10 June 1996, the Commission raised a procedural issue, in which it asked the Court to rule that the application for annulment should not proceed to judgment, declare the claim for damages inadmissible or, in the alternative, dismiss it as unfounded, and order the applicant and Kolprojekt to pay the costs of the claim for damages.

16 By order of 13 June 1997 in Case T-13/96 *TEAM and Kolprojekt* v *Commission* [1997] ECR II-983, the Court of First Instance (Fourth Chamber) ruled that there was no longer any need to give a decision on the application for annulment, reserved for the final judgment its decision on the application for a declaration that the claim for damages was inadmissible and reserved the costs.

17 On 16 June 1997 the Court requested the Commission, as a measure of organisation of procedure, to produce copies of the PHARE PL 9406 programme and of the financing memorandum relating to that programme. By letter of 24 June 1997, the Commission lodged the documents requested.

18 In its defence, lodged at the Court Registry on 16 July 1997, the Commission raised a procedural issue concerning the identity of the applicant parties, in which it asked the Court to:

— declare the claim for damages inadmissible, or alternatively dismiss it as unfounded;

— order the applicant and Kolprojekt to pay the costs relating to the claim for damages.

19 In its reply, the applicant claims that the Court should:

— uphold the claim for damages;

— order the Commission to pay the costs of the proceedings, including those relating to the application for annulment, which had been reserved by the order made in *TEAM and Kolprojekt* v *Commission*, cited above.

20 By order of 8 May 1998 in Case T-13/96 *TEAM and Kolprojekt* v *Commission* (not published in the European Court Reports), the President of the Fourth Chamber of the Court of First Instance, having been informed by the applicants in the reply that Kolprojekt wished to withdraw from the present proceedings, ordered the latter's name to be removed from the Court register.

21 By letters of 11 May and 4 June 1998, the Court requested the Commission, pursuant to Article 64 of its Rules of Procedure, to produce the non-confidential version of the minutes, notes and memoranda relating to the contested decision and the contested invitation to tender, together with the correspondence exchanged between the Commission and the Polish authorities between 13 June and 4 December 1995 concerning the conduct of the two invitations to tender in question. The Commission replied to that request by letter of 5 June 1998.

Admissibility

Arguments of the parties

22 The Commission maintains that the claim for damages is inadmissible, since it does not comply with Article 44 of the Court's Rules of Procedure and consequently violates the rights of the defence. An action for damages is admissible only if it is complete and thus enables the defendant to prepare a proper defence. In the present case, the applicant has not specified in its application, even in approximate terms, the sums corresponding to the damage pleaded by it. The absence of those essential elements cannot be justified on any objective ground. The applicant could, and therefore should, have quantified both the loss allegedly sustained and the alleged loss of profit pleaded by it. As to the damage resulting from the harm to its image, it is not surprising, in view of the extremely vague nature of the damage itself, that the applicant did not quantify its claim at the outset.

23 The Commission points out that it was not until the stage of the reply that the applicant reformulated its claim for damages, finally making clear the legal framework of the dispute, as regards both the identity of the applicant parties and the factual and legal matters relied on in support of the claim.

24 The applicant considers that the objection of inadmissibility is manifestly unfounded. In the application, it specified with clarity and precision the nature of the damage, its constituent elements and the criteria on the basis of which it was to be calculated, and reserved the right to provide details in the reply only as regards the quantification of the damage. In particular, it stated that the damage caused by the conduct of the Commission included the loss which it had suffered, a loss of profit and the harm caused to its image.

25 The applicant points out that, according to the case-law, the subject-matter of an action is to be regarded as inadequately stated only if there is a complete absence of any indication of the nature and extent of the damage and if the claim seeks compensation in general terms, without providing any other details (Case T-64/89 *Automec* v *Commission* [1990] ECR II-367). Where, by contrast, the evidence and criteria for determining the damage have already been set out in the application, as in the present case, the applicant is quite entitled to quantify the damage, properly so called, at a later stage and may, where appropriate, do so in response to specific requests from the Community judicature (Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677).

26 As to the violation of the rights of the defence, it is clear from case-law that the absence of any indication in the application of the quantum of damage does not affect the ability of the defendant institution to defend itself, since the latter has been 'able to discuss the figures produced by the applicants in their reply, both in its rejoinder and during the oral procedure' (see Joined Cases 29/63, 31/63, 36/63, 39/63 to 47/63, 50/63 and 51/63 *Usines de la Providence and Others* v *High Authority* [1965] ECR 911 and the Opinion of Advocate General Roemer in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at 117).

Findings of the Court

27 According to Article 19 of the EC Statute of the Court of Justice, which is applicable to proceedings before the Court of First Instance by virtue of the first paragraph of Article 46 of that Statute and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, an application must, *inter alia*, specify the subject-matter of the dispute and contain a brief statement of the grounds on which the application is based. In order to fulfil those requirements, an application seeking compensation for damage allegedly caused by a Community institution must state the evidence from which the conduct alleged by the applicant against the institution may be identified, the reasons for which the applicant considers there to be a causal link between the conduct and the damage which he claims to have suffered and the nature and extent of that damage. A claim for an unspecified form of damage, however, is not sufficiently specific and must therefore be regarded as inad-

missible (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, paragraph 9, and *Automec* v *Commission*, cited above, paragraph 73).

28 The applicant stated in its application that the damage which it had sustained comprised the loss suffered by it, corresponding to the charges and expenses incurred as a result of its participation in the tendering procedure, the loss of profit arising from the fact that the contract was not awarded, to be assessed in terms of a proportion, not less than 30%, of the overall value of the contract — that percentage being sufficient to cover the normal profit margin and an appropriate sum to cover general expenses — and the harm caused to its image, because the annulment of the invitation to tender of 13 June 1995, for allegedly obscure and incomprehensible reasons, threatened to jeopardise its reputation and to compromise its chances of being awarded other contracts.

29 Although the applicant has not quantified the damage which it claims to have suffered, it has clearly indicated the evidence on the basis of which its nature and extent can be assessed, and the Commission has therefore been able to prepare its defence. In those circumstances, the absence of figures in an application cannot affect the Commission's rights of defence, provided that the applicant has produced those figures in its reply, thereby enabling the defendant to discuss them in its rejoinder and at the hearing, as was the position in the present case (see, to that effect, *Usines de la Providence and Others* v *High Authority*, cited above, at 935).

30 It follows that the claim for damages is admissible.

The effect on the claim for damages of the order of 13 June 1997 in *TEAM and Kolprojekt* v *Commission* ruling that there was no need to give a decision on the application for annulment

Arguments of the parties

31 The Commission maintains that the ruling that there was no need to give a decision on the application for annulment, made in the order of 13 June 1997 in *TEAM and Kolprojekt* v *Commission*, directly affects the claim for damages. The action as a whole links the damage allegedly suffered by the applicant to the existence of specific tendering procedures, of which the contested decision and the contested invitation to tender form part. Since the entire tendering procedure relating to the study was annulled, the applicant cannot claim to have suffered any reparable damage justifying the pursuit of its action.

32 The Commission recalls in that connection that the applicant incurred charges and expenses in participating in the procedures, irrespective of the outcome of the invitation to tender. The applicant was aware, prior to participating in the tendering procedure in question, of the principle set out in Article 23(3) of the General Regulations, according to which, in the event of the annulment of any tendering procedure, the participants are not entitled to any compensation for the expenses incurred; that principle remains wholly applicable.

33 The Commission further argues that the loss of profit pleaded by the applicant presupposes a positive outcome to the tendering procedure, whereas the Court found, in its order of 13 June 1997 in *TEAM and Kolprojekt* v *Commission*, that such an outcome was no longer possible. Consequently, the claim for damages is pointless, both from a procedural point of view and as regards the substance of the case, since the alleged damage is in any event pleaded on the basis of a positive outcome to an invitation to tender which could, by definition, no longer be completed in that the contract could not be signed in the absence of financing.

34 According to the Commission, the applicant acknowledges that it was not the Commission but the Polish authorities which, by deciding to withdraw from the project under the PHARE PL 9406 programme, occasioned the damage which it claims to have suffered (see paragraph 37 below). It was that withdrawal which was the real cause of the damage which the applicant allegedly suffered and which, previously, could only have been theoretical.

35 Consequently, the order of 13 June 1997 in *TEAM and Kolprojekt* v *Commission* had a direct and decisive impact on the existence of the applicant's interest in claiming damages.

36 The applicant rejects the Commission's argument that the annulment of the entire tendering procedure means that it cannot have suffered any reparable damage justifying the pursuit of its action. That argument completely disregards the specific protective function served by an action for damages. It was the annulment of the second tendering procedure which in fact definitively crystallised the damage suffered by the applicant, since it precluded any possibility of remedying that damage by any means other than the action for compensation.

37 Community law recognises the principle that the interests of participants in a tendering procedure are to be protected against acts, omissions and conduct on the part of the administration which, in the absence of any objective justification in the public interest, adversely affect the proper course of that procedure and unlawfully harm the interests of those participating in it. Where difficulties arise with regard to the procedure for awarding the contract after an action has been brought, that is to say, after the damage pleaded has already crystallised, they cannot in any way have the effect of limiting the right to compensation for the damage which has actually been suffered. The applicant further maintains that the withdrawal of the feasibility study forming the subject-matter of the two invitations to tender was a supervening event brought about in part by the Commission itself as a result of its dilatoriness in awarding the contract. The fact that, as a result of the Commission's conduct, which prevented the contract from being awarded in the normal way, the Polish authorities subsequently requested the withdrawal of the study from the PHARE programme in question cannot remedy the damage suffered.

38 The Commission's observations aimed at showing that the action for damages is devoid of purpose are misleading. First, as regards the loss suffered by the applicant, the Commission's objection that, under Article 23(3) of the General Regulations, expenses occasioned by participation in the tendering procedure are not reimbursable concerns the merits of the application and not its admissibility. Second, the annulment of the procedure for awarding the contract meant that the only way in which the applicant could seek to protect itself against the loss of profit which it had suffered and the harm caused to its image was by bringing an action for damages. The claim for damages is intended to secure compensation for the damage caused by the Commission's unlawful conduct, and the actual existence of that damage and its causal link with that conduct are matters which fall to be considered in the context of the substance of the case.

Findings of the Court

39 The object of the applicant's claim for damages is to secure compensation for the damage allegedly suffered by it as a result of the unlawful conduct of the Commission in the course of the tendering procedure. That object is unaffected either by the fact that the feasibility study forming the subject-matter of both the invitation to tender of 13 June 1995 and the contested invitation to tender is no longer to be carried out, and that there is therefore no longer a contract to be awarded, or by the order of 13 June 1997 in *TEAM and Kolprojekt* v *Commission*. On the contrary, in the present case, the applicant continues to have every interest in obtaining damages from the Commission, in view of the fact that its application for annulment can no longer be successful.

40 The Court is unable to accept the Commission's arguments that (1) the charges and expenses incurred as a result of participation in the tendering procedures were unconnected with the outcome of the invitations to tender in question, (2) the loss of profit pleaded by the applicant cannot be said to have arisen since there can no longer be a positive outcome to the tendering procedure, (3) since the tendering procedure has been annulled, it can no longer affect the applicant's image and (4) it was the Polish authorities who, by withdrawing the feasibility study, gave rise to the damage alleged. It is sufficient in that regard to note that, as the applicant cor-

rectly maintains, the actual existence of the damage pleaded and its causal link with the conduct alleged against the Commission are matters which must be considered in the context of the substance of the case.

41 It follows that the claim for damages is not devoid of purpose and that the Commission's arguments in that regard must be rejected.

Substance

Arguments of the parties

42 The applicant maintains that, having issued an invitation to tender and ensured that the tendering procedure followed its normal course almost until its completion, the Commission changed its mind without warning and adopted measures wholly lacking in any objective justification or consistency. That conduct on the part of the Commission constitutes a misuse of powers and a breach of the principle of sound administration.

43 The fundamental aim of the tendering procedure within the PHARE programme, as in the case of other similar procedures, is to determine the most advantageous bid for the purposes of awarding the contract. Although the Commission is empowered to annul a procedure which is objectively incapable of securing that result, its annulment of a procedure which fully enables the identity of the tenderer to whom the contract should most appropriately be awarded to be ascertained is contrary to the public interest and to the rights and interests of the individual undertakings submitting tenders.

44 This is confirmed by Article 23 of the General Regulations, which, in conferring on the contracting authority the power to annul and, where appropriate, to recommence a tendering procedure, specifies the main cases in which that power may be exercised. It follows that the procedure may be annulled where, due to specific objective circumstances, it is clearly apparent that it cannot follow its normal course and cannot therefore attain its goal.

45 In the present case, there was no objective reason justifying the termination of the procedure in respect of the invitation to tender of 13 June 1995 and the commencement of a new procedure. In particular, there was no reason connected with the credibility of the assessment carried out by the evaluation committee, with the need to issue a new invitation to tender based on modified objectives or amended terms of reference, or with the content of the tender submitted by the consortium. Furthermore, the role allocated to Kolprojekt in the contested invitation to tender was unclear.

46 The Commission's conduct throughout the procedure was manifestly arbitrary and negligent. Instead of proceeding expeditiously to award the contract on the basis of the guidelines laid down in July 1995 by the evaluation committee and in full compliance with the principle that the contract should be awarded to the tenderer submitting the most advantageous bid, the Commission inexplicably decided to annul the invitation to tender of 13 June 1995 and to issue a fresh invitation.

47 In the circumstances, the Commission rendered itself liable for the following infringements, which caused the applicant serious actual damage:

— it unfairly ignored the results of the analysis of the tenders carried out by the evaluation committee;

— according to the information available, it exerted pressure on the evaluation committee in order to secure a rectification of the assessments made by the latter;

— it manifestly committed a misuse of powers and a breach of the principle of sound administration by annulling the invitation to tender of 13 June 1995 and by deciding thereafter to issue a new invitation to tender;

— its conduct throughout was contradictory, arbitrary, manifestly negligent and unjustified.

48 The applicant asserts that the damage suffered by it consists of three elements, namely, the loss sustained (*damnum emergens*), loss of profit (*lucrum cessans*) and harm to its image.

49 The loss sustained corresponds to the charges and expenses which the applicant incurred in participating in the tendering procedure. That loss, according to the applicant, is made up of the remuneration of the staff employed in the development of the project and of any necessary travel and subsistence expenses, amounting to a total of LIT 66 682 000 (equivalent to ECU 33 341). That sum, corresponding to the applicant's share of the loss suffered by the consortium, was calculated on the basis of the unit costs indicated in the tender which it submitted in the tendering procedure.

50 The applicant contests the Commission's argument that, under Article 23(3) of the General Regulations, no compensation is payable for loss. It asserts that the principle that the expenses and charges in question are to be reimbursed in the event of any irregularity in the tendering procedure, irrespective of the actual or possible outcome of the procedure from the point of view of the party concerned, is an established principle forming part of the Community rules on the award of public contracts. That principle, which is applicable not only to the Member States but also to the institutions, is based on the notion that a participant in a procedure for the award of a public contract should have at least a chance of being awarded the contract, and that it is precisely that prospect which causes him to incur the expenses and charges involved in preparing his bid. If that chance were reduced to zero by an irregularity in the conduct of the procedure, the participant would be entitled to require the institution to reimburse to him the expenses needlessly incurred (see in that regard the statement of reasons contained in Proposal

COM(91) 158 final — SYN 292, which culminated in the adoption of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14). It was that approach which resulted in Article 2(7) of that directive, which provides that, where an interested party claims damages representing the costs of preparing his bid, he is not required to prove that the contract would have been awarded to him but merely that an infringement has been committed and that, as a result, his chances have been adversely affected.

51 The loss of profit stems from the loss arising as a result of the failure to award the contract. That loss must be assessed in terms of a proportion — not less than 30% — of the overall value of the contract, that percentage being sufficient to cover the normal profit margin and an appropriate sum to cover general expenses. The applicant states that the damage in that regard amounts to LIT 396 000 000 (equivalent to ECU 198 000, or 30% of the bid of ECU 660 000), of which it quantifies its share in the sum of LIT 277 000 000, corresponding approximately to the level of its participation in the consortium, namely 70%.

52 The existence of that damage would be even more apparent if it were confirmed that the evaluation committee had considered the consortium's bid to be the most favourable. The applicant states that, since an award of compensation for loss of profit in the field of public contracts is intended to place the bidder in the situation in which he would have found himself if the irregularities alleged had not been committed, it is necessary to determine what the consortium's real chances of being awarded the contract actually were. The applicant draws attention to the fact that it has never claimed to have any absolute right to be awarded the contract, but simply pointed out that procedures for awarding contracts are subject to the principles of transparency and equality and to the principle that the contract should be awarded to the tenderer submitting the most economically advantageous bid (see Article 22(7) of the General Regulations). If it were established that the consortium's bid was the most advantageous and that the refusal to award the contract was due not to objective reasons pertaining to the public interest but solely to a repeated series of irregularities and negligent acts or omissions on the part of the Commission, the applicant should not be deprived of all legal protection. Having regard to the apparently positive assessment of its bid made by the evaluation committee, there can be no doubt of its entitlement in the present case to rely on

the wholly reasonable and well-founded expectation that it would be awarded the contract.

53 As to the damage resulting from the harm to its image, the applicant states that it is a well-known undertaking in Poland. Consequently, the annulment, for obscure and incomprehensible reasons, of the invitation to tender of 13 June 1995 threatens seriously to jeopardise its reputation and to compromise its ability successfully to participate in procedures for the award of new contracts. That damage must be quantified fairly, taking into account not only the fact that it is well known but also the fact that it participates in numerous international tendering procedures and has several times taken part in tendering procedures under the PHARE programme in which it has been awarded contracts, the fact that the problems arising in the present case have had wide repercussions and the fact that the reasons for which the procedure was discontinued, which remain obscure, have objectively discredited its technical and professional expertise. The applicant assesses that damage as amounting to at least LIT 350 000 000, subject to such equitable assessment as the Court may make.

54 The applicant states that its image has been harmed not by the fact of its not having been awarded the contract but by the unlawful and unprofessional manner in which the procedure was conducted, which leads to that result. It maintains that, in the context of various tendering procedures throughout Europe, its representatives have repeatedly been faced with requests for clarification concerning the outcome of the invitation to tender at issue. Moreover, since that procedure, and particularly since the institution of the present proceedings, the applicant, despite its estimable, and frequently highly esteemed, professional reputation, has not succeeded in securing a contract in any other tendering procedure organised by the Community or by any country covered by the PHARE programme. It mentions, by way of example, an invitation to tender for another feasibility study in Poland in which it was not even included on the shortlist of undertakings invited to submit tenders.

55 As regards the existence of a causal link, the applicant maintains that its chances of winning the contract, the prospect of which prompted it to incur the expenses involved in participating in the tendering procedure, were completely reduced to zero as a result of the Commission's irregular conduct, so that those expenses have become a totally unjustified pecuniary loss. It was precisely and solely the conduct of the Commission, in the form of its failure to award the contract following the first invitation to tender, the annulment of that procedure, the issue of a new invitation to tender without any objective reason for it and the suspension *sine die* of the latter procedure which rendered the applicant's participation in the tendering procedure entirely pointless and thus gave rise to the ensuing loss.

56 That conduct, and the very substantial cumulative delay which occurred, also prompted the Polish Government to modify its priorities and propose to the Commission the withdrawal of the project itself; that withdrawal led in turn to the ultimate annulment of the procedure for the award of the contract. Consequently, it was the arbitrary and negligent conduct of the Commission, still continuing after the action was brought, which caused the applicant serious damage.

57 Similar considerations apply both to the applicant's loss of profit and to the harm caused to its image.

58 The Commission considers that there is no need, in view of its arguments concerning the alleged damage and the existence of a causal link, to examine the merits of the allegation that it acted unlawfully, particularly since the annulment of the entire procedure for lack of financing renders all further analysis superfluous. It rejects the allegations in question and denies having acted unlawfully in any way, observing, moreover, that no evidence has been adduced in support of the claim for damages.

59 The Commission maintains that the loss suffered by the applicant, that is to say, the expense incurred by its participation in the tendering procedure, is irreparable. It recalls that, according to a general principle applying to tendering procedures

which is expressly restated in Article 23(3) of the General Regulations, costs and expenses incurred in the course of participation in a tendering procedure are not reimbursable.

60 Moreover, the expenses incurred do not constitute 'damage' in the true sense of the term, since they form part of the normal uncertainties involved in any tendering procedure, which include not only the possibility that the tenderer concerned will not be awarded the contract, which is not infrequently the case, but also the possibility that the contract may not be awarded at all, a contingency which falls within the discretion of the contracting authority.

61 As to the 'chances' afforded by a tendering procedure, the Commission points out that the applicant has itself conceded that its losses were caused by the Polish Government's decision not to proceed with the financing of the project (see paragraph 37 above). Consequently, the Commission cannot be under any liability whatever in that regard.

62 Nor can the applicant claim any loss of profit. According to the Commission, even if the matter had reached the stage of a formal proposal following the completion of the tendering procedure, the contracting authority would not have been under any obligation to enter into a contract. Irrespective of the result of the invitation to tender, the contracting authority retains a discretion to decide whether or not to proceed with the signing of a contract. At the time when the contested decision was adopted, the consortium was not in any way entitled to be awarded the contract; consequently, the applicant has not suffered any damage.

63 The Commission also points out that the applicant has not contested the right of the Polish Government to request financing to be withdrawn and the inevitable impossibility, resulting from that request, of proceeding with the tendering procedure.

64 In the Commission's view, no damage arises from the alleged harm to the applicant's image. Quite apart from the fact that such damage is linked to the misconception that the acts of the Commission which the applicant contests are a matter of public concern, the Commission observes that, on the applicant's reasoning, an authority issuing an invitation to tender could never annul a procedure without being immediately accused of harming the image of one of the participants, with the related obligation to make good the resulting damage. Moreover, if that were the position, unsuccessful tenderers could, upon the contract being awarded, also claim that they were entitled to compensation, since the administrative authority's decision would amount to a declaration that their bids were inferior in quality to that of the successful tenderer. In any event, the applicant neither proved that its image had sustained any real damage, nor described such damage, at the time when the application was lodged. The Commission further maintains that the Polish Government's discretion to allocate to other objectives the financial resources made available to it under the PHARE programme, and thus not to finance the project, has nothing to do with the applicant's image.

65 As regards the existence of a causal link, the Commission points out that the applicant, on which the burden of proof rests, has failed to establish the existence of a relationship between, on the one hand, the loss suffered and, on the other, the contested decision and the contested invitation to tender. It was not those acts which gave rise to the alleged damage, since the applicant willingly incurred the expenses as a necessary incident of its participation in the tendering procedure, regardless of subsequent developments in that procedure and in the knowledge that those expenses were not reimbursable.

66 Nor can any causal link be said to exist between those acts and the alleged loss of profit since, even if the applicant were to prove that one of its rights had been violated, it would be the contracting authority, in this instance the Polish Government, and not the Commission, which would be liable for that violation.

67 The position is the same as regards the alleged damage arising from the harm caused to the applicant's image, since that damage could only have resulted from the external publicity surrounding the contested decision, the contested invitation to tender and the tendering procedure. Consequently, the alleged damage was

caused by those responsible for such publicity and not by any acts of the Commission which may have entered the public domain.

Findings of the Court

68 It is settled case-law that, in order for the Community to incur non-contractual liability, a number of conditions must be satisfied concerning the illegality of the conduct alleged against the Community institutions, the fact of the damage and the existence of a causal link between that conduct and the damage complained of (Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 16). Moreover, the damage must be a sufficiently direct consequence of the conduct complained of (Case T-7/96 *Perillo* v *Commission* [1997] ECR II-1061, paragraph 41).

69 As regards the damage resulting from the loss sustained, namely the charges and expenses incurred by the applicant in connection with its participation in the tendering procedure, it should be noted, first, that under Article 23(1) of the General Regulations, the contracting authority may, prior to awarding the contract, without thereby incurring any liability to the tenderers, and regardless of the stage reached in the procedures leading to the conclusion of the contract, either decide to close or annul the tendering procedure in accordance with paragraph 2, or order that the procedure be recommenced, if necessary, on amended terms. It follows from the use of the adverbial phrase 'in particular' in Article 23(2) of the General Regulations that the list contained in that provision is not exhaustive. Furthermore, the Instructions to Tenderers forming part of the invitation to tender of 13 June 1995 provide, in the fifth paragraph of the section entitled 'F. Selection of the Contractor', that the contracting authority is not bound to accept the lowest offer or to award any contract.

70 Moreover, it is apparent from Article 23(3) of the General Regulations that, in the event of annulment of any tender procedure, the tenderers are not entitled to any compensation.

71 It follows that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute damage which is capable of being remedied by an award of damages.

72 However, the provision in question cannot, without potentially undermining the principles of legal certainty and of protection of legitimate expectations, apply in cases where an infringement of Community law in the conduct of the tendering procedure has affected a tenderer's chances of being awarded the contract.

73 In the present case, even if the applicant had shown, which it has not, that the Commission had infringed Community law in its conduct of the tendering procedure, such an infringement would not have compromised the consortium's chances of being awarded the contract. It was the withdrawal from the PHARE PL 9406 programme of the study for which the two invitations to tender concerned were issued, and the acceptance of that withdrawal by the Commission pursuant to Article 3(2) of Regulation No 3906/89, which terminated the tendering procedure (see paragraph 27 of the order of 13 June 1997 in *TEAM and Kolprojekt* v *Commission*) and which therefore sealed the fate of the bid submitted by the consortium. The applicant has not shown that the withdrawal in question was contrary to Community law.

74 Nor has the applicant shown that that withdrawal was caused by the conduct alleged against the Commission. It is apparent from the fax of 28 May 1996 that the Polish Ministry of Transport and Maritime Economy advanced two sets of reasons in support of its request for the withdrawal of the study from the PHARE programme in question, one of which cited external factors relating to the planned modernisation of the junction concerned and new priority pre-investment activities for another line. Moreover, the applicant itself states that the withdrawal was

prompted only in part by the conduct of the Commission (see paragraph 37 above). In those circumstances, it must be stated that the causal link between the conduct alleged against the Commission and the damage pleaded by the applicant is not sufficiently direct.

75 It follows that the applicant has not established the existence of a causal link between unlawful conduct on the part of the Commission and the damage resulting from the loss sustained.

76 As to the damage resulting from the loss of profit, it is sufficient to note that the claim in that connection presupposes that the applicant was entitled to be awarded the contract. It must be observed in that regard that, even if the evaluation committee had recommended acceptance of the consortium's bid, the applicant could not have been certain of securing the contract, since the contracting authority is not bound by the evaluation committee's proposal but has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract (see, to that effect, Case T-19/95 *Adia Interim* v *Commission* [1996] ECR II-321, paragraph 49). It follows that the damage at issue was not real and existing, but future and hypothetical.

77 As regards the harm to its image, even if that image was tarnished, which has not been proved, the applicant has not succeeded in establishing a causal link between unlawful conduct on the part of the Commission and the damage allegedly resulting from it. The applicant merely asserts that it was the real grounds on which the procedure was halted, which remain obscure and mysterious, that discredited its technical and professional expertise, thereby harming, and continuing to harm, its reputation.

78 In those circumstances, the claim for damages must be dismissed as unfounded.

79 In view of the foregoing, the Court holds — without there being any need to rule on the objection of inadmissibility raised by the Commission with regard to the two documents submitted by the applicant at the hearing, namely a letter dated 21 August 1995 from the Ministry of Transport and Maritime Economy of the Republic of Poland to the Commission and a confidential version of the minutes of a meeting held in Brussels on 13 September 1995 between representatives of the Commission and of the Ministry of Transport and Maritime Economy of the Republic of Poland concerning the evaluation of the tenders submitted in the context of the invitation to tender of 13 June 1995 — that those documents are irrelevant for the purposes of determining the dispute. Consequently, the documents in question have not been included in the case-file and have thus not been taken into consideration by the Court for the purposes of this judgment.

Costs

80 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, and the Commission has applied for costs in relation to the claim for damages, the applicant must be ordered to pay those costs.

81 As regards the costs relating to the application for annulment, which were reserved in the order of 13 June 1997 in *TEAM and Kolprojekt* v *Commission*, cited above, it should be noted that, under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs are in the Court's discretion. The Commission has not applied for those costs. The conduct of each of the parties will be fairly reflected by an order requiring them to bear their own costs.

82 As to the application by the applicant for an order requiring the Commission to pay all the costs, even if the applicant is unsuccessful, it is sufficient to note that

the applicant has not put forward any grounds justifying the application of the second subparagraph of Article 87(3) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay all the costs relating to the claim for damages;

3. Orders the parties to bear their own costs relating to the application for annulment.

Lindh Lenaerts Cooke

Delivered in open court in Luxembourg on 29 October 1998.

H. Jung P. Lindh

Registrar President