

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)  
27 September 2002 \*

In Case T-211/02,

**Tideland Signal Limited**, whose registered office is in Redhill, Surrey (United Kingdom), represented by C. Thomas and C. Kennedy-Loest, Solicitors,

applicant,

v

**Commission of the European Communities**, represented by J. Forman, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission decision of 17 June 2002 rejecting the applicant's tender in procurement procedure EuropeAid/112336/C/S/WW — TACIS — (Re-tender),

\* Language of the case: English.

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

composed of: B. Vesterdorf, President, N.J. Forwood and H. Legal, Judges,  
Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on  
17 September 2002,

gives the following

**Judgment**

**Facts and procedure**

- 1 On 27 February 2002, the Commission issued an Invitation to Tender in TACIS project number EuropeAid/112336/C/S/WW (Re-tender) '[s]upply of aids to navigation equipment to the ports of Aktau (Kazakhstan), Baku (Azerbaijan) and Turkmenbashi (Turkmenistan)'. The same project had previously been put out to tender in 2001, but that original procedure had subsequently been cancelled. The re-tender dossier specified at section 8 of the Instructions to Tenderers that the tenderers shall remain bound by their tenders for a period of 90 days from the deadline for the submission of tenders (29 April 2002). That period expired on 28 July 2002.
- 2 On 25 April 2002, the applicant submitted a tender for Lot 1 of the project. In accordance with the Instructions to Tenderers, the applicant's accompanying letter of 25 April 2002 (section 3 of the Tender Submission Form) stated that

‘[t]his tender is valid for a period of 90 days from the final date for submission of tenders, i.e. until 28/07/02’. It further indicated at section 4 of the Tender Submission Form that ‘[t]his tender is subject to acceptance within the validity period stipulated in [section] 8 of the Instructions to Tenderers’.

3 On 7 May 2002 the Commission issued a notice of amendment entitled ‘Addendum No 1 to Tender Dossier’ (hereinafter the ‘Addendum’) by which it modified the description of one of the lots (Item 4.2.2 of Lot 1) and announced its decision to allow extra time for the submission of tenders so that interested parties might, if necessary, amend their offers and resubmit new tenders by 11 June 2002. Tenders received by the original deadline, including that of the applicant, were returned to tenderers unopened. According to the applicant, since it had no need to modify the relevant part of Lot 1, it resubmitted on 10 June 2002 the very same tender documents including the elements required by the Tender Submission Form and, in particular, the letter of 25 April 2002 containing the sentence quoted in the previous paragraph.

4 At its Tender Opening Session on 17 June 2002, the Commission’s Evaluation Committee rejected the applicant’s bid. According to the part of the Tender Opening Report relating to the applicant’s tender, the reason for rejection was that:

‘While checking whether the tender submission form, the declarations and the tender guarantee had been duly completed/submitted, the chairperson noted that the validity of the offer was not reflecting the requested 90 days from the date of the submission of the tender.’

- 5 On 28 June 2002, the applicant inquired as to the outcome of the tender procedure by telephone and was informed that its tender had been rejected. On the same date, the Commission also sent to the applicant by fax a copy of the Tender Opening Report.
- 6 On 1 July 2002, the applicant contacted the Commission by Email stating that it wished to appeal against the rejection of its tender and asking for information about the relevant appeal procedure. The Commission responded that the applicant's tender had been rejected on the ground that its validity was found to be inadequate with respect to the Commission's requirements because:

'Section 8, paragraph 1 of the Instructions to Tenderers states that: "[t]enderers shall remain bound by their tenders for 90 days from the deadline for submission of tenders". Given as a fact that the deadline was 11 June 2002 and that in section 5, paragraph 3 of your Tender Submission Form you [wrote] that: "[t]his tender is valid for a period of 90 days from the deadline for the submission of tenders, i.e. until 28.07.02", the Evaluation Committee was, unfortunately, forced to reject your bid.'

- 7 By letter dated 5 July 2002, the applicant formally requested that the Commission reinstate it in the tender process and asked for an assurance that the Commission would not take any further steps in the tender process pending the resolution of its situation.
- 8 By letter of 10 July 2002, the Commission replied to the applicant:

'Thank you for your inquiry and remarks concerning this evaluation procedure which we will take into account. As the evaluation is not yet finalised, we are not

in a position to respond to your observations, but will revert to you in due course.’

- 9 By an application lodged with the Registry of the Court of First Instance on 15 July 2002, the applicant brought the present proceedings. By two separate applications lodged on the same day the applicant also requested, first, the adoption of both an immediate order and subsequently a final order for interim measures and, second, an expedited procedure in the present case.
- 10 On 16 July 2002, the President of the Court of First Instance granted the request for the immediate adoption of interim measures. The operative part of that order was worded as follows:

‘1. The Commission shall alternatively:

— adopt all the necessary measures to suspend the award of the procurement procedure for the supply of aids to navigation equipment to the ports of Aktau (Kazakhstan), Baku (Azerbaijan) and Turkmenbashi (Turkmenistan), referred as EuropeAid/112336/C/S/WW — TACIS — (Re-tender), until the date of the final order in these interlocutory proceedings,

or

— evaluate the tender submitted by Tideland Signal Limited in the above mentioned procurement procedure and allow the said Tideland Signal Limited to participate fully in that procedure in the same way and on the same basis as all the tenderers, until the date of the final order in these interlocutory proceedings.

2. Costs are reserved.’

- 11 Subsequent to the notification of that order, the Commission informed the Court that an award letter had already been sent to another tenderer, Pintsch Bamag A+V, in respect of Lot 1 of the project on 9 July 2002. However, the Commission had subsequently informed that undertaking that the suspension of the award of the contract following that order made it impossible for any further steps to be taken as far as the actual signature of the contract was concerned.
- 12 Having heard the Commission, the Court of First Instance (First Chamber) decided, on 1 August 2002, to grant an expedited procedure in the present case under Article 76a of its Rules of Procedure.
- 13 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure and requested that the Commission produce certain documents referred to in its defence. The Commission complied with that request.
- 14 The parties presented oral argument and answered questions put to them by the Court at the hearing in open court on 17 September 2002. At the end of the hearing an informal meeting was held and the Commission was asked to indicate by 19 September whether a settlement of the case was possible on the basis of its withdrawal of the decision to reject the applicant’s tender. An answer having been provided within the deadline, the Court then requested a further clarification of that decision’s status on 23 September 2002 which was provided on the same day.

- 15 On 24 September 2002, the Court asked both parties to make observations on the question whether the application for annulment had become devoid of purpose. In their observations, lodged the same day, the Commission submitted that the application was now devoid of purpose but the applicant claimed that it was still necessary for the Court to give judgment particularly in order to settle the question whether the decision to reject its tender had been lawful and to ensure its complete disappearance from the Community legal order.

### Forms of order sought

- 16 The applicant claims that the Court should:
- annul the Commission decision of 17 June 2002 rejecting the tender submitted by Tideland Signal Limited in tender procedure for EuropeAid/112336/C/S/WW — TACIS — (Re-tender);
  - order the Commission to pay the costs incurred by the applicant.
- 17 The Commission claims that the Court should:
- dismiss the application;
  - order the applicant to pay the costs.

## Substance

- 18 The applicant raises two pleas in law. By its first plea the applicant claims that the Commission decision of 17 June 2002 rejecting its tender is unlawful because it is based on an erroneous determination that the tender was valid only until 28 July 2002, and not for 90 days from 11 June 2002 as required by section 8.1 of the Instructions to Tenderers. By its second plea it alleges that the said decision to reject its tender is illegal because, by failing to seek clarification of the period of validity of the tender, the Commission infringed section 19.5 of the Instructions to Tenderers, the duty of care and the principle of proportionality.
- 19 The Court will proceed to examine the second plea first.

### *Arguments of the parties*

- 20 The applicant considers that even if the Court does not agree that its tender was clearly intended to be valid for 90 days from the revised 11 June 2002 deadline for the submission of tenders, the wording of the tender documentation in conjunction with the surrounding circumstances should at the very least have led the Evaluation Committee to exercise its power to seek clarification under section 19.5 of the Instructions to Tenderers which states:

‘In the interests of transparency and equal treatment and without being able to modify their tenders, Tenderers may be required, at the sole written request of the

evaluation committee, to provide clarifications within 24 hours. Any such request for clarification must not seek the correction of formal errors or major restrictions affecting performance of the contract or distorting competition.’

- 21 Moreover, the applicant maintains that the Commission is bound by a duty of care when organising procurement procedures, just as it does in other contexts such as the examination of State aid notifications. According to the applicant, the Commission’s Evaluation Committee failed to exercise due diligence when it rejected the applicant’s tender without making use of its power to ask for clarification of the period of validity of that tender.
- 22 Similarly, the Evaluation Committee acted disproportionately by rejecting the applicant’s tender because of the view it took as to the duration of the validity of the tender when it could instead have exercised its power to seek clarification. This course of action would have avoided any risk that the applicant would be incorrectly excluded from the tendering process, without causing any significant delay in that process.
- 23 The Commission first reiterates that there was no uncertainty regarding the meaning of the expression ‘until 28.07.02’. With regard to the applicant’s argument that there may have been a certain ‘suspicion’ as to the correctness of that date, the institution further points out that is an open question when a suspicion has arisen in a particular case such as would ‘oblige’ the Commission to accept a date other than that unambiguously put forward by a tenderer.
- 24 More specifically as to the Instructions to Tenderers, which constitute an integral part of the conditions applicable to all tenders, the applicant’s interpretation of

section 19.5 is rejected by the Commission. Firstly, it points out that, under that provision, tenderers may ‘at the sole written request of the Evaluation Committee’ be ‘required... to provide clarifications’ within 24 hours. Moreover, in exercising the discretion which it thus enjoys, the Evaluation Committee is to consider ‘the interests of transparency’ and ‘equal treatment’ as between all the companies which have submitted tenders. It is also expressly stated that, while tenderers may be required to provide clarifications, this is ‘without being able to modify their tenders’ and that ‘[a]ny such request for clarification must not seek the correction of formal errors...’.

- 25 The Commission argues that the issue which the applicant claims should have been clarified is of precisely the kind which is expressly excluded from the remit of the Evaluation Committee. Indeed, according to the applicant’s own pleading, its tender contains a formal error, in respect of one of the basic tender conditions, which cannot be corrected.
- 26 Furthermore, the Commission dismisses the allegation that it has ‘failed to exercise due diligence’ in rejecting the applicant’s tender without seeking clarification. The Commission points out that it is in fact an error which the applicant itself now claims to have made which caused the applicant’s tender to be rejected.
- 27 The Commission points out that tender procedures, including those applying to the TACIS Regulation, are the subject of detailed and precise conditions, the ongoing and strict respect of which represents a *sine qua non* for admission to any tender by analogy, in particular, with the position in respect of competitions for the recruitment of Community officials (Case T-54/91 *Antunes v Parliament* [1992] ECR II-1739, in particular, paragraph 40, and the order in Case C-435/98 P *Joubki v Commission* [2000] ECR I-2229, in particular, paragraph 35). Moreover, economic operators will be fully aware of these conditions when they

participate in Community tendering. The Commission points out that the tender submitted in respect of the very same project by the applicant had previously been rejected in 2001 and that the applicant should therefore have been especially vigilant when it submitted its tender on this occasion. In particular, it should not have simply resubmitted the same documents after the Addendum was issued and its tender documents were returned to it, without even checking the dates, assuming that is what actually happened as the applicant claims.

- 28 The Commission argues that the date at issue regarding the extent of validity of the offer is of fundamental importance, not only for the contracting authority, but for each of the individual tenderers. The former must know with certainty when each offer expires and ensure that all participants enjoy the same opportunity to take into account all possible relevant factors for the same period of time. Essential tender conditions, such as the period of validity for tenders, must therefore be unambiguous and must not be subject to interpretation.
- 29 In particular, it would be unacceptable, according to the Commission, for reasons of transparency, consistency and equality, for individual tenderers to be able to enter into a dialogue with the contracting authority in order to have it reconsider, on a bilateral basis, their individual offers. In particular, it is therefore improper for the Commission, as contracting authority, to contact a particular tenderer so that the latter could set its tender in order, except in respect of certain specific issues where this is expressly permitted. Indeed, such an approach would fly in the face of a system which is based on the fundamental principle of equality of treatment between all tenderers (Case C-243/89 *Commission v Denmark* [1993] ECR I-3353, paragraph 37, and Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, paragraph 70; also Opinion of Advocate General Stix-Hackl in Case C-57/01 *Makedoniko Metro and Michaniki v Dimossio* [2003] ECR I-1091, paragraph 66). The Commission also points out, in this regard, that such contacts would impose on it a heavy workload, since in 2001, for the TACIS Regulation alone, Directorate A of Commission DG EuropeAid Cooperation Office, dealt with some 240 contracts.

- 30 In this context, the Commission observes that the applicant's conduct in contacting both the Chairperson and the Secretary of the Evaluation Committee might merit examination under section 19.6 of the Instructions to Tenderers according to which '[a]ny attempt by a tenderer to influence the Evaluation Committee in the process of examination, clarification, evaluation and comparison of tenders, to obtain information on how the procedure is progressing or to influence the Contracting Authority in its decision concerning the award of the contract shall result in the immediate rejection of its tender'.
- 31 The Commission also points out that, in the present case, five other tenderers were excluded by the Evaluation Committee at the Opening Session following a variety of errors on their part and that to accept the arguments of the applicant would, at the very least, call into question the situation of those other tenderers. More generally, it contends that the precedent created by a judgment in the applicant's favour in the present case would oblige the Commission to justify why it had followed its own rules whenever a decision it had taken in accordance with those rules was queried by one or more of the unsuccessful tenderers.
- 32 Finally, in response to the applicant's allegation that it acted disproportionately, the Commission reiterates that the alleged existence of a 'suspicion' as regards the offer's validity is irrelevant in view of the clarity with which the timelimit at issue was set out in the tender and the strictness of the rules governing tender procedures.

### **Findings of the Court**

- 33 The Court recalls that the Commission enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to

award a contract following an invitation to tender. Review by the Community courts is therefore limited to checking compliance with the applicable procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (Case T-145/98 *ADT Projekt v Commission* [2000] ECR II-387, paragraph 147).

34 Moreover, it is essential, in the interests of legal certainty, that the Commission should be able to ascertain precisely what a tender offer means and, in particular, whether it complies with the conditions set out in the call for tenders. Thus, where a tender is ambiguous and the Commission does not have the possibility to establish what it actually means quickly and efficiently, the institution has no choice but to reject that tender.

35 However, section 19.5 of the Instructions to Tenderers issued in the present case expressly empowered the Commission's Evaluation Committee to seek clarification of tenders submitted within 24 hours subject to the condition that any such clarification 'must not seek the correction of formal errors or major restrictions affecting performance of the contract or distorting competition'. The possibility of seeking such clarification, as a general practice, is also confirmed at section 4.3.9.4 of the document entitled 'Practical Guide to EC external aid contract procedures', produced by the Commission at the hearing. The issue to be resolved is therefore whether or not the Evaluation Committee acted legally in deciding not to make use of that possibility in respect of the period of validity of the applicant's tender.

36 As to the Commission's contention that the applicant's tender contained a 'formal error', because its validity was unambiguously and expressly limited to 28 July 2002, and that no request for clarification under section 19.5 of the Instructions to Tenderers was therefore necessary or indeed permissible, the Court finds as a fact that the statement on which the Commission relies in this

regard, quoted at paragraph 2 above, was ambiguous with regard to the period for which the tender remained valid. It follows that the statement in question did not necessarily constitute a formal error, but rather gave rise to an ambiguity which might or might not have revealed the existence of such an error, depending on the way that ambiguity was resolved, and in respect of which the Evaluation Committee had power to seek clarification. In the present case, it was therefore only if, after clarification, the tender's validity turned out to be limited to 28 July 2002 that it could have been said to contain a formal error.

- 37 In response to the Commission's argument that its Evaluation Committee was nevertheless under no obligation to seek clarification from the applicant, the Court holds that the power set out in section 19.5 of the Instructions to Tenderers must, notably in accordance with the Community law principle of good administration, be accompanied by an obligation to exercise that power in circumstances where clarification of a tender is clearly both practically possible and necessary (see, by analogy, Cases T-22/99 *Rose v Commission* [2000] ECR-SC I-A-27 and II-115, paragraph 56, T-182/99 *Carvelis v Parliament* [2001] ECR-SC I-A-13 and II-523, paragraphs 32 to 34; see also, more generally, Case T-231/97 *New Europe Consulting and Brown v Commission* [1999] ECR II-2403, paragraph 42, and Article 41 of the Charter of fundamental rights of the European Union, OJ 2000 C 364, p. 1, proclaimed in Nice on 7 December 2000). While the Commission's evaluation committees are not obliged to seek clarification in every case where a tender is ambiguously drafted, they have a duty to exercise a certain degree of care when considering the content of each tender. In cases where the terms of a tender itself and the surrounding circumstances known to the Commission indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved, then, in principle, it is contrary to the requirements of good administration for an evaluation committee to reject the tender without exercising its power to seek clarification. A decision to reject a tender in such circumstances is liable to be vitiated by a manifest error of assessment on the part of the institution in the exercise of that power.

- 38 It would, moreover, be contrary to the principle of equality, to which section 19.5 of the Instructions to Tenderers in the present case makes reference, for an

evaluation committee to enjoy an unfettered discretion to seek or not to seek clarification of an individual tender regardless of objective considerations and free from judicial supervision (see, by analogy, Joined Cases T-112/96 and T-115/96 *Séché v Commission* [1999] ECR-SC I-A-115 and II-623, paragraph 127). Moreover, contrary to the Commission's argument, the principle of equality did not preclude the Evaluation Committee from allowing tenderers to clarify any ambiguities in their tenders, since section 19.5 made express provision for such clarification to be sought and the Evaluation Committee was obliged to treat all tenderers in a similar manner with regard to the exercise of this power.

- 39 It is also relevant to recall, in the present context, that the principle of proportionality requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued and that where there is a choice between several appropriate measures recourse must be had to the least onerous (see, for example, Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 60).
- 40 In the present case, the Court finds as a fact that the applicant did indeed, as it claims, simply resubmit its original tender documents on 10 June 2002, without modification, on the basis that the modification to Item 4.2.2 of Lot 1 resulting from the Addendum did not necessitate any change to the terms of its tender.
- 41 Furthermore, given that the date of '28.07.02' corresponded to the 90 day period for which tenders were required to remain valid under the initial call for tenders of 27 February 2002, the Court considers that the Evaluation Committee should have realised that the applicant was probably not intending to make its tender subject to a different period of validity than that required by section 8.1, but had probably omitted by an oversight to modify that date when it resubmitted its tender following the Addendum. Not only did the applicant's tender documentation submitted on 10 June 2002 state in two other places that the

applicant's tender remained valid for the requisite period of 90 days, namely in the letter of 25 April 2002 itself where the letter states, directly above the signature, that '[t]his tender is subject to acceptance within the validity period stipulated in [section] 8 of the Instructions to tenderers' and in the Terms and Conditions attached to the tender which state '[v]alidity of offer: 90 days', but that same letter also stated that the applicant 'accept[ed] without reserve or restriction the entire contents of the tender dossier for the procedure referred to above'.

- 42 In those circumstances, the principle of good administration required the Evaluation Committee to resolve the resulting ambiguity by seeking clarification of the period for validity of the applicant's tender.
- 43 In addition, as regards the principle of proportionality, the Court finds that in the present case the Evaluation Committee, faced with the applicant's ambiguous tender, had a choice between two courses of action, either of which would have produced the legal certainty referred to at paragraph 34 above, namely to reject the tender outright or to seek clarification from the applicant. Given the likelihood, noted at paragraph 41 above, that the tender was indeed intended to remain valid for 90 days from 11 June 2002 until 9 September 2002 as required by section 8.1 of the Instructions to Tenderers and the fact that the applicant would have been obliged to provide within 24 hours any clarification sought so that the tender procedure as a whole would have suffered only minimal disruption and delay, the Court holds that the Evaluation Committee's decision to reject the tender without seeking clarification of its intended period of validity was clearly disproportionate and thus vitiated by a manifest error of assessment.
- 44 As to the Commission's argument that the situation of other tenderers whose offers were rejected might be affected by the annulment of the decision to reject the applicant's tenders, that circumstance can in no way justify rejection of the

present application. Under Article 233 EC, it is for the institution whose act has been declared void to take the necessary measures to comply with the judgment. Those measures involve, *inter alia*, the removal of the effects of the illegal conduct found in the judgment annulling the act, and the institution is thus required to take adequate steps to restore the applicant to its original position (see, for example, the judgments in Case 22/70 *Commission v Council* [1971] ECR 263, paragraphs 59 and 60, and in Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others v Commission* [1995] ECR II-2941, paragraph 47). However, the judgment annulling the act cannot entail the annulment of other acts not challenged before the Community courts but which may be alleged to be vitiated by a similar illegality (see Case C-310/97 P *Commission v AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 55).

- 45 As to the Commission's allegation that the applicant's conduct after the rejection of its tender violated section 19.6 of the Instructions to Tenderers, it is sufficient to state that even were it to be founded in law and in fact, this allegation can have no bearing on the present case since it cannot affect the legality of the decision annullment of which is sought.
- 46 It follows from all of the above reasoning that the Evaluation Committee committed a manifest error of assessment in failing to exercise its power to seek clarification from the applicant in accordance with section 19.5 of the Instructions to Tenderers.
- 47 In consequence, the Commission decision of 17 June 2002 rejecting the tender submitted by Tideland Signal Limited for Lot 1 in the tender procedure for EuropeAid/112336/C/S/WW — TACIS — (Re-tender) must be annulled, without its being necessary to examine the first plea raised by the applicant.

- 48 Finally, the Court observes that an application for annulment may, exceptionally, not become devoid of purpose despite the withdrawal of the act whose annulment is sought in circumstances where the applicant nevertheless retains a sufficient interest in obtaining a judgment formally annulling it (see, by analogy, Joined Cases 294/86 and 77/87 *Technointorg v Commission and Council* [1988] ECR 6077, paragraph 11). In the present case, the applicant claims that it retains such an interest.
- 49 The Court recalls that no settlement agreement has been reached between the parties following the informal meeting of 17 September 2002 and considers that it is not clear from the responses made by the Commission on 19 and 23 September 2002 whether the decision to reject the applicant's tender has truly disappeared from the Community legal order and ceased to have any legal effects (see, for example, the order in Case T-26/97 *Antillean Rice Mills v Commission* [1997] ECR II-1347, paragraph 14). In those circumstances, the Court concludes that the applicant does retain an interest in obtaining the judgment it seeks and, given the urgency of the present case and the requirements of legal certainty, it is therefore appropriate for the Court to proceed to judgment immediately in order to resolve formally and definitively the continuing uncertainty as to the legality and current status of the decision rejecting the applicant's tender.

## Costs

- 50 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. Since the Commission has been unsuccessful and the applicant made application in that regard, the Commission must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber),

hereby:

1. Annuls the Commission decision of 17 June 2002 rejecting the tender submitted by Tideland Signal Limited for Lot 1 in the tender procedure for EuropeAid/112336/C/S/WW — TACIS — (Re-tender);
2. Orders the Commission to pay the costs.

Vesterdorf

Forwood

Legal

Delivered in open court in Luxembourg on 27 September 2002.

H. Jung

Registrar

B. Vesterdorf

President