

Case T-211/02

Tideland Signal Ltd

v

Commission of the European Communities

(Public procurement — Rejection of tender — Failure to exercise power to seek clarification of tender — Action for annulment — Expedited procedure)

Judgment of the Court of First Instance (First Chamber), 27 September
2002 II-3785

Summary of the Judgment

1. *Public procurement in the European Communities — Conclusion of a contract following an invitation to tender — Discretion of the institutions — Judicial review — Limits*

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2. *Public procurement in the European Communities — Contract following an invitation to tender — Obligation to reject ambiguous tenders — Scope — Evaluation committee empowered to contact a tenderer after opening the tender procedure — Power to be exercised observing the principles of good administration, equality and proportionality*
3. *Actions for annulment — Judgment granting annulment — Effects — Annulment of a Commission decision rejecting a tender submitted by a tenderer in a public procurement procedure — Whether the institution concerned is obliged to re-examine decisions similar to the measure annulled but uncontested in judicial proceedings — No such obligation*
(Art. 233 EC)
4. *Actions for annulment — Withdrawal of the contested measure while the proceedings are pending before the Court — Applicant retaining an exceptional interest in annulment — Whether the action is rendered devoid of purpose — No*
(Art. 230 EC)

1. 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.

(see para. 33)

2. It is essential, in the interests of legal certainty, that the authority awarding a contract in a tender procedure should

be able to ascertain precisely what tenders mean and, in particular, whether they comply with the conditions set out in the call for tenders. Thus, where a tender is ambiguous and it is not possible to establish what it actually means quickly and efficiently, the contracting institution has no choice but to reject that tender.

However, where the evaluation committee is empowered, in accordance with the instructions to tenderers, to seek clarification of tenders submitted, the Community law principle of good administration imposes an obligation to exercise that power in circumstances where it is both practically possible and necessary to obtain such clarification. Thus, while the 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, with the result that, where the terms of a tender itself and the surrounding circumstances indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved, it is, in principle, 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.

obliged to treat all tenderers in a similar manner with regard to the exercise of this power.

Furthermore, 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, where there is a choice between several appropriate measures, recourse must be had to the least onerous.

(see paras 34-39)

It would, moreover, be contrary to the principle of equality 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. In addition, the principle of equality does not preclude an evaluation committee from allowing tenderers to clarify any ambiguities in their tenders, since the instructions to tenderers expressly provide for requests for such clarification and the evaluation committee is

3. 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 annulling that act. 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. However, the judgment annulling the act cannot entail the annulment of other acts not challenged before the Community Courts but in respect of which it may be claimed that they are vitiated by the same illegality. Consequently, the argument that annulment of the decision to reject a tender submitted by a tenderer in a public procurement procedure might

affect the situation of other tenderers whose offers have likewise been rejected can in no way justify dismissal of the action brought by the first tenderer.

4. An application for annulment may, exceptionally, not become devoid of purpose despite the withdrawal of the act whose annulment is sought if the applicant nevertheless retains a sufficient interest in obtaining a judgment formally annulling it.

(see para. 44)

(see para. 48)