

## Case T-169/00

Esedra SPRL

v

Commission of the European Communities

(Public contract for the supply of services — Day nursery management services — Principle of non-discrimination — Contract notice — Contract documents — Reasons stated for decision not to award contract — Misuse of powers)

Judgment of the Court of First Instance (Fifth Chamber), 26 February 2002 II - 612

### Summary of the Judgment

1. *Budget of the European Communities — Financial Regulation — Provisions applicable to tendering procedures — Prohibition of all contact between the institution and the tenderer after tenders have been opened — Scope — Limits (Commission Regulation No 3418/93, Art. 99(b), second subpara.)*

2. *Public procurement in the European Communities — Conclusion of a contract following an invitation to tender — Discretion of the institutions — Judicial review — Limits*
3. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision to reject a tender under the procedure for the award of a public service contract (Art. 253 EC; Council Directive 92/50, Art. 12(1))*
4. *Actions for annulment — Pleas in law — Misuse of powers — Concept*

1. According to the second subparagraph of Article 99(h) of Regulation No 3418/93 laying down detailed rules for the implementation of certain provisions of the Financial Regulation, any contact in tendering procedures between the institution and the tenderer after the tenders have been opened is prohibited save, exceptionally, 'if some clarification is required in connection with a tender, or if obvious clerical errors contained in the tender must be corrected'. In those cases, the institution may take it upon itself to contact the tenderer and, in the event of a dispute, it is necessary to determine whether the tenderer's reply to the Commission's request for clarification should be regarded as clarifying the terms of its tender or whether it goes beyond that and modifies the substance of the tender by reference to the requirements of the contract documents.
2. The Commission 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 and the Court's review must be limited to verifying that there has been no serious and manifest error.

(see paras 95, 114, 135, 152, 162)

(see paras 49, 52)

3. It follows from Article 12(1) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, which, pursuant to Article 126 of Regulation No 3418/93, applies to contracts awarded by the institutions where the value of the contract exceeds the threshold fixed by Article 7(1) of that directive, that the Commission must, within 15 days

of receipt of his request, inform an unsuccessful tenderer of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer, except for information described as confidential.

This manner of proceedings satisfies the purpose of the obligation to state reasons enshrined in Article 253 EC, according to which the reasoning followed by the authority which adopted the measure in question 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.

(see paras 188-190)

4. The concept of misuse of powers has a precisely defined scope in Community law and refers to cases where an administrative authority exercises its powers for a purpose other than that for which they were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated.

(see para. 198)