

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

25 February 2003 *

In Case T-183/00,

Strabag Benelux NV, established in Stabroek (Belgium), represented by A. Delvaux and V. Bertrand, lawyers, with an address for service in Luxembourg,

applicant,

v

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

defendant,

APPLICATION for the annulment of the Council Decision of 12 April 2000 awarding to the company Entreprises Louis De Waele the contract forming the subject-matter of invitation to tender No 107865 issued on 30 July 1999 (OJ 1999 S 146) for general installation and maintenance work in the Council's buildings, and a claim for compensation for the damage allegedly suffered by the applicant as a consequence of the Council's conduct,

* 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 thresholds 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 European Parliament and Council Directive 97/52/EC 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.

However, contracting authorities may decide that certain information on the contract award, referred to in the preceding subparagraph, be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between contractors.

2. ...

3. For each contract awarded, the contracting authorities shall draw up a written report which shall include at least the following:

- the name and address of the contracting authority, the subject and value of the contract,

- the names of the candidates or tenderers admitted and the reasons for their selection,

- the names of the candidates or tenderers rejected and the reasons for their rejection,

- the name of the successful tenderer and the reasons for his tender having been selected...'

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.

...’

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

installation 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 installation and maintenance work was in the order of EUR 5 000 000.'

8 The contract documents relating to the invitation to tender 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 company. 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 the contract stages.

...⁹

- 9 Three undertakings submitted tenders conforming with the specifications: Renco SpA ('Renco'), Entreprises Louis de Waele ('De Waele') and the applicant.

- 10 The applicant's tender, which was submitted on 11 January 2000, was in the amount of EUR 4 468 110.74 per annum.

- 11 By decision of 12 April 2000 ('the contested decision'), taken on the basis of an opinion of 5 April 2000 of the Advisory Committee on Procurements and Contracts ('CCAM') 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 tender was in the amount of 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).

12 By letters of 14 April 2000 the Council informed the applicant and Renco that their tenders had been rejected.

13 By letter of 26 April 2000 the applicant asked the Council for a copy of the decision awarding the contract and for the reasons on which the decision was based.

14 By letter of 11 May 2000 the Council gave the following answer to that 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 (p. 16 of doc. IMM 99/2046).

Consequently, the three tenders received on 11 January 2000 were analysed and compared in the light of those eight 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 your tender was also ranked highly for the qualitative evaluation criteria but was unsuccessful because of its price.’

15 By letter of 19 June 2000 the applicant asked the Council to send it a copy of ‘all the documents which led to the rejection of [its tender] and to the award of the contract to... De Waele’.

16 By letter of 4 July 2000, the Council replied to that letter in the following terms:

‘...’

The analysis carried out by the staff of the General Secretariat of the Council led to the following assessment of your tender in relation to the other two competing tenders, for each of the eight criteria on which the selection was based:

— administrative conformity of the tender; all three candidates equal,

— price of the tender; second,

— experience and technical competence of the permanent team; first,

- experience and technical competence of the company; equal first,

- proposal of safety-coordinator; first,

- quality of subcontractors and suppliers; first,

- technical quality of the plant and materials proposed; all three candidates equal,

- measures proposed in order to observe the time-limits: all three candidates equal.

To sum up, the staff of the General Secretariat of the Council concluded that:

“The [applicant’s] proposal, for almost all the criteria, is ranked in first position: however, it was not successful because of its higher cost” (about 10% more than De Waele’s proposal).

I am unable to accede to your request for all the documents, in the light of Article 8 of Directive [93/37] as amended by Directive 97/52...'

Proceedings and forms of order sought by the parties

- 17 By application lodged at the Registry of the Court of First Instance on 13 July 2000 the applicant brought the present action.

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

- 19 The parties presented oral argument and their replies to the questions put by the Court at the hearing held on 7 February 2002. At the hearing the applicant withdrew three of its pleas alleging that:
 - by awarding the contract to a company whose tender did not conform to the contract documents, the Council acted in breach of the terms of those documents and the principle of equality between tenderers;

- by placing De Waele and the applicant equal in respect of the first, fourth and eighth criteria of the contract documents, the Council committed three manifest errors of assessment;

- by accepting abnormally low prices from De Waele, the Council infringed Article 30(4) of Directive 93/37.

The Court took formal notice of the withdrawal of those pleas in the minutes of the hearing.

20 The applicant claims that the Court should:

- declare the applications for annulment and for compensation admissible and well founded;

- annul the contested decision;

- subject to the applicant's claiming a higher sum, order the Council to pay the sum of BEF 153 421 286 or EUR 3 803 214 together with interest thereon at the rate of 6% from 12 April 2000;

- order the Council to pay the costs.

21 The Commission contends that the Court should:

- declare the application for annulment inadmissible or, at least, unfounded;
- declare the application for compensation unfounded;
- order the applicant to pay the costs.

The application for annulment

Admissibility

Arguments of the parties

22 The Council challenges the admissibility of the action for annulment on the ground that the applicant is not an addressee of the contested decision and is not directly and individually concerned by it.

- 23 It points out that it adopted, first, the contested decision, addressed to De Waele, and, secondly, the two decisions of 14 April 2000, addressed to the applicant and Renco, informing them that their tenders had been rejected. Referring to the judgment of the Court of First Instance in Case T-19/95 *Adia interim v Commission* [1996] ECR II-321, it maintains that the applicant should have contested the decision of 14 April 2000 which had been addressed to it, or at least that decision and the contested decision.
- 24 The applicant maintains that it is directly and individually concerned by the contested decision. It contends that that decision includes a series of decisions, namely a positive decision to award the contract to De Waele and two negative decisions not to award the contract to the other two tenderers. Therefore, the applicant is an addressee of the contested decision. Consequently, the Council's argument that it ought to have challenged the decision of 14 April 2000 not to award it the contract is fallacious. That negative decision and the positive award decision are, in fact, the two facets of a single decision.
- 25 The applicant adds that the contested decision has binding legal effects which affect its position inasmuch as it rejects the applicant's tender, which also ceases to produce its effects.
- 26 In the alternative, the applicant states that, because of its special status as a tenderer, it is individually concerned by the contested decision. Furthermore, since the effect of the decision has the direct effect of eliminating the applicant from the award of the contract, without requiring the intervention of any authority, it directly concerns the applicant.

Findings of the Court

- 27 Under the fourth paragraph of Article 230 EC, any natural or legal person may institute proceedings for the annulment of a decision addressed to that person or of a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former (Case C-403/96 P *Glencore Grain v Commission* [1998] ECR I-2405, paragraph 40).
- 28 It should be pointed out that a decision relating to the award of a contract to a single tenderer inevitably and inseparably entails a corresponding decision not to award the contract to the other tenderers. Since the Council awards the contract to one tenderer, the offers of the other tenderers are automatically rejected, and there is no need to adopt other decisions in that regard. It must therefore be held that the formal communication of the result of the tendering procedure to the rejected tenderers does not mean that a decision other than the decision awarding the contract will be adopted for the express purpose of stating a rejection.
- 29 In the present case the contested decision was formally addressed to De Waele. Therefore, it had the effect of awarding the contract in question to De Waele and, by so doing, of rejecting the offers of the other two tenderers. It follows that the contested decision is of direct and individual concern to the applicant and that it may be the subject of an action for annulment brought by the applicant.
- 30 It follows from the foregoing that the application is admissible.

Substance

- 31 The applicant puts forward three pleas in support of its action for annulment. The first plea alleges the non-existence of the contested decision. The second alleges infringement of the duty to state reasons and of Article 8(1) of Directive 93/37, and the third alleges infringement of Articles 18 and 30 of Directive 93/37 and of the contract documents.

The first plea, alleging the non-existence of the contested decision

— Arguments of the parties

- 32 In its reply the applicant asks the Court to declare that the contested decision does not exist.
- 33 It points out that, in its letter of 4 July 2000, the Council referred to a departmental document in which it had concluded: '[The applicant's] proposal is, for almost all the criteria, ranked first: however, it was not successful because its price was higher'. According to the applicant, that was probably an extract from the award decision. It points out that the Council did not, however, produce that decision or the report required under Article 8(3) of Directive 93/37. In those circumstances, it asks the Court either to declare that the decision does not exist or to order the Council to produce the document.

- 34 At the hearing the applicant conceded that this plea was not put forward in the application initiating the proceedings. However, it points out that the non-existence of the contested decision only emerged during the proceedings and in particular because the document in question was not communicated.
- 35 In its rejoinder the Council challenges the admissibility of this plea. It points out that Article 48(2) of the Rules of Procedure of the Court of First Instance prohibits the introduction of new pleas in law in the course of proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. Since this new plea refers to the letter of 4 July 2000, which is annexed to the application, it clearly is not based on a new matter. The Council also states that the record of the decision to award the contract in question does not exist in the form of a single document but in the form of three documents, namely the report to the CCAM, the CCAM's favourable opinion and the Notice of contract awarded published in the *Official Journal of the European Communities* (see paragraph 11 above). It adds that those three documents, which contain all the information referred to in Article 8(3) of Directive 93/37, were drawn up in connection with the invitation to tender in question and ensure transparency with regard to the method of and the reasons underlying the award of the contract and the rejection of the other tenders.
- 36 At the hearing, in reply to a question put by the Court, the Council stated that the formal decision to award the decision to De Waele consists only in a framework contract signed on 12 April 2000 between De Waele and the Council. The Court took formal note of that statement.

— Findings of the Court

- 37 As a preliminary point it should be noted that, according to settled case-law, the Community judicature, drawing inspiration from the principles identified by the national legal systems, declares that acts tainted by irregularities which are

particularly serious and obvious are non-existent (Case 15/85 *Consortio Cooperative d'Abruzzo v Commission* [1987] ECR 1005, paragraph 10, and Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555, paragraph 49). This plea relates to public policy and it is for the Court, in an action for annulment brought under Article 230 EC, to consider, of its own motion, the issue of the existence of the contested measure if the parties put forward sufficient evidence in that regard (see, to that effect, Case T-9/89 *Hüls v Commission* [1992] ECR II-499, paragraph 384).

38 In the present case the arguments expounded by the applicant, particularly during the hearing, provide sufficient support for the suggestion that the contested decision is non-existent. It is therefore necessary to ascertain whether, in the present case, the contested decision is tainted within the meaning of the case-law cited in the previous paragraph, without its being necessary to consider the matter — raised by the Council — of the admissibility of this plea.

39 It should be pointed out that the rules governing the procedure for comparing tenders for public works contracts ensure the compliance at every stage with the principle of the equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers (see, to that effect, Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, paragraph 54).

40 In the present case the applicant puts forward, in essence, two arguments in support of the plea alleging the non-existence of the contested decision: the lack of a formal decision awarding the contract in question to De Waele and the Council's failure to draw up a report in accordance with Article 8(3) of Directive 93/37.

- 41 As regards the first argument, the first point to note is that, contrary to what the applicant claims, the passage from the Council's letter of 4 July 2000 to which it refers (see paragraph 33 above) is not an extract from the decision awarding the contract but comes from the report to the CCAM. In order to determine whether the contested decision is tainted with particularly serious and obvious irregularities, it is necessary to examine the context in which it was adopted.
- 42 The tendering procedure culminates in the drawing-up of an agreement between the Council and the successful tenderer in respect of the works stipulated in the contract documents. Under the rules laid down in the contract documents, tenderers are required, when submitting their tenders, to transmit to the Council a signed offer which commits them to carrying out the works in accordance with the contract documents and with the prices and rates indicated by the tenderers in their tenders where appropriate. When, at the end of the tendering procedure, a tender is accepted, it only remains for the Council to sign the successful tenderer's offer in order to conclude an agreement binding the parties.
- 43 It is not disputed that, in this case, the Council did not adopt any formal decision awarding the contract in question other than by signing the framework agreement with De Waele on 12 April 2000.
- 44 Therefore, the Court considers that, as the Council maintains, the signing of the agreement with De Waele and the decision to award the contract were simultaneous and that that signing is deemed to constitute the award of the contract. It should also be pointed out that the decision awarding the contract was taken after receipt of a copy of the report to the CCAM and the CCAM's favourable opinion and, therefore, in accordance with a procedure which complied with the principles of non-discrimination and transparency. It follows that, contrary to the applicant's claim, the contested decision is not tainted with irregularities.

- 45 As for the applicant's second argument, alleging failure to draw up a report pursuant to Article 8(3) of Directive 93/37, the Court considers that it cannot be accepted. In that regard, it should be pointed out that, under that provision, for each contract awarded, the contracting authority is required to draw up a report (in the English version, 'a written report') containing at least the details listed in the provision. For the contract in the present case the report to the CCAM drawn up by the Council includes 12 annexes, amongst them the Contract Notice, the record of the opening of the tendering procedure and a copy of the framework agreement concluded with De Waele. It must be stated that all the information required under Article 8(3) of Directive 93/37 (see paragraph 4 above) was contained in the report to the CCAM, in the CCAM's favourable opinion and in the Notice of contract awarded. The Council cannot be criticised for having reproduced that information in three documents rather than in one. In any event, the requirement to draw up a report under that provision arises out of the concern to ensure compliance with the principles of non-discrimination and transparency in the awarding of public works contracts. It should be noted that the applicant has not adduced the slightest evidence that those principles were infringed and, as the Court has already pointed out in paragraph 44 above, the procedure awarding the contract to De Waele complied with those principles.
- 46 It follows from the above that the plea alleging the non-existence of the contested decision is unfounded.

The second plea, alleging infringement of the duty to state reasons

— Arguments of the parties

- 47 The applicant maintains that the contested decision should be annulled owing to the absence of a statement of reasons or, at the very least, to the inadequacy of the reasoning.

- 48 It claims that the reasoning given in the Council's letter of 11 May 2000 does not meet the requirements for stating reasons laid down by Article 253 EC and Article 8(1) of Directive 93/37 (see paragraph 4 above) in that it does not give the characteristics and relative advantages of De Waele's tender, but merely makes the general statement that it was the most economically advantageous.
- 49 The additional information given in the letter of 4 July 2000, following the applicant's request of 19 June 2000, cannot be taken into consideration because it was communicated outside the 15-day period calculated from the first request for reasons. In any event, the reasoning contained in that letter is inadequate, because it neither explains why the other tenders were considered to be of equal merit to the applicant's nor identifies the undertaking which ranked second in respect of the third, fifth and sixth criteria or the undertaking ranked equal with the applicant in respect of the fourth criterion. Furthermore, the applicant points out that, contrary to the Council's argument, its request of 19 June 2000 did not have the effect of reopening that 15-day period, since it sought to obtain not additional reasons but disclosure of the award procedure file.
- 50 As a preliminary point, the Council recalls the mechanism established by Directive 93/37 in respect of the obligation to state reasons. Under Article 8(1) of that directive the contracting authority is required, first of all, to inform the eliminated tenderer, by a simple, unreasoned letter, that his tender has been rejected. It need give reasons for its decision to reject the tender only to tenderers who expressly request that, and that within a period of 15 days from the time of the request. Furthermore, it is settled case-law that the purpose of the duty to state reasons is to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and to enable the Court to exercise its supervisory jurisdiction (*Adia interim v Commission*, cited above, paragraphs 31 and 32).

- 51 Moreover, the Council claims that it gave adequate reasons, in its letter of 11 May 2000 — which had clearly been sent within the prescribed period of 15 days —, for its decision rejecting the applicant's tender. It points out that, in that letter, it clearly stated the name of the successful tenderer, the procedure which was followed, the reasons for rejecting the applicant's tender and the reasons for accepting De Waele's tender. The Council refers, in that regard, to paragraph 35 of the judgment in *Adia interim v Commission*, cited above. It adds that the applicant was obviously able to understand that, in the light, particularly, of the high price of its tender, it could not be regarded as the most economically advantageous.
- 52 According to the Council, the additional information contained in its letter of 4 July 2000 was communicated within the prescribed period of 15 days. The purpose of the letter was, in fact, to reply to a second request made by the applicant in its letter of 19 June 2000. It points out that, in that letter, it gave the applicant details of the comparison it had made between the various tenders.
- 53 The Council states that, in any event, the possible inadequacy of the reasons for rejecting the applicant's tender cannot invalidate the decision to award the contract to a third tenderer. The annulment of the decision to award the contract on the grounds of inadequate reasoning *a posteriori* for a decision to reject another tender is clearly a disproportionate penalty.

— Findings of the Court

- 54 It is apparent from Article 8(1) of Directive 93/37, as amended by Directive 97/52, 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.

- 55 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 supervisory jurisdiction (Case T-166/94 *Koyo Seiko v Council* [1995] ECR II-2129, paragraph 103, and *Aida interim v Commission*, cited above, paragraph 32).
- 56 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 for a copy of the decision awarding the contract and for the reasons for the decision.
- 57 Clearly, in the letter of 11 May 2000 (see paragraph 14 above) 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 in evaluating 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 level of its price in relation to that of De Waele. The adequacy of that statement of reasons is not affected by the fact that, on

4 July 2000, the Council provided, at the express request of the applicant, an even more detailed explanation of the evaluation of its tender.

58 In any event, and contrary to what the applicant claims (see paragraph 49 above), the duty to state reasons must be assessed in the light of the information available to the applicant at the time when the action 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, he 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.

59 It is apparent from the foregoing that the second plea, alleging infringement of the duty to state reasons, must be rejected.

The third plea, alleging infringement of Articles 18 and 30 of Directive 93/37 and of the contract documents

— Arguments of the parties

60 The applicant maintains that, since the Council used the method of the most economically advantageous tender, as defined in Article 30(1) of Directive 93/37, it should — in accordance with Article 18 of the Directive — have compared the three tenders submitted in the light of each of the eight criteria set out in the

contract documents (see paragraph 8 above). However, it is clear from the Council's letters of 11 May and 4 July 2000 that this rule was not observed in the present case, because the decisive criterion for awarding the contract was the price and the assessment of that criterion was not counterbalanced by the assessment of the other criteria. By so doing, the Council infringed Articles 18 and 30 of Directive 93/37 and also the contract documents.

- 61 The applicant states that, according to Article 30(2) of Directive 93/37, when a contract is awarded to the most economically advantageous tender, all the criteria on which the award is based are to be stated in the contract documents 'where possible in descending order of importance'. The applicant considers that, since, in the present case, the contract documents did not list the award criteria in descending order of importance, the eight criteria selected all had the same value. It follows that, pursuant to that rule, the Council should have awarded the contract to the applicant since, as is clear from the report to the CCAM, it was ranked first for seven award criteria whereas De Waele was ranked first for only five.
- 62 In its reply the applicant points out that, contrary to what the Council states, it is not apparent from the report to the CCAM that, for the three criteria in which it ranks higher than De Waele, the differences between the two companies are insignificant. Thus, as regards the experience and competence of the permanent team, the report to the CCAM states that the applicant proposes to use again the permanent team which has technical 'know-how' of the Council's buildings, which is a considerable advantage. Similarly, as regards the quality of subcontractors and suppliers, the report to the CCAM states that the applicant supplied a list of 60 subcontractors whereas De Waele's list contained only about 20. This difference is all the more significant because, as the Council points out, 'the Council's general undertaking contract requires the contractor to arrange for competitive tendering between the subcontractors in order to obtain the best possible terms for the General Secretariat of the Council' and therefore 'a high number of subcontractors is desirable'. Also, as regards the safety-coordinator, the applicant had proposed three independent companies whereas De Waele had designated only one.

- 63 In response to this the Council states that it is clear, both from the report to the CCAM and from its letter of 11 May 2000, that the three tenders were examined in the light of the eight criteria set out in the contract documents and that the price of the tender was not the only criterion adopted.
- 64 It states that the financial analysis — on which the CCAM's opinion is based — which was carried out to evaluate the amount of the tender did not contain solely the analysis of the price but also that of the multiplication factor for the general costs and a comparison of the tenders over the whole five-year term of the contract. It points out, in that regard, that the applicant's tender was 10% higher than that of De Waele. It is clear from this analysis that De Waele's offer was more advantageous from a financial point of view.
- 65 With regard to the other criteria, the Council points out that, as stated in the final paragraph of its letter of 11 May 2000, they were 'qualitative'. It considers that, when, as in the present case, the candidates — in respect of the qualitative criteria — are of equal merit or there is no significant difference between them, it cannot be criticised for having chosen the candidate ranked first for the financial criteria.
- 66 The Council submits that it must be concluded from those considerations that it compared the various tenderers in the light of the different award criteria and that, in view of the fact that there were no significant differences between the applicant and De Waele with regard to the 'qualitative' criteria and that, on a financial level, De Waele's offer was clearly more advantageous, it was fully entitled, in the exercise of its discretion, to judge that tender to be the most economically advantageous.
- 67 In its rejoinder the Council rejects the applicant's argument that the eight criteria were of equal value. It points out that the first criterion, namely 'conformity of

the tender' (see paragraph 8 above), is an absolute criterion in that the tenderer who does not meet it is excluded at the outset. The second criterion, 'price of the tender' (see paragraph 8 above), is an objective criterion since it allows an order to be established between the tenders. 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. Those last criteria are, however, less important than the first two.

- 68 The Council disputes the applicant's argument that, if there is no weighting, the eight criteria are bound to have the same value. It contends that, in a tendering procedure in which the contract is awarded to the most economically advantageous tender, it goes without saying that, when the financial criteria are placed first, the awarding authority has given them more weight than the others.
- 69 It challenges the validity of the applicant's claim that it was ranked first for seven award criteria. For the fourth criterion, it was ranked equal with De Waele and, for the seventh and eighth criteria, it was ranked equal with De Waele and Renco.
- 70 However that may be, since it was ranked last for the price criterion, the applicant could have been successful only if the differences between it and De Waele for the other criteria had actually been significant, which was not the case.
- 71 Furthermore, as regards the criterion relating to the experience and competence of the permanent team, the Council points out that it considered that the applicant's advantage in that regard, namely the fact that it was already working in the Council's buildings, could not prevail, since the specific purpose of a tendering procedure is to avoid monopoly situations and to allow an undertaking whose tender is the most economically advantageous to be selected.

- 72 Moreover, as regards the quality of the subcontractors and suppliers, the applicant was ranked in a better position than De Waele because of the number of subcontractors on the list enclosed with the tender. However, the number of 20 subcontractors proposed by De Waele was more than sufficient to satisfy the conditions of the contract documents, which require that at least three companies be suggested. As for the safety-coordinator, the contract documents required the introduction of one or more persons or bodies able to assume those tasks and De Waele's tender fulfilled that requirement.

— Findings of the Court

- 73 It is settled case-law that 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 and that the Court's review must be limited to verifying that there has been no serious and manifest error (Case 56/77 *Agence européenne d'interims v Commission* [1978] ECR 2215, paragraph 20; *Adia interim v Commission*, cited above, paragraph 49, and Case T-139/99 *AICS v Parliament* [2000] ECR II-2849, paragraph 39).
- 74 In the present case, it is apparent from the file that the contract was awarded to the most economically advantageous tender. However, it should be pointed out that Article 30(2) of Directive 93/37 does not list the criteria which may be adopted as criteria for the award of a contract to what is the most economically advantageous tender. Although that provision thus leaves it to the Council to choose the criteria on which it proposes to base its award of the contract, that choice may relate only to criteria aimed at identifying the offer which is economically the most advantageous (see, to that effect, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraphs 35 and 36). In order to determine which is the most economically advantageous tender, the Council must be able to exercise its discretion in taking a decision on the basis of qualitative and

quantitative criteria that vary according to the contract in question (see, to that effect, Case 274/83 *Commission v Italy* [1985] ECR 1077, paragraph 25).

75 In that regard, the parties agree that the Council set out in the contract documents eight award criteria which it intended to use. Notwithstanding the applicant's assertions, the documents before the Court clearly show that the Council correctly assessed and classified the three tenders submitted in the present case in respect of each of those eight criteria. The Court also considers that the applicant's argument that its tender was wrongly assessed in relation to that of De Waele in respect of the criteria relating to the experience and competence of the permanent team, to the quality of the subcontractors and suppliers and to the safety-coordinator cannot be accepted.

76 Admittedly, the applicant's tender was ranked first for most of the criteria listed in the contract documents. However, the Council considered, as is apparent from the conclusion of the report to the CCAM, that, although 'the tenders submitted by both De Waele and [the applicant met] the criteria of the contract documents best overall, De Waele's financial proposal [was] the more advantageous'. It must be inferred from that that, although its tender was ranked higher for most of the eight criteria in question, the applicant was eliminated because of the relatively high price of its tender.

77 However, it should be pointed out that the Council listed the eight award criteria in question without specifying the order of importance applied to them. This is not incompatible with Article 30(2) of Directive 93/37, which does not prescribe but merely recommends that the criteria for awarding a contract should be placed in order of importance. In those circumstances, it should be pointed out that, contrary to what the applicant claims, each of the eight criteria does not necessarily have the same value unless there is an indication to the contrary in the contract documents. The Court considers that the Council has a wide discretion not only in choosing the contract-award criteria which it intends to follow but also as regards the relative weight it accords to the various criteria for the purpose

of taking a decision to award a contract following a tendering procedure, provided that the assessment it carries out is designed to identify the most economically advantageous offer.

78 It is important to point out that the eight criteria referred to in paragraph 8 above are, apart from the first criterion concerning the conformity of the tender, qualitative and quantitative. The Court considers that the criterion concerning the conformity of the tender is absolute. If the tender does not comply with the contract documents, it must be rejected. The second criterion, the price of the tender, is quantitative and provides an objective basis for comparing the financial costs of the tenders. The other six criteria are all qualitative and their main function is to verify that each tenderer has the skills and aptitudes necessary for executing the contract works. However, it must be held that, as, in the present case, the three tenders revealed no significant differences — with regard to the qualitative criteria — which might affect their respective definitive financial values, the Council was entitled, within the limits of its discretion, to accord more weight to the second criterion, concerning the price of the tender.

79 As for the applicant's complaint that the Council had not taken sufficient account of the differences between the applicant and De Waele in respect of three criteria, namely those relating to the experience and competence of the permanent team, to the quality of the proposed subcontractors and suppliers, and to the safety-coordinator, the Court considers that that complaint must be rejected. With regard to the criterion concerning the experience and competence of the permanent team, the Court considers that, as the Council rightly submits, the fact that the applicant is already working in the Council's buildings cannot be a preponderant factor if the effectiveness of the tendering procedure is not to be negated. In any event, the applicant does not demonstrate the alleged lack of experience and competence of De Waele's permanent team. As regards the criteria of the quality of the subcontractors and suppliers and of the safety-

coordinator, the applicant merely refers to the fact that it proposed more companies than De Waele, without challenging the quality of De Waele's proposals.

80 It follows that the Council has not infringed the contract documents and Articles 18 and 30 of Directive 93/37 by awarding the contract to the lowest-priced tender, all things being relatively equal otherwise.

81 It is apparent from the foregoing that this plea must be rejected in its entirety.

The claim for compensation

82 The applicant requests payment of the sum of BEF 153 421 286 or EUR 3 803 214, subject to increase, together with interest thereon at the rate of 6% from 12 April 2000, by way of damages for the harm which it has suffered owing to the unlawful conduct of the Council during the procedure for the award of the contract in question.

83 In accordance with settled case-law, for the Community to incur non-contractual liability, the applicant must prove the unlawfulness of the conduct alleged against the institution concerned, the fact of damage and the existence of a causal link between that conduct and the damage complained of (Case T-175/94 *International Procurement Services v Commission* [1996] ECR II-729, paragraph 44; Case T-336/94 *Efisol v Commission* [1996] ECR II-1343, paragraph 30, or Case

T-267/94 *Oleifici Italiani v Commission* [1997] ECR II-1239, paragraph 20). Where one of those conditions is not fulfilled, the action must therefore be dismissed in its entirety and it is not necessary to examine the other conditions for that liability (Case C-146/91 *KYDEP v Council and Commission* [1994] ECR I-4199, paragraph 19).

84 It follows from the Court's conclusions relating to the application for annulment that the applicant has not adduced proof of unlawful conduct on the part of the Council.

85 It follows that the claim for compensation must be rejected.

86 It follows from all the above considerations that the application must be dismissed in its entirety.

Costs

87 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 Council has applied for costs, the applicant must be ordered to pay the costs incurred by the Council.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;
2. Orders the applicant to bear its own costs and pay 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