

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

18 April 2007\*

In Case T-195/05,

**Deloitte Business Advisory NV**, established in Brussels (Belgium), represented by D. Van Heuven, S. Ronse and S. Logie, lawyers,

applicant,

v

**Commission of the European Communities**, represented by L. Pignataro-Nolin and E. Manhaeve, acting as Agents,

defendant,

**ACTION** for annulment, firstly, of the Commission's decision rejecting the tender from Euphet for the public procurement contract 'Evaluation Framework Contract covering the policy areas of [the Directorate-General for] Health and Consumer Protection, Lot 1 (Public Health) — call for tenders SANCO/2004/01/041' and, secondly, of the Commission's decision awarding that contract to a third party,

\* Language of the case: Dutch.

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

composed of H. Legal, President, I. Wiszniewska-Białecka and E. Moavero Milanesi,  
Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 11 October  
2006,

gives the following

## **Judgment**

### **Legal framework**

- <sup>1</sup> The award of service contracts by the Commission is governed by Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1; 'the Financial Regulation') and Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1; 'the Implementing Rules').

2 Pursuant to Article 89(1) of the Financial Regulation:

‘All public contracts financed in whole or in part by the budget shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination.’

3 Under Article 94 of the Financial Regulation:

‘Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:

(a) are subject to a conflict of interest;

...’

4 Under Article 99 of the Financial Regulation:

‘While the procurement procedure is under way, all contacts between the contracting authority and candidates or tenderers must satisfy conditions ensuring transparency and equal treatment. They may not lead to amendment of the conditions of the contract or the terms of the original tender.’

5 Article 138 of the Implementing Rules provides:

‘1. Contracts shall be awarded in one of the following two ways:

- (a) under the automatic award procedure, in which case the contract is awarded to the tender which, while being in order and satisfying the conditions laid down, quotes the lowest price;
  
- (b) under the best-value-for-money procedure.

2. The tender offering the best value for money shall be the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability completion or delivery times, after-sales service and technical assistance.

...’

6 Pursuant to Article 146(3) of the Implementing Rules:

‘Requests to participate and tenders which do not satisfy all the essential requirements set out in the supporting documentation for invitations to tender or the specific requirements laid down therein shall be eliminated.

However, the evaluation committee may ask candidates or tenderers to supply additional material or to clarify the supporting documents submitted in connection with the exclusion and selection criteria, within a specified time-limit ...'

7 Article 147(3) of the Implementing Rules states:

'The contracting authority shall then take its decision giving at least the following:

- (a) the name and address of the contracting authority, and the subject and value of the contract or of the framework contract;
- (b) the names of the candidates or tenderers rejected and the reasons for their rejection;
- (c) the names of the candidates or tenderers to be examined and the reasons for their selection;
- (d) the reasons for the rejection of tenders found to be abnormally low;
- (e) the names of the candidates or contractor selected and the reasons for that choice by reference to the selection and award criteria announced in advance and, if known, the proportion of the contract or the framework contract which the contractor intends to subcontract to third parties;

(f) in the case of negotiated procedures, the circumstances referred to in Articles 126, 127, 242, 244, 246 and 247 which justify their use;

(g) where appropriate, the reasons why the contracting authority has decided not to award a contract.’

8 Article 148(3) of the Implementing Rules provides:

‘If, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may contact the tenderer, although such contact may not lead to any alteration of the terms of the tender.’

### **Background to the dispute**

9 On 14 December 2004, the Commission published in the *Supplement to the Official Journal of the European Union* (OJ 2004 S 243) a contract notice for the award of a framework contract entitled ‘Evaluation framework contract covering the policy areas of [the Directorate-General for] Health and Consumer Protection, Lot 1 (public health) — invitation to tender SANCO/2004/01/141’ (‘the framework contract’).

- 10 It is clear from sections 7.1.3 and 7.1.4 of the specifications relating to the tendering procedure ('the specifications') that the framework contract is to relate in particular to the evaluation of the programme of Community action in the field of public health established by Decision No 1786/2002/EC of the European Parliament and of the Council of 23 September 2002 adopting a programme of Community action in the field of public health (2003-2008) (OJ 2002 L 271, p. 1).
- 11 The specifications divide the tasks to be carried out under the framework contract into two main tasks. The first task ('main task 1') is to conduct studies and to provide services intended to assist in the design and preparation of Community programmes or policies, their ex-ante assessment and the 'organisation of evaluation activities'. The second task ('main task 2') is to carry out mid-term, final and ex-post evaluations of programmes, policies and other activities. According to the specifications, the framework contract must allow specific contracts to be concluded in accordance with the Commission's needs. It must be concluded in principle for a period of 24 months with the possibility of renewal for two further periods of 12 months each.
- 12 The specifications also set out several grounds for the exclusion of tenderers.
- 13 One of those grounds, set out in section 9.1.3 of the specifications, which reproduces Article 94 of the Financial Regulation, is formulated as follows:

'Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:

(a) are subject to a conflict of interest ...'

- 14 With a view to tendering for the contract in question, Deloitte Business Advisory NV formed a consortium with the London School of Hygiene and Tropical Medicine, the Nederlandse Organisatie voor toegepast-natuurwetenschappelijk onderzoek (Netherlands Organisation for Applied Scientific Research, TNO) and the Istituto superiore di sanità (National Health Institute, Italy) for the evaluation of European public health (European Public Health Evaluation Task Force; 'Euphet'), assisted by other bodies such as the Karolinska Institutet (a Swedish medical research and education centre). The applicant acts as the legal representative of that group.
- 15 On 10 February 2005 Euphet submitted a tender to the Commission under the tendering procedure. Euphet's tender includes a paragraph with the heading 'Independence', which reads as follows:

'Euphet understands and accepts that none of the evaluation organisations or their staff should have the slightest existing or potential conflict of interest in the performance of their task under the framework contract. We confirm that all the participants in Euphet are entirely independent of the Commission and that we do not foresee any risk in this regard at present. Furthermore, we undertake to conduct a detailed prior check in connection with each specific contract in order to ensure that the teams we propose are composed of members who are able to work in complete independence and to provide an objective and independent external assessment. If, in the course of execution of the projects, the slightest problem should arise which could have a bearing on this key principle, we would notify the Commission immediately and work with it to seek to rectify the situation.'

- 16 By a letter of 22 April 2005, the Commission informed Euphet that its tender had been rejected since the evaluation committee for the contract had found there to be risks of conflicts of interest within Euphet. In the decision rejecting the tender, the Commission noted as follows:



“The evaluation committee examined the offers concerning possible Conflict of Interest ... The definition of [conflict of interest] is provided in the draft contract that was included in the tender documentation. This definition reads:

“The Contractor shall take all necessary measures to prevent any situation that could compromise the impartial and objective performance of the Contract. Such conflict of interests could arise in particular as a result of economic interest, political or national affinity, family or emotional ties, or any other relevant connection or shared interest.”

In the context of an evaluation contract, a case of [conflict of interest] could take place if the tenderer is being, or has been, involved in the implementation of the subject to be evaluated. This situation could involve the evaluator assessing his/her own work, and there is a great risk that the conflict of interest affects the objectivity — which is a crucial factor for an evaluation — of the evaluator. It is also being stressed in the Specifications of the Tender that objectivity has to be ensured in evaluations.

The following information was found concerning the Euphet main and supporting partners' involvement in ... activities [of the Directorate-General for health and consumer protection (SANCO)].

— London School of Hygiene and Tropical Medicine (LSHTM) has a large number of grant contracts (14 listed) with SANCO.

- TNO has a large number of grant contracts with SANCO/Public Health.
  
- Istituto Superiore di Sanità (ISS) has one grant contract with SANCO/Public Health and another one is planned to be signed in the coming months.
  
- Karolinska Institutet (KI) has a large number of grant contracts with SANCO/Public Health.

The evaluation committee concluded that Euphet does not acknowledge the fact that a number of the consortium partners have a large involvement in the implementation of the Public Health programme. Considering the great risk of [conflict of interest], a detailed and concrete explanation would have been required to provide a sufficient level of understanding of how the [conflict of interest] issue should be addressed and the risks should be eliminated. However, the approach proposed is not sufficient, and no satisfactory assurance is provided by the tenderer that [conflict of interest] could be avoided.'

- <sup>17</sup> In the decision rejecting the tender, however, the Commission adds that it would not be signing the framework contract with the successful tenderer until a period of two weeks had passed.
- <sup>18</sup> By a letter dated 3 May 2005, Euphet contested the Commission's position and, inter alia, asked it to respond by 4 May 2005, failing which it would bring the matter before the Court of First Instance.

19 By a fax of 4 May 2005, the Commission acknowledged receipt of the letter from Euphet and stated:

‘Because we need more time to examine the questions raised in your letter, we will not proceed with the signing of the contract for a further period of 15 days from the date on which this letter was sent.’

20 By a fax of 19 May 2005, the Commission replied that it was maintaining its position and rejecting the tender submitted by Euphet.

### **Procedure and forms of order sought**

21 By application lodged at the Registry of the Court of First Instance on 19 May 2005, the applicant brought the present action.

22 By a separate document lodged at the Registry of the Court of First Instance on the same day, the applicant made an application for interim measures, seeking, on the one hand, suspension of execution of the decision rejecting the tender and the decision awarding the contract to another tenderer (‘the award decision’) and, on the other, an order preventing the Commission, firstly, from notifying the award decision to the successful tenderer and, secondly, from signing the relevant contract, on pain of a fine of EUR 2.5 million.

- 23 By order of 26 May 2005, the President of the Court of First Instance ordered the Commission not to sign the framework contract until a final order had been made on the application for interim measures.
- 24 By order of 20 September 2005, the President of the Court of First Instance dismissed the application for interim measures.
- 25 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure.
- 26 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 11 October 2006.
- 27 The applicant claims that the Court should:
- declare the action well founded;
  - annul the decision rejecting the tender;
  - annul the award decision;
  - order the Commission to pay the costs.

28 The Commission contends that the Court should:

- declare the applicant's application unfounded and dismiss the action;
  
- order the applicant to pay the costs.

## Law

29 In support of its action, the applicant raises, in essence, two pleas in law, alleging, respectively, that Euphet was unlawfully excluded from the tender procedure on grounds of a risk of conflict of interest and that it was unlawfully deprived of the possibility of supplying additional information with regard to the conflict of interest.

*The first plea in law, alleging the unlawful exclusion of Euphet from the tender procedure on grounds of a risk of conflict of interest*

30 The applicant's arguments seek to show, in essence, firstly, the lack of reasoning in the decision rejecting the tender with regard to the existence of a conflict of interest, secondly, the lack of a conflict of interest and, thirdly, infringement of the principle of protection of legitimate expectations and of Article 138 of the Implementing Rules.

## Breach of the duty to give reasons concerning the existence of a conflict of interest

## — Arguments of the parties

- 31 In the context of the first part of its first plea, alleging breach of the general duty to give reasons and of Article 147(3) of the Implementing Rules, the applicant submits that the decision rejecting the tender is based on incorrect and insufficient reasons with regard to the existence of a conflict of interest.
- 32 The reasons given by the Commission for its decision rejecting the tender are incorrect since the evaluation committee — certain extracts of whose report are set out in the present judgment — concluded wrongly that Euphet did not acknowledge the fact that a number of the consortium partners are greatly involved in the implementation of the Public Health programme. Euphet's tender clearly stated that certain Euphet partners were involved in ongoing activities for the DG 'Health and Consumer Protection'.
- 33 The Commission's reasons for its decision rejecting the tender are also incorrect, since at no time did it state why the course of action suggested by Euphet was inadequate and why it offered no satisfactory assurance that all conflicts of interest could be avoided. Moreover, according to the applicant, although the invitation to tender required a minimum of seven experts, Euphet's tender included 65 *curricula vitae*, 45 of which were of persons who had nothing to do with the organisations named by the Commission, and therefore Euphet would always have been capable of carrying out the different tasks without there being a conflict of interest. The 20 persons connected to organisations named by the Commission would be faced with a conflict of interest only if they carried out activities of type D for main task 2, which has many aspects, thus enabling them to work on a number of evaluation files without any risk of conflict of interest. Since the conditions for selection were particularly stringent, Euphet had tried to gather a large number of experts who

were likely to have experience in the activities of the DG ‘Health and Consumer Protection’. Accordingly, a necessary and sufficient condition would have been to propose a way of resolving conflicts of interest, which is a condition that Euphet would have met in the present case.

34 As subsidiary points, the applicant observes that the fact that one or more Euphet partners had received grants from the Commission is not such as to cast doubt on their objectivity in all circumstances. The applicant also notes that the Commission raises that point, and the fact that several of the experts engaged have received grants from the DG ‘Health and Consumer Protection’, for the first time in its defence.

35 It is for the Commission to show concrete proof that a particular tenderer has a conflict of interest, and if such a risk could justify the exclusion of a tenderer — which is not the case here — the Commission ought to state that clearly in the invitation to tender, so that tenderers so forewarned can take that risk into account when forming their teams.

36 The Commission disputes, firstly, the allegation that the decision rejecting the tender is based on incorrect reasons, maintaining that it was fully entitled to hold that Euphet did not acknowledge the fact that a number of Euphet partners were greatly involved in the implementation of the Public Health programme in question in the present case. Although the curricula vitae of some of the partners in Euphet disclosed their involvement in the implementation of the programme of Community action in the public health sector, Euphet did not see the need to notify the Commission of a potential risk of conflicts of interest, and stated as follows:

‘We confirm that all the participants in Euphet are entirely independent of the Commission and that we do not foresee any risk in this regard at present.’

- 37 Furthermore, that ground for exclusion — exclusion for conflict of interest — which is set out in Article 94 of the Financial Regulation and reproduced in section 9.1.3 of the specifications, was — by choice — drafted in wide terms by the Commission, since the assessment as to whether there is a conflict of interest requires a concrete examination by the adjudicating authority on the basis of the documents in the file.
- 38 The Commission further takes the view that it gave sufficient explanation of the reasons for its finding that there was a conflict of interest with regard to Euphet. It adds that its letter of 19 May 2005 was not a statement of reasons a posteriori but a response to the arguments raised in the detailed letter from Euphet's lawyers of 3 May 2005. Accordingly, Euphet has sufficient knowledge of the reasons for the decision rejecting the tender.
- 39 Finally, the Commission rejects the applicant's assertion that it would still have been possible to carry out certain evaluation tasks without risk of conflict of interest, since the tender included 65 curricula vitae, 45 of which were of persons who have no connection with the Euphet partners in respect of which the Commission had found a conflict of interest. The experts proposed by Euphet did not all carry the same specific weight and, in its tender, Euphet classified its experts according to their experience in the areas of 'Evaluation' and 'Public Health'. On that basis a points system was established on a scale from A to D. Analysis of the qualifications of the experts proposed by Euphet shows that most of those given the highest points — and, it may be supposed, those who play the most important role in the actual performance of the evaluation tasks — are connected with organisations which received large subsidies from the Commission for carrying out work relating to the Community public health programme. Each partner in the consortium is also a member of the contract committee which oversees performance of the contract. Furthermore, the applicant has tried to create a homogeneous team and it is rather implausible that those organisations or experts would be excluded from carrying out certain tasks, irrespective of the consequences that that would have for the quality of the work to be done.



40 Moreover, the Commission refutes the argument that it should have made express mention of the ‘risk of a conflict of interest’ as a specific ground for exclusion in the specifications, thus depriving Euphet of the opportunity to take that risk into consideration.

41 Firstly, the grounds for exclusion are exhaustively laid down in Articles 93 and 94 of the Financial Regulation; the possibility of conflict of interest is mentioned in Article 94 and repeated word for word in the specifications.

42 Secondly, Euphet was perfectly aware of the problem of conflicts of interest when it drafted its tender since it stated therein: ‘Euphet understands and accepts that none of the evaluation organisations or their staff should have the slightest existing or potential conflict of interest in the performance of their task under the framework contract’. Aware of the fact that the risk of conflict of interest — not merely actual but also potential — was incompatible with performance of the evaluation tasks under the framework contract, Euphet nevertheless asserted in its tender:

‘We confirm that all the participants in Euphet are entirely independent of the Commission and that we do not foresee any risk in this regard at present.’

43 Thirdly, the applicant accepted, in its reply, that there was a problem of conflict of interest where organisations participate in the evaluation of a Community policy in the context of which they have received subsidies, stating that ‘it is clear that a partner or an expert employed by that partner cannot participate in the evaluation of a file in the context of which that partner has itself received a subsidy’. In that regard, the Commission points out that all the partners in the consortium in question, as well as a number of the experts called upon, received subsidies from the DG for ‘Health and Consumer Protection’ for carrying out certain actions in implementation of the Community public health programme.

## — Findings of the Court

- 44 As a preliminary point, it should be noted that the arguments alleging incorrect and insufficient reasons for the decision rejecting the tender amount essentially to a single argument alleging an error of assessment by the Commission and the unfounded nature of the decision rejecting the tender. Accordingly, those questions require not an analysis of the Commission's duty to give reasons, but an in-depth analysis of the substance of the decision rejecting the tender, and will therefore be dealt with in the analysis of the second part of this plea. The arguments set out above will be analysed in the context of the first part of the plea only to the extent that they can truly be understood as alleging infringement of the duty to give reasons.
- 45 In that regard, it should be noted that, according to established case-law, the duty to give reasons depends on the type of document at issue and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution in such a way, firstly, as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to verify whether or not the decision is well founded and, secondly, to permit the Community Court to exercise its supervisory jurisdiction (Case C-350/88 *Delacre and Others v Commission* [1990] ECR I-395, paragraphs 15 and 16, and Case T-217/01 *Forum des migrants v Commission* [2003] ECR II-1563, paragraph 68).
- 46 In the present case, the decision rejecting the tender expressly states that Euphet's tender was rejected because of the existence of a conflict of interest connected, on the one hand, to the subsidies received by the main members of Euphet and, on the other, to the inadequacy of the safeguards offered by Euphet in that regard.

47 The decision rejecting the tender therefore states clearly and unequivocally the Commission's reasoning, thus, firstly, making the persons concerned aware of the reasons for the measure so that they are able to defend their rights and verify whether or not the decision is well founded and, secondly, permitting the Court to exercise its supervisory jurisdiction.

48 It follows that the applicant's argument alleging lack of reasoning for the decision rejecting the tender cannot be accepted. Accordingly, the first part of the first plea must be rejected.

The absence of conflict of interest

— Arguments of the parties

49 In the context of the second part of the first plea, the applicant alleges that the Commission infringed Article 94 of the Financial Regulation and the provisions of the tendering procedure.

50 Firstly, Euphet could not be excluded from the procurement procedure merely because of the existence of a risk of a conflict of interest. Section 9.1.3 of the specifications does indeed provide that the contract cannot be awarded to candidates or tenderers likely to find themselves in a situation of conflict of interest during the procedure for award of the contract, but the concept of conflict of interest is not defined either in the invitation to tender or in Article 94 of the Financial Regulation.

- 51 Under Article II.3.1 of the framework contract, a simple conflict of interest and, a fortiori, a risk of a conflict of interest do not in themselves constitute a ground for exclusion. It is sufficient for the party involved to take the measures necessary to avoid any conflict of interest or its consequences. Furthermore, that article lays down a procedure for resolving conflicts of interest likely to arise during the performance of contracts. The Commission therefore foresaw the risk of conflicts of interest in the context of the contract; it follows that the existence of such a risk cannot justify exclusion.
- 52 The applicant adds that Euphet's suggested approach greatly exceeded the requirements of the draft framework contract in that it proposed not only an ex-post solution — that is to say during performance of each specific contract — but also an ex-ante check, that is to say with effect from the stage at which the application file is drawn up, depending on the nature and the subject of the specific contracts. Such an approach enables the maximum reduction of the risk of a conflict of interest arising in the performance of a specific task. The independence of Euphet's staff was thus guaranteed in the letter of 10 February 2005 accompanying the tender, sent by Euphet to the Commission.
- 53 The applicant claims that the Commission could not require more of Euphet, all the more so because, at the date of lodging of the application, the exact content of the specific contracts was not known. Accordingly, the Commission could not exclude Euphet without acquiring detailed knowledge of the contents of the specific contracts to be concluded. If the Commission wished to have the option of excluding a tenderer on grounds of a risk of conflict of interest, it should have stated that in the specifications.
- 54 Furthermore, none of the invitation to tender documents provides — by way of a specific ground for exclusion — for the exclusion of a tenderer of which one or more members are involved in ongoing projects for the DG 'Health and Consumer Protection', and such a ground for exclusion could not be applied since it was neither mentioned in Article 94 of the Financial Regulation nor laid down in case-law.

55 In addition, the applicant submits that it is necessary to distinguish — as did the President of the Court of First Instance in his order of 20 September 2005 — between a case where the tenderers are ‘subject to a conflict of interest during the procurement procedure’, which justifies their exclusion pursuant to Article 94 of the Financial Regulation, and a case where there is potential risk of a conflict of interest, as relied upon by the Commission in the present case to justify exclusion. Basing its argument on paragraph 88 of that order, the applicant takes the view that it is for the Court to ascertain the degree of certainty needed to justify exclusion from the tendering procedure and to determine the discretion enjoyed by the Commission for the purposes of establishing a risk of a conflict of interest. The Commission cannot and must not exclude a tenderer before an actual conflict of interest is found.

56 Secondly, the applicant claims that the Commission did not carry out a specific check of Euphet’s tender.

57 In that regard, it refers to case-law, according to which it is unlawful to exclude a tenderer in an abstract manner without any specific check on the resolution of a conflict of interest (Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 and Case T-160/03 *AFCon Management Consultants and Others v Commission* [2005] ECR II-981, paragraphs 75 to 78).

58 The Commission disputes the argument that Euphet was excluded from the tendering procedure on the sole ground that there was a risk of conflict of interest.

59 Firstly, it submits that the provisions of Article 94 of the Financial Regulation, reproduced in section 9.1.3 of the specifications, provide for the exclusion of tenderers who ‘during the procurement procedure’ are ‘subject to a conflict of interest’. Those provisions relate inter alia to risks of conflicts of interest which exist

at the stage of the procurement procedure and may affect its implementation. The existence of a conflict of interest even before the award of the contract accordingly constitutes a ground for rejection of the tender. That is not the case where a conflict of interest which did not exist when the contract was awarded arises during performance of the contract. In the latter situation, a contractual provision is laid down to remove any conflict of interest. An actual risk of conflict of interest already present at the stage of award of the contract is a legitimate ground for exclusion from the contract pursuant to Article 94 of the Financial Regulation. A finding that there is a serious risk of a conflict of interest 'in the future' (when the contract is performed) is an 'actual' conflict of interest in the context of award of the contract.

- 60 Next, although the invitation to tender does not require tenderers to include proposals for measures to correct conflicts of interest in their tender from the outset, that omission is explained by the very fact that a finding of conflict of interest even before award of the contract entails exclusion of the tender concerned, pursuant to section 9.1.3 of the specifications and Article 94 of the Financial Regulation.
- 61 Finally, a risk of conflict of interest, so far as Euphet is concerned, requires no prior knowledge of the precise content of the specific contracts following the framework contract. It is sufficient to note that, having regard to the subject-matter of the framework contract itself, Euphet's objectivity and impartiality in the performance of the tasks to be entrusted to it may seriously be doubted.
- 62 With regard to the argument alleging lack of a specific check of Euphet's tender, the Commission responds that, in the present case, the evaluation committee specifically checked whether there was a conflict of interest. On making that check, it found that all the partners in the consortium, as well as a number of experts called upon, received subsidies from DG 'Health and Consumer Protection' for carrying out certain actions in implementation of the Community public health programme. The participation of those organisations in the carrying out of the evaluation could

require them, in the context of an intermediary or ex-post evaluation, to assess their own work, which would compromise their objectivity and impartiality. Moreover, in the context of an ex-ante evaluation, there is also a risk of conflict of interest since organisations regularly receiving subsidies under certain programmes are in a position to affect the development and later direction of those programmes.

- 63 The Commission rejects the theory that there can be conflict of interest only at the stage of intermediary and ex-post evaluations of individual programmes. Since the ex-ante evaluations are intended to support and guide the future policy of the Commission on public health matters, organisations regularly receiving subsidies would be inclined to put their own interests first when setting out the basic outlines of a future action programme.

— Findings of the Court

- 64 The reasons for the decision rejecting Euphet's tender were the risk of conflict of interest on the part of the tenderer, the tenderer's failure to acknowledge the existence of such a risk and the absence, in the tender, of concrete proposals for the removal of that risk. Thus, firstly, it must be determined, on the one hand, whether the Commission was correct to base its refusal of the tender submitted by Euphet on the existence of a risk of conflict of interest and, on the other, whether it was indeed the existence of that risk which led the Commission to adopt the decision rejecting the tender. Subsequently, it must be considered whether the Commission was justified in taking the view that the risk of conflict of interest alleged actually existed in the present case.

- 65 The legal basis for the decision rejecting the tender is to be found in Article 94 of the Financial Regulation, reproduced in section 9.1.3 of the specifications, which

provides for the exclusion — from the award of contracts — of tenderers who ‘during the award procedure’ are ‘subject to a conflict of interest’. Moreover, the decision rejecting the tender suggests as a definition of conflict of interest the terms of Article II.3.1 of the framework contract, which provides: ‘The Contractor shall take all necessary measures to prevent any situation that could compromise the impartial and objective performance of the Contract. Such conflict of interest could arise in particular as a result of economic interest, political or national affinity, family or emotional ties, or any other relevant connection or shared interest’. Article II.3.1 also provides that ‘the Contractor shall ensure that his staff, board and directors are not placed in a situation which could give rise to conflict of interests’.

66 Article 94 of the Financial Regulation applies — according to the provisions of that regulation — to all public contracts financed in whole or in part by the Community budget. Thus no distinction is made according to whether the procurement procedure in question relates to a framework contract or another type of contract.

67 However, Article 94 of the Financial Regulation permits exclusion of a tenderer from a procurement procedure only if the situation of conflict of interest to which it refers is real and not hypothetical. That does not mean that a risk of conflict of interest is not sufficient to exclude a tender. In principle, it is only when the contract is performed that a conflict of interest can become real. Before conclusion of the contract, a conflict of interest can be only potential and Article 94 of the Financial Regulation therefore implies an assessment in terms of risk. That risk must actually be found to exist, following a specific assessment of the tender and the tenderer's situation, for that tenderer to be excluded from the procedure. The mere possibility of a conflict of interest cannot suffice for that purpose.

68 It follows that, in the procedure for the award of a framework contract, account must be taken of the fact that specific contracts, award of which will give rise to a check that there is no risk of conflict of interest, must come into being before the successful tenderer for the framework contract is entrusted with the performance of



specific tasks. Thus, in such a case, the risk that a conflict of interest will in fact arise can be considered only where there are material circumstances placing the tenderer in a position where it is unable to avoid the risk of bias in the performance of the majority of the tasks under the framework contract.

69 In the present case, the decision rejecting the tender could rightly be related to a situation of conflict of interest that was real and not hypothetical and it is that situation which led the Commission to adopt that decision.

70 As stated in paragraph 16 above, the decision rejecting the tender shows that the main partners in Euphet are involved in activities of the DG 'Health and Consumer Protection', particularly since they hold a large number of subsidy contracts in that area and that of public health, whereas Euphet does not acknowledge that its members are involved in the implementation of the public health programme.

71 The Commission has also stated, without being contradicted on the point, that the majority of the most experienced experts proposed by Euphet are connected with organisations which have received large subsidies from the Commission for carrying out work relating to the Community public health programme.

72 By concluding, on that basis, in the decision rejecting the tender and in the confirmatory letter of 19 May 2005, that there was a risk of conflict of interest, classified as 'great', the Commission thus took the view that a situation of conflict of interest already existed in principle at the stage of the procedure for the award of the contract, even if that conflict had not yet materialised in terms of its consequences.

- 73 It follows that the Commission correctly assessed Euphet's tender on the basis of the provisions of Article 94 of the Financial Regulation and of section 9.1.3 of the specifications. Accordingly, the applicant's argument that criteria extraneous to those provisions were taken into account in rejecting its tender cannot be accepted.
- 74 The applicant's arguments to the contrary are not such as to cast doubt on that conclusion.
- 75 The argument that Article II.3.1 of the framework contract applies only to conflicts of interest arising during performance of the framework contract and not to those at the stage of the procurement procedure is irrelevant, since the conflict of interest in the present case existed at the stage of award of the contract, thus justifying the exclusion of the tender pursuant to Article 94 of the Financial Regulation and section 9.1.3 of the specifications. For the same reason, the applicant submits in vain that the proposed course of action for resolving conflicts of interest exceeded the requirements of the framework contract in so far as it entailed an ex-ante check, that is to say, with effect from the stage of drawing up of the application file, with reference to the nature and the subject of the specific contracts.
- 76 In the same way, contrary to the applicant's assertion, since the subject-matter of the framework contract was expressly defined, the Commission was entitled to find that, because of the subsidies received, serious doubts could be cast on the objectivity of the main partners in Euphet as early as the time when the tender was lodged, the reason being, as stated in the decision rejecting the tender, that that situation could require the evaluator to assess his own work, thus creating a conflict of interest.
- 77 Next, with regard to whether the Commission was in fact justified in finding that there was a situation of conflict of interest in the present case involving Euphet and

in taking the view that Euphet did not recognise such a risk, it must be noted that, as stated in paragraph 70 above, the Commission states in the decision rejecting the tender — without being contradicted by the applicant on that point — that the evaluation committee found that the main partners in Euphet have a number, indeed a large number, of subsidy contracts with DG ‘Health and Consumer Protection’, particularly in the area of public health. Having regard to the subject-matter of the framework contract, namely ‘evaluation ... covering the policy areas of DG Health and Consumer Protection ... (public health)’, the Commission was correct to take the view, at the stage of the procedure to award the contract, that there was a conflict of interest which could compromise the impartial and objective performance of the framework contract by Euphet. Furthermore, the Commission points out in the decision rejecting the tender that Euphet’s tender specified that ‘Euphet understands and accepts that none of the evaluation organisations or their staff should have the slightest existing or potential conflict of interest in the performance of their task under the framework contract. We confirm that all the participants in Euphet are entirely independent of the Commission and that we do not foresee any risk in this regard at present’. Accordingly, it must be held that the Commission was also correct to infer from that in the decision rejecting the tender that ‘Euphet [did] not acknowledge the fact that a number of the consortium partners [had] a large involvement in the implementation of the Public Health programme’ and that, ‘considering the great risk of [conflict of interest], a detailed and concrete explanation would have been required to provide a sufficient level of understanding of how the [conflict of interest] issue should be addressed and the risks should be eliminated’.

78 It follows from the foregoing that the Commission was right to take the view that, pursuant to Article 94 of the Financial Regulation and section 9.1.3 of the specifications, it was necessary to exclude Euphet’s tender from the award of the contract.

79 The applicant’s argument that it is unlawful to exclude a tenderer in an abstract manner without any specific check of its tender, and in particular of its proposal for resolving conflicts of interest, is unfounded.

- 80 It follows from the foregoing findings that in the present case the Commission did carry out a specific check on the tender submitted by Euphet before deciding to exclude it from the contract. Moreover, the alleged lack of examination of the proposal for resolving conflicts of interest is irrelevant, since the Commission was required to reject Euphet's tender, because of the conflict of interest, pursuant to Article 94 of the Financial Regulation and section 9.1.3 of the specifications.
- 81 In the light of the foregoing, the applicant's argument relating to the lack of conflict of interest cannot be accepted and the second part of the first plea must be rejected.

Breach of the principle of protection of legitimate expectations and of Article 138 of the Implementing Rules

— Arguments of the parties

- 82 In the context of the third part of its first plea, the applicant submits that the proposal made by Euphet for resolving conflicts of interest had previously been accepted by the Commission, even if by other Directorates-General. Since the Commission has departed from its earlier practice, it has breached the principle of protection of legitimate expectations.
- 83 The applicant adds that, if the Commission awards the contract to a third party after wrongfully rejecting Euphet's tender, it will infringe Article 138 of the Implementing Rules.

84 The Commission contends that the applicant does not provide sufficient evidence in support of its allegation of breach of the principle of protection of legitimate expectations.

85 The Commission also disputes that the award of the contract to a third party constitutes infringement of Article 138 of the Implementing Rules. That provision merely distinguishes between the two possible ways of awarding the contract, that is to say by adjudication or by award to the most economically advantageous tender. Acceptance of Euphet's tender for the selection and award stages did not necessarily mean that it would be awarded the contract.

#### — Findings of the Court

86 In accordance with established case-law, the right to rely on the principle of protection of legitimate expectations, which is one of the fundamental principles of the Community, extends to any individual who is in a situation in which it is clear that the Community administration has, by giving him precise assurances, led him to entertain reasonable expectations. Such assurances include, irrespective of the form in which they are given, precise, unconditional and consistent information coming from authorised and reliable sources (Joined Cases T-66/96 and T-221/97 *Mellett v Court of Justice* [1998] ECR-SC I-A-449 and II-1305, paragraphs 104 and 107).

87 In the present case, without otherwise substantiating its assertions in that regard, the applicant merely refers to the position adopted by the Commission in other procurement procedures. Such facts, even if proven, do not constitute precise assurances given by the institution and, accordingly, cannot form the basis of legitimate expectations as to the Commission's acceptance of the procedure proposed by Euphet in the context of the contract in question.

- 88 The applicant's allegation that the unlawful exclusion of Euphet led to the award of the contract to a tenderer whose tender was not the most economically advantageous is ineffective since, having regard to the existence of the conflict of interest found in Euphet's case (see paragraphs 77 and 78 above), the Commission was required to reject its tender.
- 89 The applicant's argument cannot therefore be accepted. Accordingly, the third part of the first plea must be rejected.
- 90 In the light of the foregoing considerations, the first plea in law must be rejected in its entirety.

*The second plea in law, alleging that Euphet was unlawfully deprived of the opportunity of supplying additional information with regard to the conflict of interest*

- 91 In the context of its second plea, the applicant essentially alleges breach by the Commission of its duty to request additional information before rejecting the tender, which follows from Article 146(3) of the Implementing Rules, of the principle of protection of legitimate expectations and the principle of equal treatment.

#### Arguments of the parties

- 92 According to the applicant, the Commission could not reject Euphet's tender without giving it the opportunity of defending its position and the evaluation committee should at least have allowed it to submit its observations on that question.

- 93 Firstly, the applicant complains that the Commission did not ask Euphet to supply additional information in relation to the problem of conflict of interest, contrary to Article 146(3) of the Implementing Rules.
- 94 Secondly, the applicant claims breach of the principle of protection of legitimate expectations and asserts — referring in that regard to an exchange of e-mails between the Commission and a tenderer — that it is the Commission's practice to ask candidates or tenderers for additional information where that is necessary. That practice is, furthermore, confirmed by the case-law of the Court of Justice on public procurement matters, inter alia by the judgment in *Fabricom*, cited in paragraph 57 above. By failing to ask for additional information, the Commission departed from an established practice confirmed by case-law and breached the principle of protection of legitimate expectations. Moreover, in other circumstances, the Commission gave a tenderer at risk of exclusion the opportunity of defending itself. Furthermore, the applicant does not know of any other case where a tenderer was excluded on the basis of a risk of conflict of interest. If the Commission could not show that such cases exist, it would be impossible for it to provide for such exclusion without infringing the principle of protection of legitimate expectations.
- 95 Thirdly, alleging in that regard breach of the principles of equal treatment and non-discrimination laid down in Articles 89(1) and 99 of the Financial Regulation, the applicant raises the question whether the Commission, in the context of the invitation to tender in question, offered other tenderers the possibility of supplying additional information. The applicant submits that the Commission's argument is contradictory in that, on the one hand, it asserts, in its defence, that 'after the opening of the tenders, no request for additional information was made to any tenderer', but, on the other, states in its rejoinder lodged on 24 June 2005 in the proceedings for interim relief brought before the President of the Court of First Instance, that it had asked certain tenderers to show that their tenders were sent within the time-limit prescribed, a request made after the Commission had opened the tenders or, at least, after the closing date for their receipt. The applicant takes the view that, if information was requested from those tenderers whilst the opportunity

was not given to Euphet to defend its position or to give its point of view on the risk of conflict of interest, the Commission was in breach of the principle of equal treatment between the tenderers.

96 The Commission argues that it is obliged to consult the tenderer only where it intends to impose administrative or financial penalties, such as exclusion from future contracts or subsidies, pursuant to Article 96 of the Financial Regulation and not when it excludes that tenderer from the award of a particular contract pursuant to Article 94 of the Financial Regulation.

97 In that regard, firstly, the Commission points out that Article 146(3) of the Implementing Rules does not impose any duty on it to ask a tenderer for more details regarding the supporting documents submitted. In any event, pursuant to Article 99 of the Financial Regulation and Article 148(3) of the Implementing Rules, contact between the Commission and tenderers cannot lead to amendment of the terms of a tender.

98 Secondly, the Commission disputes that there is a general practice of systematically requesting additional information from a tenderer before excluding it on the ground of conflict of interest. Furthermore, the exchange of e-mails with the Commission produced by the applicant, concerning a different award procedure, related to a request for additional information regarding certain elements of the tender, and in no way shows that the Commission has the standard practice of obtaining additional information from tenderers before rejecting their tenders on the basis of one of the criteria for exclusion set out in the Financial Regulation.

99 In that regard, the applicant's reference to *Fabricom*, cited in paragraph 57 above, is irrelevant, since in that judgment the Court of Justice censured Belgian legislation



which automatically precludes from participation in a public procurement contract a person who has been instructed to carry out preparatory work in connection with that contract or an undertaking connected to such a person, whereas in the present case Euphet was not prevented by the Commission from taking part in the award procedure. Initially, Euphet submitted a tender in respect of which the Commission subsequently carried out checks for the existence of a conflict of interest on the basis of information included in that tender and in the light of the type of contract to be awarded. The tender was therefore rejected because there was such a conflict of interest. The applicant's argument, consisting in the assertion that Euphet was the victim of automatic exclusion since a concrete assessment of the existence of a conflict of interest was possible only after award of the contract — and, more particularly, at the time when a specific contract is concluded in performance of the framework contract — is incompatible with Article 94 of the Financial Regulation. That article permits exclusion from the award of a contract of candidates or tenderers who, even before award of the contract, are involved in a conflict of interest.

100 Thirdly, the Commission points out that, after the opening of the tenders, no tenderer was asked to supply information regarding a potential conflict of interest. With regard to the alleged contradiction in its argument, the Commission contends that it did indeed invite some tenderers to prove that their tenders were sent within the time-limit because the postmarks on the envelopes containing those tenders were illegible. However, the applicant's position is not comparable to the position of those tenderers. As the President of the Court of First Instance held in his order in Case T-195/05 R *Deloitte Business Advisory v Commission* [2005] ECR II-3485, paragraph 120, the illegible postmarks on the envelopes containing those tenders cannot be assimilated to intrinsic shortcomings in the tender itself.

## Findings of the Court

101 Firstly, regarding whether the Commission ought to have invited Euphet to supply additional information on the conflict of interest problem, it should be recalled that

the first subparagraph of Article 146(3) of the Implementing Rules provides that requests to participate and tenders which do not satisfy all the essential requirements set out in the supporting documentation for invitations to tender or the specific requirements laid down therein are to be eliminated. However, in accordance with the second subparagraph of Article 146(3), the evaluation committee may ask candidates or tenderers to supply additional material or to clarify the supporting documents submitted in connection with the exclusion and selection criteria, within the time-limit specified by it.

102 It is clear from its very wording that the second subparagraph of Article 146(3) of the Implementing Rules gives the evaluation committee the option of requesting from tenderers additional information concerning the supporting documents submitted in relation to the exclusion and selection criteria. It follows that that provision cannot be interpreted as imposing a duty on the evaluation committee to request such information from tenderers (see, to that effect and by analogy, Case T-19/95 *Adia Interim v Commission* [1996] ECR II-321, paragraph 44).

103 Accordingly, in the present case, the Commission was right to decide to exclude Euphet's tender from the procedure for award of the contract by reason of a conflict of interest within the meaning of Article 94 of the Financial Regulation and section 9.1.3 of the specifications, without being required to request additional information pursuant to the second subparagraph of Article 146(3) of the Implementing Rules.

104 Secondly, with regard to the alleged infringement of the principle of protection of legitimate expectations, it is appropriate to recall that, in accordance with established case-law cited in paragraph 86 above, no party may allege infringement of the principle of protection of legitimate expectations without having been given precise assurances by the administration.

105 In the present case, the applicant bases its argument on a standard practice of the Commission — confirmed, moreover, by case-law — which consists in systematically requesting additional information from a tenderer before excluding it.

106 As it is, the documents submitted by the applicant concern a single invitation to tender to which it responded, that is to say, invitation to tender PO/2004-62/B3 relating to ‘Ex-ante evaluation of the activities of the “TV, radio services and studios” Unit’. What is more, the request for additional information made in that case by the evaluation committee related, on the one hand, to the question whether ‘Deloitte’s presence in the whole of the European continent in 300 cities [confirmed] its ability to cover the operations under the contract in all the Member States of the EU’ and, on the other, to the fact that the Commission had not received ‘attestations of good performance’, and not to a risk of conflict of interest.

107 Furthermore, the applicant does not submit any concrete proof showing that the Commission gave Euphet a precise assurance that it would receive from the evaluation committee a request for additional information on the question of a risk of conflict of interest and on the satisfactory nature of the response given by Euphet to that question.

108 In those circumstances, the applicant cannot claim infringement of the principle of protection of legitimate expectations.

109 That finding is not affected by the applicant’s reference to the judgment in *Fabricom*, cited in paragraph 57 above, which deals with a legal question and a factual situation which are not analogous to the dispute before the Court of First Instance in the present case.

- 110 Thirdly, the applicant's argument alleging infringement of the principles of equal treatment and non-discrimination in that the Commission requested information from other tenderers whilst Euphet did not have the opportunity of defending its position or even of putting forward its point of view on the risk of a conflict of interest must be dismissed. The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (*Fabricom*, paragraph 27). The tenderer whose tender is contained in an envelope with an illegible postmark is not in a situation comparable to that of a tenderer whose tender is incomplete since, in the first case, the defect noted by the Commission is attributable to factors outside the tenderer's control, whereas, in the second, the defect noted is intrinsic to the tender. The rejection of Euphet's tender does not, therefore, infringe the principle of equal treatment.
- 111 Accordingly, it has not been established that the Commission infringed the principles of equal treatment and non-discrimination set out in Articles 89 and 99 of the Financial Regulation.
- 112 The second plea in law must therefore be rejected and, consequently, the arguments seeking annulment of the decision rejecting the tender must be dismissed.
- 113 The application for annulment of the decision awarding the contract to a third party must be dismissed as a consequence of the dismissal of the application for annulment of the preceding decision with which it is closely connected.
- 114 It follows that the action must be dismissed in its entirety.

## Costs

- 115 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 116 In the present case, since the applicant has been unsuccessful, it must be ordered to pay the costs, including those of the application for interim measures.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders the applicant, Deloitte Business Advisory NV, to pay the costs, including those of the application for interim measures.**

Legal                      Wiszniewska-Białecka    Moavero Milanese

Delivered in open court in Luxembourg on 18 April 2007.

E. Coulon

Registrar

H. Legal

President