On those grounds,

THE COURT,

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs, save those relating to the re-opening of the hearing which are to be borne by the Commission**

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 23 November 1978

For the Registrar
J. Pompe
Deputy Registrar

For the President
J. Mertens de Wilmars
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 11 OCTOBER 1978 [1]

Mr President,
Members of the Court,

Regarding the *facts* of the case with which we are concerned today allow me to say the following:

Since 31 July 1970 the plaintiff, the Belgian company Agence Européenne d'Intérims S.A. (hereinafter referred to as "the Agence"), has been supplying the Commission in Brussels with "personnel intérimaire" (temporary staff) pursuant to outline agreements. In November 1976 the defendant resolved not to renew the contract with the applicant after its expiry on 19 March 1977 and issued on 7 December 1976 a restricted invitation to tender within the meaning of Article 59 (2) of the Financial Regulation of 25 April 1973 (Official Journal L 116 of 1 May 1973, p. 1) which is worded as follows:

"A contract following a request for tenders is a contract entered into by

1 — Translated from the German.

the contracting parties following an invitation to tender. In this case, the offer thought to be the most attractive may be freely chosen, taking into account the cost of performance, running costs involved, technical merit, the time for performance, together with the financial guarantees and the guarantees of professional competence put forward by each of the tenderers.

A request for tenders is said to be public or open where a general invitation to tender is involved; it is said to be restricted where it is addressed only to those whom it has been decided to consult because of their special qualifications".

The applicant was also invited to tender. Although not required to do so the defendant had previously obtained an opinion from the Purchases and Contracts Advisory Committee on the content and wording of the tender and the procedure to be followed.

The applicant along with 18 others made a tender. In accordance with Article 62 of the Financial Regulation the tenders were submitted for the opinion of the Purchases and Contracts Advisory Committee. On 25 February 1977 the latter pronounced itself in favour of the conclusion of a contract for the provision of "personnel intérimaire" with Randstad S.A. and gave as its reason not only the prices which in its view taking account of everything were the most favourable, but also the fact that the salaries actually paid to the staff were among the highest in comparison with the salaries paid by the Commission, that the staff previously supplied from time to time by Randstad had always fully met the requirements and that the firm had always earned the trust placed in it.

The defendant thereupon accepted the tender of Randstad S.A. and informed the other tenderers, including the applicant, that their tenders had not been accepted. Subsequently, the majority of the applicant's "intérimaires" offered their services to Randstad S.A. who thereupon engaged them.

On 3 May 1977 the Agence brought an action claiming annulment of the decision rejecting its tender and an order to the Commission to pay Bfrs 26.6 million compensation on the grounds that the Commission had not given proper reasons for the decision rejecting the applicant's tender, that it had infringed the provisions of the Financial Regulation and the implementation provisions thereto and lastly had wrongly exercised its discretion by preferring the tender from Randstad S.A. for irrelevant reasons.

The Commission claims that the action should be dismissed since the tender was accepted after a regular invitation to tender in which the relevant provisions were observed and its discretion properly exercised.

Randstad S.A. has intervened in the proceedings in support of the defendant.

A — Admissibility of the action

The defendant has already expressly stated in its defence that it had nothing to say on the admissibility of the application, which claims on the one hand the annulment of a decision of the Commission in a procedure for the award of a public contract and for an order to the Commission to pay damages. Since, however, the admissibility of the action was once again raised at the hearing on 15 June 1978 at the express request of the Court, although accepted by both parties, I should like to consider this question in more detail.

I — Not every Member State allows *measures connected with the award of public contracts* to be challenged in the courts. No remedy is available against such measures in some Member States — for example the Federal Republic of Germany or the Netherlands — but in several other States such as France,

Belgium, Luxembourg and Italy it is possible for the courts to review certain decisions relating to the procedure for the award of public tenders. It is true that not every measure is open to challenge but only certain decisions connected with the preparation of the award (choice of the manner of award and the selection of the tenderers) and the grant of the contract — that is to say the actual decision making the award (for details see Schmitz, Das Recht der öffentlichen Aufträge im Gemeinsamen Markt, 1972, p. 152 *et seq.*).

The question of the legal remedy is not expressly dealt with in the provisions of Community law on the award of public contracts by institutions of the Communities, which to some extent follow very closely the French law (thus for example Article 59 (2) of the Financial Regulation of 1973 which is relevant in the present proceedings follows almost word for word Article 97 (1) of the French Code des Marchés Publics of 1964). It is true that in Case 23/76 in which an unsuccessful tenderer challenged the rejection of his tender and the award of the contract to another tenderer, the Court considered the application for annulment and rejected it on its merits but did not expressly pronounce on the admissibility of the application for annulment (judgment of 7 December 1976 *Pellegrini* [1976] ECR 1807). In my opinion, however, the Court, by considering whether the application was well founded, recognized that the application for annulment was admissible. This is further supported by the fact that Mr Advocate General Mayras in his opinion in that case considered at length the question whether the action was admissible under Article 146 of the Euratom Treaty and Article 173 of the EEC Treaty and found that it was. In doing so he applied to Community law the doctrine developed in the French law of public contracts relating to the assailability of the award as an "acte détachable" (which is analogous to the German two-stage theory in the law on subsidies) and further drew a parallel with the competition to fill a vacant post.

I should like fully to adopt the view put forward by Mr Advocate General Mayras in the case of *Pellegrini* for the present case. The Commission has awarded the contract to Randstad following an invitation to tender in accordance with Article 59 (2) of the Financial Regulation of 1973. This award is a decision of the Commission which may be challenged even by natural or legal persons such as the applicant in accordance with the provisions of the second paragraph of Article 173 of the EEC Treaty. The fact that the award was made only to Randstad and not to other tenderers such as the applicant is irrelevant under the second paragraph of Article 173 of the EEC Treaty, since this decision is of direct and individual concern to those whose tender has not been accepted. The award to one tenderer meant the rejection of the other tenders and the unsuccessful tenderers could also be individually identified.

The applicant in the present proceedings has claimed annulment of a "decision" of the defendant Commission of 1 March 1977 by which the Commission "rejected" the applicant's tender pursuant to an invitation to tender under Article 59 (2) of the Financial Regulation applicable at the time.

1. Objections to the admissibility of the application for annulment might thus arise from the fact that the applicant has simply claimed annulment of the rejection of its tender. The question may be asked whether this "rejection" (that is in truth the simple non-acceptance) of the tender can be regarded as a "decision" of the defendant which is open to challenge on its own.

If there is a contract with one of the tenderers on the basis of an invitation to tender under Article 59 (2) of the

Financial Regulation, then, as is apparent from the wording and purpose of the said provision, the only measure representing a direct arrangement having external effects is the decision of the administration preceding the conclusion of the contract, namely the acceptance of the tender. The non- acceptance of the other tenders is simply a necessary concomitant of this decision and not an independent measure which may be independently challenged. The applicant must therefore have the award annulled to remove the basis of the "rejection" of its offer which it contests. This will become clear from an analogy from Community law and from comparative law. In his opinion in the case of *Pellegrini* Mr Advocate General Mayras referred to the similarity between the procedure for invitation to tender and that of a competition held with a view to filling a vacant post ([1976] ECR 1829). Just as an unsuccessful candidate in a competition, who seeks to claim that he ought to have been appointed in place of the person actually appointed, cannot challenge his non-appointment but must contest the appointment of the successful candidate, so in an invitation to tender the unsuccessful tenderer who seeks to claim that *his* tender ought to have been accepted must challenge the actual award of the contract. Further, where under national law legal remedies are available in connexion with the award of public contracts and it is not simply the preparation of the award that is challenged, it is always the award of the contract itself which is contested (cf. Hainaut and Joliet, Le Contrat de Travaux et de Fournitures de l'Administration dans le Marché Commun, Volume 1, 1962, pp. 229 *et seq.*, 236 *et seq.*; Volume 2, 1963, pp. 52 *et seq.*, 168 *et seq.;* Schmitz *ibid.*, p. 152 *et seq.*).

2. It is apparent from the statement of claim that this is really the objective of the present action. From this it is clear that the applicant in fact is challenging the award to the intervener. It claims that the award ought not to have been made to the intervener but to the applicant, because its tender and not the tender of the intervener was the "most attractive".

The action must therefore be understood as directed against the award of the contract and the application must be interpreted in this sense. The case-law of the Court on the interpretation of claims (cf. the comments of *Wolf* on Article 38 of the Rules of Procedure of the Court, Note 1 (d) in the Handbuch der Europäischen Wirtschaft at I A 63) covers this case as well, especially since the Court otherwise could and should have given an appropriate indication during the course of the proceedings.

To sum up, it must be agreed that the action for annulment is admissible against the award.

II — Further, the applicant claims that the defendant should be ordered to pay *damages* amounting to Bfrs 26 600 000. It bases this claim, as appears from the statement of claim and the observations of its representative at the first hearing, on a wrongful act of the defendant consisting of the illegal rejection of the applicant's tender and the illegal award to the intervener. A claim is thus put forward based on the non-contractual liability of the Community for the damage caused by its institutions in the performance of their duties in connexion with the procedure for invitation to tender. The Court has jurisdiction for such claims under Article 178 of the EEC Treaty. The claim is liquidated and sufficiently substantiated. In my opinion therefore the action is admissible in this respect also.

B — Merits of the claim

To begin with I can limit my consideration of the question whether the action is well founded to the

application for annulment of the award to the intervener. If this proves to be unfounded then the claim for damages will fail because there is no wrongful act on the part of the defendant.

On the subject of the action for annulment let me begin with certain principles.

The award was made to the intervener after an invitation to tender under Article 59 (2) of the Financial Regulation. This, as is demonstrated especially by the second sentence of the provision cited at the beginning, gives the Commission a very wide discretion. In deciding which tender to accept, the Commission can freely choose the offer thought to be the *most attractive* (la plus intéressante), taking into account the cost of performance and running costs involved, together with the financial guarantees and the guarantees of professional competence. This provision shows straightaway that the price on which the applicant has placed so much stress cannot be the sole criterion but that the Commission has a discretion to award the contract after taking into account all the criteria which it regards as relevant. It cannot therefore be a matter for the Court of Justice in reviewing the decision making the award to compare and balance one against the other the extensive computations of which it could only with difficulty form a clear view. The Commission's discretion can by no means be replaced by the Court's discretion. The only subject which the Court can review is the question whether there is a misuse of powers. In the already cited case of *Pellegrini* the Court in its judgment of 7 December 1976 reduced this question to the brief formula that in order to find that there has been a misuse of powers, it would have to be shown that the reasons for the Commission's choice were extraneous to the interests of the service ([1976] ECR at p. 1821, paragraph 30).

Moreover, and with this I should like to end my statement of principles, in every review the time at which the award was made is of decisive importance. The Commission had to be of the opinion *at that time* that the tender which it chose was the most attractive.

If the award in the present case is considered in the light of the above-mentioned principles then in my view there can be no doubt that the application for annulment is unfounded.

In so far as the applicant claims that the defendant's decision did not contain the requisite statement of the reasons on which it was based this objection relates to the notification that the applicant's tender had not been accepted which as a mere concomitant of the award to another tenderer requires no special statement of grounds.

In so far as the applicant claims that there is an infringement of Article 59 (2) of the Financial Regulation it is claiming in the end result nothing other than a misuse of powers which I shall deal with later. The applicant has not been able to prove the further alleged infringement of the second paragraph of Article 61 of the Regulation of 30 June 1975 on Measures of Implementation of certain provisions of the Financial Regulation, which is said to consist in the fact that the intervener's tender ought to have been eliminated because it did not satisfy the conditions laid down in the invitation to tender.

In my opinion there has been no misuse of powers as the applicant claims in one of its principal heads of the claim. Before awarding the contract the defendant had obtained the prescribed opinion of the Purchases and Contracts Advisory Committee which for a number of reasons favoured a contract with the intervener. After this opinion therefore the defendant was in a position to award the contract to the intervener without any misuse of powers. However, in all its pleadings and not least in summing up at the last hearing it stated that apart from

the price its decision was dictated by a number of other criteria. In my opinion the applicant has not been able to show convincingly that at the time the decision to make the award was taken the defendant could not in all good conscience be of the opinion that the tender by Randstad S.A. was for it the most attractive.

The application for annulment of the award is thus unfounded and this means that the basis of the claim for damages also falls away. How far the applicant wished to use as a separate ground for its claim for damages independent of the existence of the award its allegation that the Commission through certain of its officials actively caused a large part of the staff previously provided by the applicant to transfer to the intervener's employment has not been made entirely clear from the various submissions in the written procedure and at the hearing. The fact that the defendant's officials have acted unlawfully in this respect has not been substantiated, let alone proved, sufficiently to make the Commission liable.

I therefore propose that the application should be dismissed and the applicant should bear the costs of the proceedings.