JUDGMENT OF THE COURT (First Chamber)

4 June 2009 *

In Case C-250/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 24 May 2007,

Commission of the European Communities, represented by M. Patakia and D. Kukovec, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by D. Tsagkaraki, acting as Agent, and V. Christianos, dikigoros, with an address for service in Luxembourg,

defendant,

* Language of the case: Greek.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Tizzano, A. Borg Barthet and J.-J. Kasel (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 October 2008,

after hearing the Opinion of the Advocate General at the sitting on 17 December 2008

gives the following

Judgment

1 By its application, the Commission of the European Communities claims that the Court should declare that, by not publishing a prior call for competition and by being unjustifiably late in replying to a tenderer's request for information concerning the reasons for the rejection of its tender, the Hellenic Republic has failed to fulfil (i) its obligation under Article 20(2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy,

transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1; 'Directive 93/38') to issue a call for competition before launching the procedure for the submission of tenders and (ii) its obligation under Article 41(4) of that directive.

Legal context

2 Article 2 of Directive 93/38 provides:

'1. This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

(b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

2. Relevant activities for the purposes of this Directive shall be:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:

…

(ii) electricity;

…'

3 Under Article 20 of Directive 93/38:

'1. Contracting entities may choose any of the procedures described in Article 1(7), provided that, subject to paragraph 2, a call for competition has been made in accordance with Article 21.

2. Contracting entities may use a procedure without prior call for competition in the following cases:

(a) in the absence of tenders or suitable tenders in response to a procedure with a prior call for competition, provided that the original contract conditions have not been substantially changed;

…

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time-limits laid down for open and restricted procedures cannot be adhered to;

…'

4 Article 41(4) of Directive 93/38 provides:

'The contracting entities... shall, promptly after the date on which a written request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his 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.

…'

Background to the dispute and the pre-litigation procedure

5 On 2 July 2003, Dimosia Epikhirisi Ilektrismou AE (DEI) (the public power corporation) published a call for tenders for the study, supply, transport, installation and bringing into operation of two similar thermoelectrical units and their auxiliary equipment for the thermoelectric station at Atherinolakkos on the island of Crete (Greece).

6 That first call for tenders was withdrawn after the DEI board of directors found that the tenders received did not satisfy certain criteria, whereupon DEI published a new call for tenders on 26 May 2004, which differed from the first in certain respects. The tenders of the five companies and groups of undertakings which participated in that second tendering procedure were all rejected by the assessment committee as 'unsuitable', because they did not comply with various minimum or maximum values corresponding to certain technical parameters required under the contract.

7 By letter of 14 December 2004 ('the letter of 14 December'), the five tenderers who had participated in the second tendering procedure were informed of the withdrawal of that procedure and were called on to submit a 'final financial offer' within 15 days of the receipt of that letter.

8 In the letter of 14 December, DEI explained its decision to use a new procedure by reference to the 'overall history of the case and to:

— the time when the units would be installed,

— the requirement to cover in a timely manner the growing and urgent, since 2007, needs of the island of Crete in electricity,

— the time necessary to install the two new units, namely 29 and 31 months respectively,

— the unforeseen delay in awarding the contract, which was due to the unsatisfactory outcome of the earlier calls for competition'.

9 For that new procedure, the five tenderers concerned were requested to correct the technical discrepancies which had led to the rejection of the tenders in the second procedure. In the case of the other discrepancies pointed out by DEI, the tenderers were to indicate the cost of the corrections needed. It is apparent from the observations of the parties that all those tenderers participated in the new procedure.

10 By letter of 7 February 2005, DEI informed one of the tenderers that its tender had been rejected. That letter did not, however, give any indication of the reasons for that rejection.

11 It emerges from the parties' observations that, after making a number of requests to that end, the tenderer in question received a document on 4 April 2005 informing it in detail of the reasons for that rejection. The action brought by the tenderer against that document was dismissed by judgment of 7 July 2005, whereupon DEI concluded the contract with another on 15 September 2005.

12 On 12 October 2005, the Commission — having formed the view, following a complaint from that tenderer, that the Community public procurement rules had been infringed — sent a letter of formal notice to the Hellenic Republic, which replied by letter of 22 December 2005.

13 Not satisfied with that reply, the Commission sent a reasoned opinion to the Hellenic Republic on 4 July 2006 requesting it to comply with the opinion within two months of its notification.

14 On the view that the Hellenic Republic's reply to that reasoned opinion was unsatisfactory, the Commission decided to bring the present action.

The action

15 In support of its action, the Commission puts forward two pleas in law alleging, respectively, infringement of Article 20(2)(a) and (d) of Directive 93/38 and infringement of Article 41(4) of that directive.

The first plea in law

Arguments of the parties

16 By its first plea, the Commission alleges that the Hellenic Republic has failed to fulfil its obligations under Article 20(2)(a) and (d) of Directive 93/38.

17 According to the Commission, the provisions laid down in Article 20(2) of Directive 93/38 constitute, as is clear from Joined Cases C-462/03 and C-463/03 *Strabag and Kostmann* [2005] ECR I-5397, derogations which must, in accordance with settled case-law, be interpreted strictly. Furthermore, it follows from the case-law that the burden of proof as to the existence of exceptional circumstances warranting recourse to such a derogation lies with the party seeking to rely on it (see, inter alia, Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraph 33).

18 As regards, first, Article 20(2)(a) of Directive 93/38, the Commission observes that two of the conditions for the application of that provision — namely, that no tender must have been submitted or that the tenders submitted must have been unsuitable, and that the original contract conditions must not have been substantially changed — are not satisfied in the present case.

19 First, the contracting entity incorrectly categorised the tenders as 'unsuitable' whereas they were merely 'irregular'. The Commission submits that the interpretation of the term 'unsuitable' argued for by the Hellenic Republic is much too broad and frustrates the full effectiveness of Article 20(2)(a) of Directive 93/38. If the wording of that

provision is compared with that of similar provisions in other directives on public procurement, such as 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), it becomes clear that the term 'unsuitable' has the same meaning in all those directives. Only a tender which is entirely different in substantive terms from that described in the call for tenders should be categorised as 'unsuitable'. According to the Commission, there is a link between the situation where no tender is submitted and the situation where an unsuitable tender is submitted inasmuch as each of those situations could replace the other as a ground for direct refusal. The two situations are equivalent not only as regards their effects, but also as regards the difficulties which they create for the contracting entity, since in both cases the needs of the project in question are not met.

20 Moreover, according to the Commission, the importance of the principle of flexibility in the interpretation of Directive 93/38 should not be overestimated. Although that principle has admittedly influenced the content of the provisions laid down in Directive 93/38, it should not be relied upon in support of an interpretation of those provisions which is contrary to the EC Treaty and to the general principles of equal treatment and transparency.

21 Secondly, during the third tendering procedure, the Commission argues, the contracting entity substantially changed the contract conditions, thereby making some tenders 'irregular'. It follows from the wording of the second call for tenders that, although commercial and financial discrepancies with the call for tenders were not allowed, technical discrepancies owing to particular features of the construction or technical characteristics of the equipment provided might, in certain circumstances, have been acceptable without their correction entailing any financial loss for the tenderer. By contrast, the letter of 14 December shows that, under the third tendering procedure, the participants were required to correct all discrepancies and to bear the cost of doing so. Furthermore, in order to ensure that that requirement was met, the participants had to sign a binding declaration relating to the correction of technical discrepancies in their tenders. That change in the contract conditions meant that the tenders submitted by some tenderers were irregular under the third procedure whereas they would have been valid under the second procedure.

22 In that connection, the Commission states that it is in no way challenging the grounds which led to the complainant's exclusion from the various tendering procedures, but is merely calling into question the lawfulness of the decision by which the contracting entity held that the tenders submitted were 'unsuitable'.

23 As regards, secondly, Article 20(2)(d) of Directive 93/38 — the provision on which, according to the Commission, the contracting entity relied in order to justify its use of a procedure for the award of a contract without a prior call for competition — the Commission states that the application of that provision is conditional upon the existence of 'reasons of extreme urgency brought about by events unforeseeable by the contracting entities'. However, in the present case, it has not been demonstrated by the contracting entity either that there were reasons of extreme urgency or that such reasons had been brought about by unforeseeable events. In that regard, the Commission states, inter alia, that the time of the integration and installation of the units was known prior to the publication of the first call for tenders; that the increase in the electricity needs of the island of Crete was not unexpected; and that the fact that two procedures were withdrawn cannot be regarded as constituting an event unforeseeable by the contracting entity.

24 The Commission adds that the explanations provided by the Hellenic Republic in the course of the infringement proceedings cannot change the statement of reasons put forward by the contracting entity in the letter of 14 December as justification for the rejection of the tenders.

25 As a preliminary point, the Hellenic Republic contends, first, that the special nature of the provisions of Directive 93/38, as compared with the general directives on public procurement contracts, stems from the sensitive nature of the 'excluded sectors' and is demonstrated through the principle of flexibility as set out in recital 45 in the preamble to Directive 93/38, which states that the rules to be applied by the entities concerned should establish a framework for sound commercial practice and should leave a maximum of flexibility. The contracting entities thus enjoy under Directive 93/38 a discretion broader than that conferred on them under the general directives. The

question whether the procedure for the award of a public procurement contract was conducted in accordance with Directive 93/38 must be made in the light of that principle of flexibility.

26 Under Directive 93/38, the three procedures referred to in Article 1(7) thereof are placed, in accordance with the principle of flexibility and the broad discretion conferred on the contracting entity, at exactly the same level. Thus, Article 20(1) of Directive 93/38 leaves the contracting entities free to choose any one of those three procedures, provided that a call for competition has taken place. Since Directive 93/38 differs in this respect also from the other directives referred to by the Commission, the case-law of the Court concerning those other directives cannot be applied by analogy to Directive 93/38.

27 First, the Hellenic Republic contends that the conditions for the application of Article 20(2)(a) of Directive 93/38 are satisfied in the present case.

28 In the first place, during the second call for tenders with a call for competition, tenders were admittedly lodged, but none of those tenders was considered to be 'suitable'. Contrary to the Commission's argument, there is a significant difference between an 'unsuitable' tender and an 'inadmissible or irregular' tender: 'unsuitable' indicates whether the tender complies with the technical specifications fixed by the contracting entity and 'inadmissible or irregular' indicates failure to meet a formal condition for participation in the call for tenders. Furthermore, the interpretation by analogy suggested by the Commission cannot be accepted in view of the substantial differences between the wording of the various provisions relied upon, the Court having held, in paragraphs 90 and 91 of its judgment in Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, that only provisions which fall within the same field of Community law and which have substantially the same wording may be interpreted in an identical fashion.

29 The arguments put forward by the Commission against taking the principle of flexibility into account in the interpretation of Directive 93/38 are moreover vague, irrelevant and unsubstantiated. In addition, the Court acknowledged that the

contracting entities have a very broad discretion in the context of the procedures referred to in Directive 93/38, when it held in paragraph 34 of its judgment in *Strabag and Kostmann* that the rules set out in Directive 93/38 authorise 'more extensive use of the negotiated procedure'.

30 In the second place, the original contract conditions have not been changed or, in any event, no 'substantial' change has been made. It is apparent from a comparison of the second and third calls for tender that, contrary to the Commission's assertions, they are identical as regards the letter of guarantee relating to the participation, the assessment of the financial offers and the method of payment. Furthermore, a detailed examination of the requirements relating to the technical discrepancies, the costs of correcting those discrepancies and the binding declaration requested from the tenderers shows that those elements also were not changed between the second and third tendering procedures.

31 As regards, secondly, Article 20(2)(d) of Directive 93/38, the Hellenic Republic contends that the Commission misinterpreted the letter of 14 December. That letter unequivocally shows that the contracting entity had decided to choose a procedure without a prior call for competition because of the 'overall history of the case', that is to say, because of the fact that the tenders submitted under the first two procedures were unsuitable. The other explanatory factors referred to in that letter were only mentioned by way of secondary considerations.

32 Moreover, although the withdrawal of a call for tenders does not constitute an event which was unforeseeable by the contracting entity, the fact that, in two consecutive calls for tenders, all the tenders submitted were unsuitable should be regarded as covered by the notion of an 'unforeseeable event'.

33 In any event, the Commission has not proved to the requisite legal standard that the contracting entity relied on the fact that the failure of the preceding two calls for tender was unforeseeable in order to justify having recourse to a procedure without a prior call for competition. Proceedings for failure to fulfil obligations must not be confused with an action for annulment, since the former procedure allows Member States to provide explanations, further information and, where necessary, the reasons for their decisions. In the present case, it is not the validity of the reasons given by the contracting entity which falls to be determined, but whether the Member State concerned can be said to have infringed Directive 93/38.

Findings of the Court

34 At the outset, it should be noted that, as derogations from the rules relating to procedures for the award of public procurement contracts, the provisions of Article 20(2)(c) and (d) of Directive 93/38 must be interpreted strictly and that the burden of proof lies on the party seeking to rely on them (*Commission* v *Greece*, paragraph 33).

35 Since it is clear from Article 20(1) of Directive 93/38, read in conjunction with Article 20(2) of that directive, that Article 20(2) constitutes a derogation from Article 20(1), in that it sets out the situations in which a contracting entity may use a procedure for the award of a contract without a prior call for competition, it must be concluded that not only points (c) and (d) of Article 20(2) of Directive 93/38 must be interpreted strictly, but so must all the other provisions of Article 20(2).

36 That finding is not affected by the arguments of the Hellenic Republic that Directive 93/38, in accordance with recital 45 in the preamble thereto, must leave 'a maximum of flexibility' and authorises more extensive use of the negotiated procedure than permitted, for example, under Directive 93/37.

37 First, as the Advocate General pointed out in point 15 of his Opinion, recital 45 provides guidance as to the aim pursued by the Community legislature through the adoption of Directive 93/38, namely to grant greater flexibility in the context of the public procurement contracts with which that directive is concerned, and consequently it may explain why Directive 93/38, unlike other directives on public procurement, authorises contracting entities to make greater use of the negotiated procedure.

38 Secondly, by stating in recital 46 in the preamble to Directive 93/38 that, as a counterpart for such flexibility and in the interests of mutual confidence, it is necessary to ensure the transparency of public procurement procedures and by providing — as is made quite clear in Article 20(1) of that directive — that use of one of the three award procedures set out in Article 1(7) of the directive must be preceded by a call for competition, the Community legislature has left no room for doubt as to its intention that the option of awarding a public contract without a prior call for competition, in the circumstances specified in Article 20(2) of Directive 93/38, is to be regarded as a derogation from the principle that the award of such a contract must be preceded by a call for competition.

39 It follows that the argument of the Hellenic Republic, according to which the term 'unsuitable' in Article 20(2)(a) of Directive 93/38 must be interpreted broadly, cannot be accepted.

40 It is in the light of those considerations that it is necessary to determine whether, in the present case, the Hellenic Republic has properly demonstrated that the tenders submitted under the second tendering procedure were correctly categorised as 'unsuitable' for the purposes of Article 20(2)(a).

41 The Hellenic Republic contended in this connection that, since the tenders submitted did not, as regards the guaranteed volumes, comply with the technical specifications fixed by the contracting entity in the light of the legislative requirements on the protection of the environment, so that it would not have been possible to bring the thermoelectric station at issue legally into operation, those tenders had to be regarded as 'unsuitable' for the purposes of Article 20(2)(a) of Directive 93/38.

42 It must be held that technical specifications such as those at issue in the present case, which stem from the national and Community legislative requirements on protection of the environment, must be regarded as essential if the installations — the supply and bringing into operation of which is the aim of the contract — are to enable the contracting entity to meet the objectives imposed upon it by legislation.

43 Since the proper completion of the project for which the call for tenders was issued is not possible for the contracting entity if the tenders are not in conformity with those specifications, that non-conformity does not constitute a mere inaccuracy or a mere detail: on the contrary, it must be regarded as precluding those tenders from meeting the needs of the contracting entity.

44 Such tenders must, as the Commission itself conceded before the Court, be categorised as 'unsuitable' for the purposes of Article 20(2)(a) of Directive 93/38.

45 It should be added that, in the present case, there are no grounds for the Commission's fear that contracting entities will circumvent the obligation under Directive 93/38 to issue a call for competition by setting conditions which are overly strict or impossible to comply with, in order to be able to categorise all the tenders submitted as 'unsuitable' before awarding the contract to another tenderer without a prior call for competition.

46 First, after holding that the tenders submitted during the first procedure with a call for competition did not meet the fixed technical specifications, the contracting entity issued a second call for tenders and thus did not immediately proceed on the basis of Article 20(2)(a) of Directive 93/38.

47 Secondly, in the negotiated procedure which it initiated on the basis of Article 20(2)(a) of Directive 93/38, the contracting entity requested all the candidates which had participated in the second procedure with a call for competition to submit 'financial offers', even though the provisions of Directive 93/38 which relate to the negotiated procedure, and specifically Article 1(7)(c) of that directive, did not require this.

48 Lastly, it has been neither proved nor even claimed that the technical specifications which had been fixed by the contracting entity and which had led that entity to regard the tenders received as unsuitable were overly strict or impossible to comply with.

49 On the contrary, as the Hellenic Republic stated without being contradicted on that point by the Commission, the requirements relating to guaranteed volumes, with which the tenderers were obliged to comply, were finally met by some of the candidates for the award of the contract.

50 In the light of those considerations, it must be held that the contracting entity was entitled to categorise the tenders at issue as 'unsuitable' for the purposes of Article 20(2)(a) of Directive 93/38.

51 In those circumstances, it must also be ascertained whether, as the Commission maintains, the contracting entity — contrary to the terms of Article 20(2)(a) of Directive 93/38 — substantially changed the original contract conditions during the negotiated procedure without a prior call for competition.

52 In that connection, it should be noted that, by analogy with the Court's dicta regarding the renegotiation of contracts already awarded (see Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 35), the amendment of an initial contract condition can be regarded as substantial for the purposes of Article 20(2)(a) of Directive 93/38, inter alia, where the amended condition, had it been part of the initial award procedure, would have allowed tenders submitted in the procedure with a prior call for competition to be considered suitable or would have allowed tenderers other than those who participated in the initial procedure to submit a tender.

53 In so far as the Commission — as emerges from its observations — regards the facts in question as falling clearly within the former of those two situations, it is necessary to examine whether the original contract conditions, the non-conformity with which led the contracting entity to categorise the tenders submitted as unsuitable, were substantially changed in the negotiated procedure.

54 In respect of those conditions, the Hellenic Republic contends, without being contradicted on that point by the Commission, that the tenders submitted under the second procedure with a call for competition were all declared unsuitable because they did not comply with the requirements relating to the guaranteed volumes of waste emissions.

55 It must be stated that, in the third procedure, those requirements were not changed and the contracting entity was obliged, as it was in the first two procedures, to meet those

requirements. Furthermore, it is precisely because no discrepancy with those specifications was permissible that the candidates had to submit a binding declaration by which they undertook to bring their tenders into conformity with the requirements set out in the contract notice concerning those guaranteed volumes.

56 As regards the other technical specifications, it should be pointed out that, although some discrepancies with those specifications were acceptable under the second procedure with a call for competition, the costs entailed in correcting those discrepancies could, as the Hellenic Republic contended without being contradicted by the Commission, be left to the tenderers to bear. The fact that, under the third procedure, the tenderers had to bear the costs of correcting the technical discrepancies themselves cannot thus be regarded as a new obligation.

57 During that third procedure, moreover, the tenderers were not required to make the corrections in question, but only to provide an estimate of the total cost of those corrections and to submit a final financial offer. The third procedure thus offered all the tenderers who had participated in the second procedure the possibility of reviewing some of their proposals in the context of a final financial offer and of assessing once again the discrepancies with the technical specifications set out in the call for tenders.

58 It follows that, during the negotiated procedure without a prior call for competition, the contracting entity did not substantially change the original contract conditions for the purposes of Article 20(2)(a) of Directive 93/38.

59 In those circumstances, it must be held that the Commission has failed to prove that the Hellenic Republic infringed Article 20(2)(a) of Directive 93/38. Consequently, the first part of its first plea in law must be rejected.

60 So far as the alleged infringement of Article 20(2)(d) of Directive 93/38 is concerned, it should be recalled that, as is apparent from paragraph 34 of this judgment, Article 20(2)(d) is in the nature of a derogation and the burden of proving that the conditions for its application are fulfilled lies on the party seeking to rely on it.

61 It is sufficient to observe, in this connection, as the Advocate General did in point 25 of his Opinion, that the Hellenic Republic did not invoke Article 20(2)(d) of Directive 93/38 in support of the decision by which DEI awarded the contract at issue without a prior call for competition, but merely stated that that decision had been adopted on the basis of Article 20(2)(a) of Directive 93/38.

62 The Commission cannot legitimately allege that the Hellenic Republic infringed a provision upon which that Member State did not actually rely and, in consequence, the second part of the first plea in law must also be rejected.

63 In those circumstances, the first plea in law relied upon by the Commission must be rejected in its entirety as unfounded.

The second plea in law

Arguments of the parties

64 By its second plea in law, the Commission alleges that the Hellenic Republic has failed to fulfil its obligation under Article 41(4) of Directive 93/38 to, 'promptly after the date on which a written request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his application or his tender'.

65 In the present case, a period of two months elapsed between the request from the eliminated tenderer and the reply from the contracting entity. The Commission submits that such a period cannot under any circumstances be regarded as a reply provided 'promptly'. With regard to the interpretation of those terms, the Commission refers to the similar provisions laid down in Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), Directive 93/37 and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), each of which prescribes a period of 15 days.

66 The Hellenic Republic acknowledges that there was some delay in communicating the reasons for rejecting one of the tenders. However, that delay did not frustrate the full effectiveness of Directive 93/38 and did not prevent the tenderer concerned from being able to assert its rights effectively before a court. Moreover, the contract was not signed until the legal action brought by the eliminated tenderer had been dismissed. The Hellenic Republic adds that the periods prescribed by the various directives referred to

by the Commission cannot be transposed to the present case since Directive 93/38 does not lay down any specific time-limit and Directive 2004/17 was not yet applicable at the material time.

Findings of the Court

67 As regards this plea in law, it should be pointed out that, in so far as Directive 93/38, unlike the other directives relied on by the Commission in this connection, does not prescribe a specific period within which the candidate or tenderer whose application or tender has been rejected must be informed of the grounds for the rejection, but merely provides, in Article 41(4) thereof, that that communication must be made 'promptly', it is not possible, as the Advocate General pointed out in point 27 of his Opinion, to adopt an interpretation of that provision to the effect that the contracting entity must communicate that information within 15 days of receiving the tenderer's written request.

68 However, it should be stated that, by requiring the contracting entity to communicate the required information 'promptly', the Community legislature placed that entity under a duty of diligence, which falls to be categorised more as an obligation as to means than an obligation as to results. Thus, it is necessary to consider on a case-by-case basis and in the light of the specific characteristics of the procurement contract at issue, in particular its complexity, whether or not the contracting entity concerned communicated that information with the requisite diligence. The fact that a communication may have been sent before the expiry of the period within which the decision to eliminate the application or the tender may be challenged, with the result that the tenderer was in a position to make use of the legal remedies available in order to have a court review the legality of the decision, is only one of a bundle of factors which must be taken into account in order to determine whether a contracting entity has complied with its obligation of diligence under Article 41(4) of Directive 93/38 and does not, in itself, constitute sufficient evidence in that regard.

69 Since, in the present case, the Hellenic Republic accepts that there was a delay in communicating to the tenderer whose tender was rejected the reasons for that rejection, while asserting that that communication was made in a manner consistent with Article 41(4) of Directive 93/38, it is for that Member State to adduce evidence of objective factors capable of justifying the delay in communicating the information and making it plausible that such a period should have elapsed between the receipt of the tenderer's request and the reply from the contracting entity.

70 The fact remains that, apart from the argument that the period which elapsed did not prevent the tenderer concerned from being able to assert its rights effectively before a court, the Hellenic Republic neither advances any specific information capable of justifying the delay in the communication nor states reasons why, in the present case, a period of two months should be regarded as signifying 'promptly' for the purposes of Article 41(4) of Directive 93/38.

71 In consequence, the second plea in law relied upon by the Commission must be held to be well founded.

72 It must therefore be held that, by being unjustifiably late in replying to a tenderer's request for information concerning the reasons for the rejection of its tender, the Hellenic Republic has failed to fulfil its obligation under Article 41(4) of Directive 93/38.

Costs

73 Under Article 69(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. However, under the first subparagraph of Article 69(3) of those rules, the Court may order that the costs be shared or that the parties bear their own costs if the parties are each unsuccessful on one or more heads of claim. Since the Hellenic Republic and the Commission have been partly unsuccessful in their pleas, each party must be ordered to bear its own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by being unjustifiably late in replying to a tenderer's request for information concerning the reasons for the rejection of its tender, the Hellenic Republic has failed to fulfil its obligation under Article 41(4) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Commission Directive 2001/78/EC of 13 September 2001;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Hellenic Republic and the Commission of the European Communities each to bear their own costs.**

[Signatures]