

Case T-461/08

Evropaïki Dynamiki — Proïgmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE

v

European Investment Bank (EIB)

(Public service contracts — Tender procedure — Provision of services in the form of assistance in the maintenance, support and development of an information technology system — Rejection of a tenderer's bid — Contract awarded to another tenderer — Action for annulment — Admissibility — Jurisdiction — Duty to state reasons — Right to an effective remedy — Transparency — Proportionality — Equal treatment and non-discrimination — Selection and award criteria — Action for damages — Admissibility — Loss of profit)

Judgment of the General Court (Fourth Chamber), 20 September 2011 . . . II - 6378

Summary of the Judgment

1. *Actions for annulment — Actionable measures — Measures producing binding legal effects — Measures of the European Investment Bank (Arts 225(1) EC, 230 EC and 237(b) and (c) EC)*

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2. *Actions for damages — Autonomy in relation to the action for annulment — Limits — Application for compensation for damage caused by the European Investment Bank acting as contracting authority*
(Arts 225(1) EC, 235 EC and 288, second para., EC)
3. *Actions for annulment — Conditions for admissibility — Interest in bringing proceedings — To be considered of the Court's own motion — Application by analogy to actions which include an ancillary claim for damages*
(Art. 230 EC; Rules of Procedure of the General Court, Art. 113)
4. *Actions for annulment — Interest in bringing proceedings — Action against a decision which has been implemented*
(Arts 230 EC and 233 EC)
5. *European Communities' public procurement — Tender procedure — Lawfulness of the terms of reference disputed*
(Art. 230, fourth para., EC)
6. *European Investment Bank — Public procurement procedures financed by the Bank utilising its own resources — Applicable provisions*
(Arts 28 EC, 43 EC and 49 EC; Charter of Fundamental Rights of the European Union; Council Regulation No 1605/2002, Art. 88(1); European Parliament and Council Directive 2004/18)
7. *Acts of the institutions — Statement of reasons — Obligation — Scope*
(Arts 230, fifth para., EC and 253 EC)
8. *European Communities' public procurement — Tender procedure — Right of tenderers to effective judicial protection — Scope*
(Arts 225(1) EC, 242 EC, 243 EC and 253 EC)
9. *European Communities' public procurement — Tender procedure — Right of tenderers to effective judicial protection — Right of appeal against the decision awarding a contract to another tenderer*
10. *European Investment Bank — Public procurement procedures financed by the Bank utilising its own resources — Award of contracts — Contract awarded to the tenderer submitting the most economically advantageous tender — Criteria — Choice of the contracting authorities — Limits*

11. *Actions for annulment — Pleas in law — Breach of the principles of equal treatment and transparency — Tender procedure*
12. *Non-contractual liability — Conditions — Causal link — Loss sustained by a tenderer as a result of the loss of a contract in a tender procedure — No evidence of the link between that loss and the unlawful decision awarding the contract to another tenderer (Arts 266 TFEU and 340, second para., TFEU)*

1. The need for full judicial review of Community acts dictates that Article 225(1) EC and Article 230 EC are to be interpreted as not precluding the General Court from hearing an action for annulment of an act connected with the management of the European Investment Bank's current business by the Management Committee which has definitive legally binding effects vis-à-vis third parties.

if they are final and produce legally binding effects vis-à-vis third parties.

(see paras 46, 50, 52)

Although it is not a Community institution, the Bank is none the less a Community body established and endowed with legal personality by the Treaty, and it is on that account that it is subject to judicial review by the Court of Justice, in particular as provided for in Article 237(b) EC. Acts formally adopted within the Bank by bodies other than those referred to in Article 237(b) and (c) EC, namely bodies other than the Board of Governors or the Board of Directors, must therefore be amenable to judicial review

2. While, under the system of legal remedies established by the Treaty, an action for damages constitutes an autonomous remedy, separate from the action for annulment, the fact nevertheless remains that account must be taken of the 'direct link' or 'complementarity' between the action for annulment and the action for damages — where such a link or complementarity exist — as well as the extent to which the latter is ancillary to the former, at the stage at which it is decided whether those actions are admissible, in order to avoid the outcome of the action for damages being artificially separated from that of the action for annulment, to which it is nevertheless merely ancillary or complementary.

In so far as the damage alleged to have been caused to an applicant by the European Investment Bank originates in the pursuit by the Bank of activities which are integral to the performance of the Community administration's duties and relate to action taken by that administration as a contracting authority and that damage is not therefore the result of the Bank's pursuit of its activities or operations in the financial domain, the General Court has jurisdiction to adjudicate on a claim for damages brought against the Bank, on the basis of Article 225(1) EC, Article 235 EC and the second paragraph of Article 288 EC, if that claim is ancillary to an admissible action for annulment of an act of the Bank having definitive legal binding effects vis-à-vis a third person.

(see paras 55-58)

3. Since the conditions of admissibility of an action, in particular whether there is a legal interest in bringing proceedings, concern an absolute bar to proceedings, it is for the Court to consider of its own motion whether applicants have an interest in obtaining annulment of the contested decision. That approach is applicable, by analogy, to applications for

annulment brought in an action which includes an ancillary claim for damages.

(see para. 62)

4. Even where, in the context of a tendering procedure, a decision to award a contract has been fully implemented for the benefit of other competitors, a tenderer retains an interest in the annulment of such a decision; such interest consists either in the tenderer's being properly restored by the contracting authority to his original position or in prompting that authority to make suitable amendments in the future to the tendering procedure if that procedure is found to be incompatible with certain legal requirements.

The fact that the agreement for the execution of a public contract has been signed and indeed implemented before a decision is delivered concluding the proceedings brought by an unsuccessful tenderer against the decision awarding that contract and that there is a contractual relationship between the contracting authority and the successful tenderer does not remove the requirement under Article 223 EC, if the main action is successful, for the contracting authority to take the measures necessary to ensure appropriate protection of the unsuccessful tenderer's interests.

Where, following an action brought by an unsuccessful tenderer for a public contract, the decision awarding the contract is annulled but the contracting authority is no longer able to reopen the tendering procedure for the public contract in question, the interests of that tenderer may be protected, for example, by pecuniary compensation corresponding to the loss of the chance of securing the contract or, if it can be definitively established that the tenderer should have been awarded the contract, the loss of profit. In fact, an economic value can be attributed to the loss of chance of securing a contract suffered by an unsuccessful tenderer for the contract as a result of an unlawful decision.

sent individually to the tenderers by the contracting authority cannot distinguish each tenderer individually from any other person for the purposes of the fourth paragraph of Article 230 EC. Terms of reference are therefore not acts which are capable of being the subject of a direct action under that provision. Consequently, the decision to reject a tenderer's bid is the first measure which can be challenged and thus the first measure entitling the tenderer to dispute, indirectly, the lawfulness of the formula used in the comparative evaluation of the tenders which was set out by the contracting authority in the terms of reference.

(see paras 73-74)

(see paras 64-66)

5. A document relating to a call for tenders, such as the terms of reference, cannot be regarded as a measure which concerns each tenderer individually. Like each of the other documents relating to the call for tenders issued by the contracting authority, the terms of reference apply to objectively determined situations and produce legal effects with respect to categories of persons envisaged generally and in the abstract. They are therefore of a general nature and the fact that they are
6. A European Investment Bank public procurement procedure financed by the Bank's own resources is not governed either by the provisions in Title IV of Part 2 of Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as amended, or, a fortiori, the provisions in Title III of Part 2 of Regulation No 2342/2002 laying down detailed rules for the implementation of the Financial Regulation, as amended. Those provisions are applicable only to the general budget of the European Communities

and, as is apparent from Article 88(1) of the Financial Regulation, the only public contracts governed by that regulation are contracts which are financed, entirely or in part, by the Community general budget.

The fact nevertheless remains that the Bank's public procurement procedures must comply with the fundamental rules of the Treaty and the general principles of law as well as the objectives of the Charter of Fundamental Rights of the European Union concerning, in particular, the free movement of goods (Article 28 EC), the right of establishment (Article 43 EC), freedom to provide services (Article 49 EC), non-discrimination and equal treatment, transparency and proportionality.

Moreover, even though the directives concerning the award of public works contracts, public supply contracts and public service contracts govern only contracts concluded by the bodies or contracting authorities of the Member States and are not directly applicable to public contracts concluded by the Community administration, the rules or principles laid down in or derived from those directives can be relied on against that administration when they themselves simply appear to be the specific expression of fundamental rules of the Treaty and of general principles of law which

are directly applicable to the Community administration. In a community based on the rule of law, the uniform application of the law is a fundamental requirement and any person is required to comply with the principle of respect for legality. Moreover, the rules or principles laid down in or derived from those directives may be relied on against the Community administration if, in the exercise of its operational and institutional autonomy and within the limits of the powers conferred on it by the Treaty, it adopts a measure which expressly refers, for the purpose of governing the public contracts which it concludes for its own account, to certain rules or principles laid down in the directives, the effect of which is that those rules and principles are applicable in accordance with the principle *patere legem quam ipse fecisti*.

Furthermore, it is apparent from the Guide for the procurement of services, supplies and works by the European Investment Bank for its own account that, even though Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts is not applicable as such to the Bank, it provides an appropriate reference for establishing the Bank's procedures. The Guide sets out rules of general application which produce legal effects in relation to third parties, in particular those who decide to bid for a public contract financed entirely or in part by the Bank's own resources, and binds the Bank in

law when it decides to conclude a public contract for its own account. Consequently, when the Bank takes steps by having recourse to the capital market or its own resources, in particular when it concludes public contracts for its own account, it is subject to both the fundamental rules of the Treaty, the general principles of law and the objectives of the Charter of Fundamental Rights of the European Union and to the provisions of the Guide, as interpreted in the light of the principles which those provisions are intended to put into effect and, where appropriate, the provisions of Directive 2004/18 to which those provisions refer.

(see paras 87-90, 92-93)

7. Where the Community administration enjoys a wide power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of fundamental importance. Those guarantees include in particular the requirement that the Community administration should give adequate reasons for its decisions.

It is apparent from the Guide for the procurement of services, supplies and works by the European Investment Bank for its own account that, on request from the party concerned, the Bank is required, within 15 days from receipt of the written request, to inform 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 or the parties to the framework agreement.

Such a manner of proceeding satisfies the purpose of the obligation to state reasons laid down in Article 253 EC. In tendering procedures, the fact that interested tenderers receive a reasoned decision only if they make an express request to that effect does not restrict their ability to assert their rights before the Court. The period for bringing proceedings laid down in the fifth paragraph of Article 230 EC does not begin to run until the reasoned decision is notified, subject to the tenderer having made his request for a reasoned decision within a reasonable time after he was apprised of the rejection of his tender.

However, in view of the wide power of appraisal it enjoys in tendering procedures, the contracting authority is required to provide an adequate statement of reasons to unsuccessful tenderers who

so request, which presupposes that it will take particular care to ensure that the grounds communicated by it set out all the factors on which its decision is based.

authority may be reviewed effectively and as rapidly as possible.

While a letter from the Bank to the unsuccessful tenderer communicating the name of the successful tenderer, the weighting applied to the award criteria and the breakdown of the points awarded might amount to an attempt to explain, it cannot, in any event, be regarded as sufficient in the light of the requirement that the reasoning followed by the authority which adopted the measure in question must be disclosed in a clear and unequivocal fashion. Such a decision to reject the tenderer's bid is, in those circumstances, vitiated by a failure to state adequate reasons and therefore infringes the provisions of the Guide and, more generally, the obligation to state reasons laid down in Article 253 EC.

First, full legal protection against arbitrary decisions on the part of the contracting authority presupposes the obligation to inform all the tenderers of the decision to award the contract before the contract is concluded, so that they may have a real possibility of initiating proceedings for annulment of that decision, where the requisite conditions are met. Next, such full legal protection requires that the unsuccessful tenderer should have the opportunity to examine in sufficient time the validity of the award decision, which means that there must be a reasonable period of time between communication of the award decision to the unsuccessful tenderers and the signature of the contract, in order inter alia to enable the latter to lodge an application for interim measures, under Articles 242 EC and 243 EC in conjunction with Article 225(1) EC, so that the judge hearing the application for interim measures may order suspension of the operation of the decision rejecting the bids of the unsuccessful tenderers until the court adjudicating on the substance rules on the main action for annulment of that decision. The right to full and effective judicial protection means that individuals must be granted interim protection if this is necessary to ensure the full effectiveness of the judgment to be given in the main proceedings, in order to prevent a lacuna in the legal protection afforded by the courts having jurisdiction. Lastly, in order to ensure that the requirement of effective judicial protection is satisfied,

(see paras 100, 106-108, 112, 114, 116)

8. In tendering procedures, tenderers must be protected against arbitrary decisions by the contracting authority by ensuring that unlawful decisions taken by that

the contracting authority must comply with its duty to give reasons by providing an adequate statement of reasons to any unsuccessful tenderer who so requests, so as to ensure that the latter may rely on that right under the best possible conditions and have the possibility of deciding, with full knowledge of the facts, if there is any point in his applying to the court having jurisdiction.

must lead to the annulment of the decision in question.

(see paras 130-131)

(see paras 119-122)

9. In public procurement procedures, the right of an unsuccessful tenderer to an effective remedy against the decision awarding the public contract to another tenderer and the corresponding obligation on the contracting authority to communicate to the unsuccessful tenderer, upon request, the grounds of the decision must be regarded as essential procedural requirements, in so far as those requirements dictate that safeguards be attached to the award decision so as to enable the impartiality of the tendering procedure which resulted in the decision to be effectively reviewed. The contracting authority's failure to have regard for those essential procedural requirements

10. The European Investment Bank's power to freely choose the award criteria on the basis of which it intends to award the public contracts which it enters into, for its own account, enables it to take account of the nature, subject-matter and specific features particular to each contract.

However, account should be taken of the rules applicable to the conduct of the tender procedure set out in the Guide for the procurement of services, supplies and works by the European Investment Bank for its own account, which are designed to ensure that the discretion enjoyed by the Bank as to the choice of award criteria is exercised in accordance with the principles of equal treatment and transparency during the stage at which the tenders are evaluated for the purpose of awarding the contract. The purpose of those provisions is, first, to enable all reasonably well-informed and normally diligent tenderers to interpret the award criteria in the same way and, as a consequence, to have an equal chance in the formulation of the terms of their tender

and, second, to ensure compliance with the principle of proportionality.

While that Guide does not set out an exhaustive list of the criteria which may be chosen by the contracting authority when awarding the contract to the most economically advantageous tender, and leaves it open to the contracting authority to choose the award criteria which it considers most appropriate, that choice is limited to criteria aimed at identifying the tender which is economically the most advantageous. Therefore, award criteria do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' ability to perform the contract in question, which are applicable at the stage of selecting tenderers and cannot be taken into account for the purpose of the comparative evaluation of the tenders.

reference, it must be rejected by the contracting authority; the latter has no authority, however, to alter the general scheme of the contract by changing one of the essential conditions on which it is to be awarded. If, during the tendering procedure, the contracting authority was authorised to amend at will the very conditions of the invitation to tender, such as the weighting applied to the award criteria, where there was no express authorisation to that effect in the relevant provisions, the terms governing the award of the contract, as originally laid down, would be distorted. Furthermore, a practice of that kind would inevitably lead to infringement of the principles of transparency and equal treatment as between tenderers, since the uniform application of the conditions of the invitation to tender and the objectivity of the procedure would no longer be guaranteed.

(see paras 137-138, 141-142, 160)

If the bid of a tenderer who has not been excluded from the tendering procedure and satisfies the selection criteria set out in the contract notice or the terms of reference does not appear, from the contracting authority's point of view, to be the most economically advantageous, in the light of the award criteria set out in the contract notice or the terms of

11. If, in proceedings for annulment of a decision by the European Investment Bank awarding a public contract, the Court does not have before it any evidence enabling it to conclude, or to rule out the possibility, with any certainty, that the alterations to the successful tenderer's bid and the weightings applied to the technical criteria and the financial criterion, after the adoption of the contested

decision, were capable of distorting the comparative evaluation of the tenders to the detriment of the unsuccessful tenderers, in such a way that the outcome of the tendering procedure was affected by it, such uncertainty must be construed against the Bank as contracting authority.

results from the loss of the contract itself, there is no basis for the applicant's claim for damages to compensate for the loss resulting from the fact that it did not conclude a contract with the contracting authority or, a fortiori, implement the contract.

(see para. 181)

That finding is without prejudice to the compensation to which the applicant may be entitled, under Article 266 TFEU, by being restored sufficiently to its original position, following the annulment of the contested decision.

12. Where, in an action for damages, it is impossible to establish the existence of a causal link between the contracting authority's adoption of a decision excluding a tenderer from a public procurement procedure which is unlawful, and the damage alleged by the applicant, which

(see paras 212, 214)