

Fourth, they claim that the Commission has acted in violation of Articles 7 and 8 of Regulation No 1049/2001 and in violation of Article 6 of Regulation No 1367/2006 ⁽³⁾ as it has failed to fulfil legal obligations during the two-stage administrative procedure. The applicants submit that the Commission refused to release the documents or claim exceptions to justify their withholding.

⁽¹⁾ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43

⁽²⁾ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ 2009 L 140, p. 16

⁽³⁾ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006 L 264, p. 13.

Action brought on 1 October 2010 — Timab Industries and CFPR v Commission

(Case T-456/10)

(2010/C 346/91)

Language of the case: French

Parties

Applicants: Timab Industries (Dinard, France) and Cie financière et de participations Roullier (CFPR) (Saint-Malo, France) (represented by: N. Lenoir, lawyer)

Defendant: European Commission

Form of order sought

- principally, annul the decision;
- in the alternative, annul Article 1 of the Decision in particular in so far as it states that CFPR and Timab participated in practices relating to sales conditions and a compensation system;
- in any event, amend Article 2 of the Decision and reduce substantially the fine imposed jointly and severally on CFPR and Timab;
- order the Commission to pay all the costs.

Pleas in law and main arguments

The applicants seek, principally, annulment of Commission Decision C(2010) 5001 final of 20 July 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the Agreement on the European Economic Area ('EEA') (Case COMP/38.866 — Animal feed phosphates) concerning a cartel in the European animal feed phosphates market relating to the allocation of sales quotas, the coordination of prices and sales conditions and the exchange of commercially sensitive information.

The applicants put forward eight pleas in support of their action:

- infringement of the rights of the defence, the principle of the protection of legitimate expectations and the principle of sound administration, and of Regulation No 773/2004 ⁽¹⁾ and the Notice on the conduct of settlement procedures ⁽²⁾ on account of the fact that the applicants were penalised for the fact that they withdrew from settlement discussions under Article 10a of Regulation No 773/2004, in so far as the likely fine that the Commission had set at the stage of the settlement discussions was subsequently increased by 25 %, whereas (i) the likely fine must not increase by more than 10 % following discontinuation of participation in the settlement procedure and (ii) the duration of the infringement was reduced by 60 %;
- inadequate and contradictory grounds and infringement of the rights of the defence and the burden of proof inasmuch as practices in which the applicants did not participate were imputed to them, although the Commission possessed no evidence of such participation;
- infringement of the principle of non-retroactivity of the more punitive law and infringement of the principles of the protection of legitimate expectations, equal treatment and legal certainty, since the amount of the fine was determined pursuant to the 2006 Guidelines, ⁽³⁾ whereas the infringement imputed took place before the publication of those guidelines; that retroactive application of the 2006 Guidelines increased the amount of the fine;
- infringement of Article 23 of Regulation No 1/2003, ⁽⁴⁾ the principle of proportionality, the principle that penalties must fit the offence and the principle of equal treatment, since the fine imposed does not reflect either the duration or the gravity of the practices;
- a manifest error of assessment of the gravity of the practices alleged against the applicants and infringement of the principle of equal treatment, the principle of proportionality and the principle that penalties must fit the offence when the basic amount is set, since the Commission failed to take account of the fact that the infringement had no significant effects and that Timab participated in the cartel to a lesser extent than the other participants;
- an error of assessment and infringement of the principle that penalties must fit the offence and the principle of equal treatment inasmuch as the Commission refused to grant the applicants the benefit of any attenuating circumstances despite their dependence on one of the other cartel participants and despite Timab's competitive conduct;
- infringement of the rights of the defence, the principle of equal treatment and the Leniency Notice, ⁽⁵⁾ in so far as the reduction of the fine granted to the applicants in respect of leniency at the stage of the settlement discussions was considerably reduced after the applicants withdrew from those discussions;

— a manifest error of assessment of the applicants' ability to pay and infringement of the principle of equal treatment and the combined provisions of Article 3 TEU and Protocol No 17 annexed to the Treaty of Lisbon inasmuch as the Commission applied the provisions of the 2006 Guidelines on the applicants' ability to pay without taking account either of the exceptional circumstances arising from the crisis afflicting European agriculture or of the economic and social constraints specific to the applicants.

(¹) Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] (OJ 2004 L 123, p. 18).

(²) Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ 2008 C 167, p. 1).

(³) Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2).

(⁴) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1).

(⁵) Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

Action brought on 26 September 2010 — Evropaiki Dynamiki v Commission

(Case T-457/10)

(2010/C 346/92)

Language of the case: English

Parties

Applicant: Evropaiki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and M. Dermizakis, lawyers)

Defendant: European Commission

Form of order sought

— annul DIGIT's decision to select the bid of the applicant, filed in response to the open call for tenders DIGIT/R2/PO/2009/045 "External service provision for development, studies and information systems" (OJEU 2009/S 198-283663), for Lot 2 "Off-site development projects", for the award of the above procurement contract as third contractor in the cascade mechanism instead of first contractor and all the related decisions of DIGIT including the one to award the contract to the successful contractors;

— order DIGIT to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 30 000 000 for Lot 2 and the amount of EUR 3 000 000 for damages for loss of opportunity and damage to its reputation and credibility;

— order DIGIT to pay the applicant's legal and other costs and expenses incurred in connection with this application even if the current application is rejected.

Pleas in law and main arguments

In the present case the applicant seeks the annulment of the defendant's decision of 16 July 2010 to select its bid in the context of the call for tenders DIGIT/R2/PO/2009/045 "External service provision for development, studies and information systems" (¹), for Lot 2 "Off-site development projects", as third contractor in the cascade mechanism instead of first cascade contractor and of all the related decisions of the defendant including those to award the respective contracts to the first and second cascade contractors. The applicant further requests compensation for the alleged damages in account of the tender procedure.

In support of its claims the applicant puts forward the following grounds.

First, the applicant argues that the Commission has infringed Articles 93 and 94 of the financial regulation (²) and the principles of good administration and transparency as well as Articles 106 and 107 of the financial regulation because several members of the winning consortium did not comply with the exclusion criteria since they should have been found to be in serious breach of previous contracts, and one member of the winning consortium was involved in fraud, corruption and bribes, while several members of the winning consortia use non WTO/GPA based subcontractors.

Furthermore, the applicant argues that the principle of good administration and the principle of equal treatment as well as Articles 89 and 98 of the financial regulation and Article 145 of its implementing rules were infringed since a conflict of interest existed in the person of several evaluators.

The applicant further contends that vague and irregular award criteria were used during the evaluation thus infringing Article 97 of the financial regulation and Article 138 of the implementing rules.

Finally, the applicant claims that the contracting authority has failed to disclose the relative merits of the successful tenderer and has committed several manifest errors of assessment while evaluating its tender as well as the one of the winning consortia. In the applicant's opinion, the contracting authority has also used vague and unsubstantiated comments in its evaluation report thus violating the obligation to state reasons.

(¹) OJ 2009/S 198-283663

(²) 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)