



## Reports of Cases

Case T-165/12

European Dynamics Luxembourg SA

and

Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE  
v  
European Commission

(Public service contracts — Tendering procedure — Provision of support services with a view to developing IT infrastructure and eGovernment services in Albania — Rejection of a tender — Transparency — Duty to state reasons)

Summary — Judgment of the General Court (First Chamber), 13 December 2013

1. *EU public contracts — Tender procedure — Duty to comply with the principle of equal treatment of tenderers — Need to ensure equal opportunities and comply with the principle of transparency — Scope — No obligation to communicate the report of the evaluation committee to a tenderer during the pre-litigation procedure*

*(Council Regulation No 1605/2002, Art. 89(1); Commission Regulation No 2342/2002, Art. 147)*

2. *Judicial proceedings — Introduction of new pleas during the proceedings — Plea raised for the first time at the reply stage — Inadmissibility*

*(Rules of Procedure of the General Court, Arts 44(1)(c) and 48(2))*

3. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision, in the procedure for the award of a public service contract, not to accept a tender — Obligation of the contracting authority to provide sufficiently precise comments clearly showing the justifications for the rejection — Infringement — Infringement of the duty to state reasons*

*(Art. 296 TFEU; Council Regulation No 1605/2002, Art. 100(2); Commission Regulation No 2342/2002, Art. 149)*

4. *Actions for annulment — Action against a decision, in the procedure for award of a public service contract, not to accept a tender — Annulment of the contested decision for lack of reasoning — Subsidiary plea for annulment claiming infringement of the principle prohibiting the modification of contractual documents during the tendering procedure — Reality of the infringement depending on examination of pleas having to be directed against the decision replacing the contested decision — Plea premature*

1. The contracting authority is required to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers. The principle of equal treatment implies an obligation of transparency so that it is possible to verify that that principle has been

complied with. That principle of transparency implies that all technical information relevant for the purpose of a sound understanding of the contract notice or the tendering specifications must be made available as soon as possible to all the undertakings taking part in a public procurement procedure in order, first, to enable all reasonably well-informed and normally diligent tenderers to understand their precise scope and to interpret them in the same manner and, secondly, to enable the contracting authority actually to verify whether the tenderers' bids meet the criteria of the contract in question.

In those circumstances, it is not an infringement of the principle of transparency for an institution to refuse to disclose the report of the evaluation committee to a tenderer during the pre-litigation procedure where it has not had the effect of creating inequality of opportunity between the applicants and other tenderers when formulating their tenders. As is apparent from Article 147 of Regulation No 2342/2002, laying down detailed rules for the implementation of Regulation No 1605/2002, on the Financial Regulation applicable to the general budget of the European Communities, the aim of the evaluation report is not to set out all the conditions and detailed rules of the award procedure, but rather to present the outcome of the evaluation carried out by the evaluation committee, including, in particular, the names of the tenderers rejected and the reasons for the rejection of their tenders as well as the name of the contractor proposed and the reasons for that choice.

(see paras 45-51)

2. See the text of the decision.

(see para. 55)

3. It is apparent from Article 100(2) of Regulation No 1605/2002, on the Financial Regulation applicable to the general budget of the European Communities, and from Article 149 of Regulation No 2342/2002, laying down detailed rules for its implementation, that a contracting authority meets its obligation to state reasons if it, first of all, merely informs the unsuccessful tenderers immediately of the rejection of their tender and, subsequently, notifies tenderers who expressly so request of the characteristics and relative advantages of the successful tender and of the name of the tenderer to whom the contract is awarded, within 15 days from receipt of a request in writing.

However, whilst that provision does not necessarily require the contracting authority to make the evaluation report available to the unsuccessful tenderer or to undertake a detailed comparative analysis of the successful tender and of the unsuccessful tender, in order to meet the requirements of Article 100(2) of Regulation No 1605/2002, the contracting authority's comments must nevertheless be sufficiently precise to enable the applicants to ascertain the matters of fact and law on the basis of which the contracting authority rejected their offer and accepted that of another tenderer. Those conditions are not fulfilled by comments concerning only the applicants' tender and not that of the successful tenderer, or by vague comments not reflecting the disparity of the marks awarded for each of the applicants' experts.

Thus, the requirements of Article 100(2) of the said regulation are not satisfied where the Commission communicates to the applicants the scores awarded for the criteria and sub-criteria concerning their tender in the form of a table which does not contain the scores obtained by the successful tenderer for the same criteria and sub-criteria, and which does not therefore enable the applicants to make a direct comparison between the scores awarded by the Commission to their tender and those awarded to the successful tender. That is all the more the case where such scores in themselves do not inform the applicants of the reasons why they were awarded to their tender. The same applies to award criteria laid down in the evaluation grid which likewise do not enable the applicants to understand the

justification for the scores awarded or for the Commission's comments on the applicants' tender since they do not demonstrate the Commission's reasoning clearly and unequivocally, so as to enable the applicants to understand the justifications for the rejection of their tender.

(see paras 62, 78-82, 85-87, 89, 90)

4. See the text of the decision.

(see para. 97)