



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

13 October 2015*

(Public service contracts — Tendering procedure — Technical assistance to the Customs Administration of Serbia to support the modernisation of the customs system — Conflict of interests — Rejection of a tenderer's bid by the Delegation of the European Union to the Republic of Serbia — Implicit rejection of the complaint against the rejection of the bid)

In Case T-403/12,

Intrasoft International SA, established in Luxembourg (Luxembourg), represented by S. Pappas, lawyer,

applicant,

v

European Commission, represented by F. Erlbacher and E. Georgieva, acting as Agents,

defendant,

APPLICATION, first, for annulment of the Commission's letter of 10 August 2012, acting through the Delegation of the European Union to the Republic of Serbia, stating that the tendering procedure EuropeAid/131367/C/SER/RS, entitled 'Technical assistance to the Customs Administration of Serbia to support the modernisation of the customs' (OJ 2011/S 160-262712), could not be awarded to the consortium of which Intrasoft International SA was a part, and secondly, an application for the annulment of the alleged implicit decision rejecting the complaint made by the applicant against the letter of the 10 August 2012,

THE GENERAL COURT (Second Chamber),

composed of M.E. Martins Ribeiro, President, S. Gervasoni and L. Madise (Rapporteur), Judges,

Registrar: L. Grzegorzcyk, Administrator,

having regard to the written procedure and further to the hearing on 27 January 2015,

gives the following

* Language of the case: English.

Judgment

Background to the proceedings

- 1 The applicant, Intrasoft International SA, is a company established in Luxembourg (Luxembourg).
- 2 On 23 August 2011 a contract notice was published in the *Supplement to the Official Journal of the European Union* (OJ 2011/S 160-262712), under reference EuropeAid/131367/C/SER/RS ('the contract notice').
- 3 The subject-matter of that notice was the award of a public service contract entitled 'Technical assistance to the Customs Administration of Serbia to support the modernisation of the customs system'. The period originally scheduled for performance of the contract was 24 months and the maximum budget was EUR 4 100 000.
- 4 The tendering procedure was part of the Instrument for Pre-Accession Assistance, created and governed by Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA) (OJ 2006 L 210, p. 82). The aim of the IPA is to provide assistance to several countries, including Serbia, to enable their progressive alignment with the standards, policies and *acquis* of the European Union, with a view to their future membership. Such assistance takes the form of, inter alia, the launch of tendering procedures and the award by the European Commission of contracts for public service contracts by the European Commission that the successful tenderers provide in the beneficiary country, namely, in the present case, Serbia.
- 5 The contracting authority was the European Union, represented by the Commission, acting through its Delegation to the Republic of Serbia ('the contracting authority').
- 6 Under the terms of the contract notice, the contract had to be awarded to the tender offering the best value for money, within the framework of a restricted procedure comprising two steps, namely shortlisting and award.
- 7 For the purpose of the shortlist, interested parties had until 30 September 2011 to submit their applications, with information giving evidence of their financial, technical and professional capacity to perform the contract. After evaluating the applications, an evaluation committee was to draw up a shortlist of eligible candidates, consisting of four to eight candidates, invited to participate in the second stage of the procedure, namely, the contract award stage.
- 8 During that tendering procedure the applicant put written questions to the contracting authority in accordance with paragraph 3.3.5, entitled 'Additional information during the procedure', of the *Practical Guide to Contract Procedures for EU External Actions* drawn up by the Commission services for the detailed implementation of financial aid to third countries ('the Practical Guide'). The applicant asked, inter alia, whether a firm or an expert intending to take part in the tendering procedure at issue must be considered to have a conflict of interests because of its participation in the implementation, in a previous tendering procedure, of Project EuropeAid/128180/C/SER/RS.
- 9 By e-mail of 26 April 2012, the contracting authority responded to the applicant that '[t]here is no conflict of interest for the firm or the expert who participated in the execution of project EuropeAid/128180/C/SER/RS and intends to participate in the tender EuropeAid/131367/SER/RS [given that] project EuropeAid/128180/C/SER/RS did not include preparation of the tender documentation for the call for tenders for Europe/Aid/131367/SER/RS'.
- 10 The applicant submitted its application to participate in the tendering procedure in a consortium with Serbian Business Systems d.o.o. and Belit d.o.o.

- 11 By letter of 10 August 2012, the contracting authority told the applicant that the contract could not be awarded to the consortium of which it was part ('the letter of 10 August 2012'). That letter contained the following particulars:
- the applicant has had privileged access to a certain number of documents constituting an integral part of the tendering procedure and which constituted the starting point for determining the activities covered by the contract in question. The privileged access which the applicant enjoyed was linked to its participation in drafting those documents under an earlier tendering procedure, EuropeAid/128180/C/SER/RS; therefore, the contracting authority, pursuant to section 2.3.6 of the Practical Guide, considers the conflict of interest condition to be fulfilled;
 - the contracting authority was in a position to analyse the circumstances in detail only after having reviewed the applications carefully case by case;
 - the applicant could state its disagreement or request additional information up to 17 August 2012, when the contracting authority would continue with the award procedure.
- 12 By e-mail of 13 August 2012, the applicant requested the contracting authority to reconsider its decision, contained in the letter of 10 August 2012, to reject the tender of the consortium of which it was part and also requested the suspension of the tendering procedure in the expectation of receiving more information on the reasons for that rejection.
- 13 By letter of 12 September 2012, the contracting authority informed the applicant that it could not award the contract to the consortium of which the applicant was part, on account of the conflict of interest referred to in the letter of 10 August 2012, and also notified the applicant of the name of the consortium to which, in the opinion of the Evaluation Committee, the contract should be awarded ('the letter of 12 September 2012').

Procedure and forms of order sought

- 14 By application lodged at the Court Registry on 11 September 2012, the applicant brought the present action for annulment of the decision contained in the letter of 10 August 2012 and of the alleged implicit decision to reject its complaint.
- 15 By separate application, lodged at the Court Registry on 21 September 2012, the applicant brought an action to suspend operation of the decision contained in the letter of 10 August 2012, the alleged implicit decision to reject its complaint, and the decision contained in the letter of 12 September 2012, issued after the action for annulment was brought before the Court.
- 16 By order of 14 November 2012 in *Intrasoft International v Commission* (T-403/12 R, EU:T:2012:600), the judge hearing the application for interim measures dismissed the application for interim measures for lack of urgency.
- 17 The composition of the chambers of the Court having been altered, the Judge-Rapporteur was assigned to the Second Chamber, to which this case was consequently assigned.
- 18 Upon hearing the report of the Judge-Rapporteur, the General Court (Second Chamber) decided to open the oral procedure.
- 19 The parties presented oral argument and answered the Court's oral questions at the hearing on 27 January 2015.
- 20 The oral procedure was closed on 12 February 2015.

- 21 The applicant claims that the Court should:
- annul the decision of the Delegation of the European Union to the Republic of Serbia contained in the letter of 10 August 2012 and also the implicit decision to reject the applicant's complaint against that decision, so that the applicant will be allowed to participate in the subsequent stages of the tender;
 - order the defendant to pay the costs.
- 22 The Commission contends that the Court should:
- dismiss the action as inadmissible;
 - in the alternative, dismiss the action as unfounded;
 - order the applicant to bear its own costs and pay the costs incurred by the Commission in the present proceedings, and also in the proceedings for interim measures in Case T-403/12 R.
- 23 In response to a question put during the hearing, as noted in the minutes of the hearing, the applicant stated that the letter of 12 September 2012, sent by the contracting authority the day after the applicant's action was brought before the court, was not the subject of that action or of an amendment to its pleadings. In that regard, the applicant explained that the letter of 12 September 2012 was a measure which was merely confirmatory of the letter of 10 August 2012, and consequently it should be treated in the same way.

Law

Admissibility

- 24 It should be observed, first of all, that the acts which are the subject of the present action ('the contested acts') are, first, the letter of 10 August 2012 indicating that the contract at issue could not be awarded to the consortium of which the applicant was part because the latter had a conflict of interests and, secondly, the alleged implicit decision to reject the applicant's complaint against the letter of 10 August 2012.
- 25 The Commission, without formally raising an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the General Court, puts forward, in its defence, arguments challenging the admissibility of the action in relation to the contested acts.
- 26 It contends that the letter of 10 August 2012 does not constitute a challengeable act in that it simply seeks to inform the applicant that its application is considered to give rise to a conflict of interests and to give the reasons for that assessment. The only act capable of being subject to an action for annulment would be the decision communicated in the letter of 12 September 2012 which, not having been challenged within the prescribed time-limit, has become definitive in relation to the applicant.
- 27 In respect of the alleged implicit decision to reject the complaint, the Commission states that the period of 15 working days for responding to a complaint referred to in section 2.4.15.1 of the Practical Guide, is only a 'rule of best endeavour', laid down in the interests of sound administration, and that consequently the lack of a reply within that time-limit cannot be considered an implicit rejection of the applicant's complaint. The Practical Guide cannot prescribe mandatory rules in relation to the applicable time-limits for bringing an action before the Court.

- 28 It is apparent from settled case-law concerning the admissibility of actions for annulment that, in order to classify the contested acts, it is necessary to look to their substance, as well as the intention of those who drafted them. In that regard, it is in principle those measures which definitively determine the position of the Commission upon the conclusion of an administrative procedure, and which are intended to have legal effects capable of affecting the interests of the complainant, which are open to challenge and not intermediate measures whose purpose is to prepare for the final decision, which do not have those effects (see judgment of 17 July 2008 in *Athinaiki Techniki v Commission*, C-521/06 P, ECR, EU:C:2008:422, paragraph 42 and the case-law cited).
- 29 The form in which an act or decision is adopted is in principle irrelevant to the admissibility of an action for annulment. It is therefore irrelevant for the classification of the act in question whether or not it satisfies certain formal requirements, that is to say, whether it is duly named by its author, is sufficiently reasoned, and mentions the provisions providing the legal basis for it. It is, therefore, irrelevant that the act is not described as a 'decision' or that it does not refer to the provisions of the TFEU prescribing the legal remedies available against it (see, by analogy, judgment in *Athinaiki Techniki v Commission*, cited in paragraph 28 above, EU:C:2008:422, paragraphs 43 and 44 and the case-law cited).
- 30 If it were otherwise, the Commission could avoid review by the Courts of the European Union simply by failing to adhere to such formal requirements. It is apparent from the case-law that, as the European Union is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty, the procedural rules governing actions brought before the courts of the Union must, so far as is possible, be interpreted in such a way that their application contributes to the attainment of the objective of ensuring effective judicial protection of an individual's rights under EU law (see judgment in *Athinaiki Techniki v Commission*, cited in paragraph 28 above, EU:C:2008:422, paragraph 45 and the case-law cited).
- 31 It is in the light of those considerations that it must be determined first whether, as the applicant maintains, the contested acts mentioned at paragraph 24 above, are acts adversely affecting it and thus can be the subject of an application for annulment.

Admissibility of the action against the letter of 10 August 2012

- 32 The binding legal effects of an act must be assessed according to objective criteria such as the content of that act (see, by analogy, judgment of 20 March 1997 in *France v Commission*, C-57/95, ECR, EU:C:1997:164, paragraph 9), taking into account, as appropriate, the context in which it was adopted (see, by analogy, order of 13 June 1991 in *Sunzest v Commission*, C-50/90, ECR, EU:C:1991:253, paragraph 13 and the judgment of 26 January 2010 in *Internationaler Hilfsfonds v Commission*, C-362/08 P, ECR, EU:C:2010:40, paragraph 58) and also the powers of the institution which adopted the measure (see, by analogy, judgment of 1 December 2005 in *Italy v Commission*, C-301/03, ECR, EU:C:2005:727, paragraph 28).
- 33 In the present case it should be examined whether the letter of 10 August 2012, with regard to its content, the legal and factual context in which it was written, and the powers possessed by the authority which adopted it, may be considered a decision adversely affecting the applicant.
- 34 In that regard, as a preliminary point, it should be noted, first, that it is not disputed in the present case that the contested measures, drafted by the EU Delegation to the Republic of Serbia, are attributable to the Commission, which is therefore the rightful defendant in the present action. As the applicant rightly argues, it is apparent from the Court's case-law that the measures adopted by that delegation, acting in the capacity of subdelegated authorising officer of the Commission, do not confer

capacity on that delegation to act as a defendant in legal proceedings and are, in the present case, attributable to the Commission (see, to that effect, order of 4 June 2012 in *Elti v Delegation of the European Union to Montenegro*, T-395/11, ECR, EU:T:2012:274, paragraph 64).

35 Nor, secondly, is it disputed that the applicant, as a member of the consortium, is the addressee of the measures which are addressed to the consortium, because of the transparent structure of that consortium as regards its members (see, to that effect, judgment of 19 March 2010 in *Evropaiki Dynamiki v Commission*, T-50/05, ECR, EU:T:2010:101, paragraph 40).

36 With regard, in the first place, to the content of the letter of 10 August 2012, it should be noted that it is drafted in the following terms:

‘I regret to inform you ... that your application was assessed to represent a conflict of interests and that [the contract] cannot, therefore, be awarded to your consortium. [T]he contracting authority came to the conclusion that the contract may not be awarded to the consortium [of which you are part] as you are subject to a conflict of interests. [T]he contracting authority, in accordance with paragraph 2.3.6 of [the Practical Guide] finds the conditions [which determine] the existence of a conflict of interest are fulfilled ...’

37 Therefore, it is apparent from the terms of that letter that its author not only informed the applicant, as the Commission argues, of its intention to exclude it from the award of the contract, but also informed it of the decision not to award the contract to the consortium of which it was part.

38 That conclusion is not called into question by the reference, in the letter of 10 August 2012, to a time-limit for informing the contracting authority of its disagreement or for requesting further information from it. Such a reference, in accordance with the provisions of paragraph 2.4.15.1 of the Practical Guide, seeks in particular, first, to give the addressee of the measure the opportunity to protect such of his interests as are affected by the decision by means of a complaint without having to take legal action and, secondly, to allow him to obtain further clarification of a decision already taken.

39 Moreover, the possibility of lodging a complaint, as is noted *inter alia* at paragraph 2.4.15.3 of the Practical Guide and in the footnote referred to in that paragraph, does not prejudice the right of the addressee of the measure to bring an action before the General Court within the time-limit expressly provided by EU law (see, to that effect, judgment of 15 September 2011 in *CMB and Christof v Commission*, T-407/07, EU:T:2011:477, paragraph 103). It follows that such a possibility does not relieve the applicant of the obligation to comply with the time-limits for bringing an action for annulment before the Court.

40 In the second place, in relation to the context in which the letter of 10 August 2012 was written, it should be noted that it relates to the assessment of the conditions for exclusion of tenderers selected for the award of the contract, as they are referred to at paragraph 2.3.3 of the Practical Guide, in accordance with the indication at paragraph 15 of the contract notice. Such an assessment was concluded by the notification that the contract could not be awarded to the consortium of which the applicant was part. It is not apparent from the documents before the Court that, following the letter of 10 August 2012, an assessment of the tender of the consortium of which the applicant was a part was again carried out.

41 It should be added that in the letter of 10 August 2012 its author noted that, in the absence of any disputes or requests for additional information, ‘[it would] follow the contract award procedure in accordance with the rules in the Practical Guide’. It should be observed that the letter of 12 September 2012, sent to the applicant the day after the action was brought before the Court, contains the name of the tenderer proposed by the Evaluation Committee. It follows that,

notwithstanding the applicant's request to suspend the current tendering procedure set out in its complaint of 13 August 2012, the contracting authority continued with that procedure and identified, amongst the remaining candidates, the potential successful tenderer.

- 42 In that regard, it should be added that the mention, in the last line of the letter of 12 September 2012, of the possibility, in accordance with paragraph 2.4.15 of the Practical Guide, of an application to challenge the decision in question can be construed as referring to the possibility of challenging the decision to award the contract to another tenderer. Consequently, the indication in question is not decisive in classifying the letter of 12 September 2012 as a final decision to exclude the applicant. On the other hand, such an indication shows, once more, and as the applicant rightly argues, that the tendering procedure had not been suspended and had been concluded by the indication of the potential successful tenderer by the Evaluation Committee.
- 43 Therefore, it must be stated, having regard to the context of which the letter of 10 August 2012 forms part, that its author adopted a position on the capacity of the applicant to participate in the tendering procedure, also noted that the applicant found itself in a situation of a conflict of interests and consequently established that the contract could not be awarded to the consortium of which the applicant was part.
- 44 In the third and final place, concerning the powers available to the author of the letter, namely, the EU Delegation to the Republic of Serbia, as has been noted at paragraph 5 above, it operated in the capacity of the Commission's subdelegated contracting authority. Consequently, the measure in question did not constitute a mere opinion of the Evaluation Committee on the conditions for the exclusion of a tenderer on the basis of a conflict of interests but a decision of the contracting authority capable as such of producing legal effects binding on those to whom its decisions were addressed.
- 45 It follows from all the preceding observations that, having regard to its content, the legal and factual context in which it was written, and the powers of the authority which wrote it, the letter of 10 August 2012 was liable to have legal consequences affecting the applicant's interests, with the result that it is a question of a measure adversely affecting the applicant and capable of being the subject of an action for annulment before the Court.
- 46 Contrary to what is maintained by the Commission, the applicant, faced with a measure which adversely affected it, within the meaning of the case-law cited at paragraphs 28 to 30 and 32 above, correctly brought the present action within the time-limit calculated from the adoption of that measure. It did not have to wait for a reply to its complaint of 13 August 2012 before bringing the present action, as is apparent from the case-law mentioned at paragraph 39 above and, in addition, from paragraphs 2.4.15.1 and 2.4.15.3 of the Practical Guide.
- 47 Since the letter of 10 August 2012 has been classified as a measure open to challenge, it is necessary to answer the arguments of the Commission that the letter of 12 September 2012 contains a decision that adversely affects the applicant, which, not having been challenged within the time-limits for a legal action, rendered definitive the exclusion of the applicant from the tendering procedure because there was a conflict of interests. Such an argument requires it to be determined whether the applicant's legal interest in bringing proceedings persists, following the adoption by the contracting authority of the letter of 12 September 2012, which presupposes that the action must be liable, if successful, to procure an advantage to the party bringing it (see, to that effect, order of 25 June 2014 in *Accorinti and Others v BCE*, T-224/12, EU:T:2014:611, paragraph 68).
- 48 In that regard, it is apparent from the case-law that the annulment of a confirmatory measure follows that of the earlier measure, so that annulment of the earlier measure automatically implies the annulment of the confirmatory measure (see, to that effect, judgment of 5 May 1998 in *United Kingdom v Commission*, C-180/96, ECR, EU:C:1998:192, paragraph 28 and the case-law cited).

Accordingly, where the confirmed decision has not become final, the person concerned is entitled to challenge the original decision, the confirmatory decision or both (see judgment of 16 September 1998 in *Waterleiding Maatschappij v Commission*, T-188/95, ECR, EU:T:1998:217, paragraph 108 and the case-law cited).

- 49 First, it should be observed in the present case, that the reference in the letter of 12 September 2012 to the decision of the Evaluation Committee to award the contract to another consortium cannot confer on the letter in question the character of a measure replacing the letter of 10 August 2012 concerning the rejection of the bid by the consortium of which the applicant was part. That reference changes neither the reasoning, nor the content, nor the effects of the decision in the letter of 10 August 2012, in particular, in relation to the exclusion of the applicant from the tendering procedure because of a conflict of interests and the subsequent rejection of the bid of the consortium of which it was part.
- 50 Secondly, concerning the statement that the contracting authority took into account the facts put forward by the applicant in its letter of 13 August 2012, it should be noted that, if it is the case that the letter of 12 September 2012 is a response to the applicant's complaint, the facts put forward by the contracting authority in that letter do not represent new or substantial facts in relation to those already known to the contracting authority at the time of the adoption of the letter of 10 August 2012, as held in the case law concerning the classification of facts as being 'new and substantial' (see, to that effect, judgment of 7 February 2001 in *Inpesca v Commission*, T-186/98, ECR, EU:T:2001:42, paragraphs 50 and 51 and the case-law cited). The facts presented by the applicant merely remind the contracting authority that it had previously excluded the existence of a conflict of interests in relation to the applicant, informing it of this factor by means of a letter of 26 April 2012 (see paragraph 9 above). Moreover, the letter of 12 September 2012 did not furnish information as to a possible review of the applicant's position or of the evaluation of its tender carried out after the letter of 10 August 2012 was sent.
- 51 Furthermore, if, according to the fourth subparagraph of Article 149(3) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 357, p. 1), unsuccessful tenderers can request the contracting authority to provide them with 'additional information about the grounds for the rejection' in writing, the communication of such additional information does not have the effect of replacing the decision by which the bid of the tenderer in question is rejected, as the obligation to state reasons pertaining to such a decision may be fulfilled in several stages (see judgment of 22 May 2012 in *Sviluppo Globale v Commission*, T-6/10, EU:T:2012:245, paragraph 29 and the case-law cited).
- 52 It follows from the above that the contracting authority, in its letter of 12 September 2012, in essence, simply reaffirmed the position already put forward in its letter of 10 August 2012, on the basis of the same matters of fact and of law. None of the information in that letter constituted a new or substantial factor conferring on it the character of a decision bearing on the exclusion of the applicant, replacing or substituting itself for the letter of 10 August 2012.
- 53 Consequently, the letter of 12 September 2012 has not deprived the present action taken against the decision contained in the letter of 10 August 2012 of its purpose, with the result that the applicant's legal interest in bringing proceedings to remedy its exclusion from the tendering procedure and to reject the bid of the consortium of which it was part, persists in the circumstances. Contrary to what is claimed by the Commission, and as has already been noted at paragraph 46 above, the applicant has rightly brought an application for the annulment of the decision contained in the letter of 10 August 2012 as a measure with legal effects affecting his interests and binding on him. Otherwise it would be exposed to the risk of the Commission arguing that its action was brought out of time on the grounds that the letter of 12 September was, in essence, and as the applicant rightly argues, only a measure confirmatory of the letter of 10 August 2012.

- 54 It must be noted that, according to well-settled case-law, where an applicant allows the time-limit for bringing an action against a decision unequivocally laying down a measure with legal effects affecting his interests and binding on him to expire, he cannot start time running again by asking the institution to reconsider its decision and by bringing an action against the refusal confirming the decision previously taken (see order of 10 October 2006 in *Evropaïki Dynamiki v Commission*, T-106/05, EU:T:2006:299, paragraph 55 and the case-law cited).
- 55 Consequently, the action for the annulment of the decision contained in the letter of 10 August 2012 should be held admissible.

The implicit decision to reject the applicant's complaint

- 56 With regard to the application for annulment of the alleged implicit decision to reject the applicant's complaint, it is necessary to examine whether the alleged decision can be classified as an act open to challenge within the meaning of Article 263 TFEU.
- 57 In that regard, it should be recalled that the silence of an institution when it has been called upon to express its view cannot, in itself and as such, have legal effects, except where that result is expressly provided for by EU law. Where there are no such express provisions laying down a deadline by which an implied decision is deemed to have been taken and prescribing the content of the decision, an institution's inaction cannot be deemed to be equivalent to a decision without calling into question the system of remedies instituted by the Treaty (judgment of 13 December 1999 in *SGA v Commission*, T-189/95, T-39/96 and T-123/96, ECR, EU:T:1999:317, paragraphs 26 and 27).
- 58 According to the Court's case law, the Practical Guide is a working tool which explains the procedures applying in a particular area and cannot, as such, constitute a basis in law for the introduction of an obligatory prior administrative complaint (judgment of 8 October 2008 in *Sogelma v AER*, T-411/06, ECR, EU:T:2008:419, paragraph 66). Nor, similarly, in the present case, can that guide constitute the legal basis for the introduction of a time-limit for the benefit of the authority responsible for answering a complaint. Consequently, the inertia of the contracting authority at the expiry of the time-limit fixed in paragraph 2.4.15.1 of the Practical Guide cannot be classified as an implied decision to reject the applicant's complaint. Moreover, the Practical Guide does not prescribe any consequence stemming from the expiry of the time-limit at issue.
- 59 In the light of the foregoing, the action must be declared inadmissible in relation to the application for annulment of the implicit rejection of the applicant's complaint.

Substance

- 60 The applicant raises two pleas in support of its action. The first plea consists of two complaints, one alleging infringement of the specifications in the call for tenders at issue, the other alleging breach of the principle of good administration. By its second plea, the applicant alleges infringement of Article 94 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities ('the Financial Regulation') (OJ 2002 L 248, p. 1).
- 61 It is appropriate, first, to consider the second plea.
- 62 In the second plea, alleging infringement of Article 94 of the Financial Regulation, the applicant argues, on the one hand, as its first complaint, that it was not able to present its observations before being excluded definitively from the tendering procedure and, on the other, as its second complaint, that no actual proof to show the existence of a conflict of interests, in so far as it was concerned, has been supplied. It refers to the Court's case-law applying Article 94 of the Financial Regulation (judgment of

18 April 2007 in *Deloitte Business Advisory v Commission*, T-195/05, ECR, EU:T:2007:107, paragraph 67) and to paragraph 2.3.6 of the Practical Guide to maintain, in essence, that the exclusion of a tenderer must be based on the existence of an actual risk of a conflict of interests, substantiated by the specific circumstances of the case, while leaving the interested party the possibility of showing that there was no conflict of interests.

- 63 In relation, in particular, to factors precluding the existence of a conflict of interests, the applicant states that it was not involved in drafting the terms of reference or the project-related requirements for Tender EuropeAid/131367/SER/RS. The applicant states, in addition, that it did not have in its possession any more information than that available to all the tenderers. Consequently, according to the applicant, the fact that it had taken part in drawing up a number of technical documents in connection with another tendering procedure could not, in itself, constitute a sufficient reason to draw the unfavourable inference that the applicant was subject to a conflict of interest. Further, it considers that it is apparent from the Court's case-law (judgment of 3 March 2005 in *Fabricom*, C-21/03 and C-34/03, ECR, EU:C:2005:127) that the experience acquired under a previous contract is not capable of distorting competition, because if that were the case most tenderers would have to be excluded from new tendering procedures on that ground.
- 64 The Commission claims that the letter of 10 August 2012 expressly acknowledged that the applicant could clarify its situation before the decision contained in the letter of 12 September 2012 was taken. Furthermore, it was apparent from that last letter that the contracting authority had 'given due consideration to the elements that [the applicant ha[d] brought forward in [its] letter of 13 August [2012]' and based its decision on an assessment of the actual offers.
- 65 As regards evidence of the conflict of interests at issue, the Commission argues that, as is clear from the letter of 12 September 2012, a certain number of documents drafted by the applicant under the previous contract were joined to the terms of reference for the new tendering procedure. These documents 'constitute[d] the basis for an important portion of the activities due under the ongoing tender'. The Commission does not dispute, as the applicant observes, that the documents were made available to all potential candidates. However, it contends that the applicant had access to them before the other tenderers and thus enjoyed a competitive advantage, in particular, in searching for qualified experts. Furthermore, while not claiming that this was actually the situation in the present case, the Commission suggests that, having participated in their drafting, the applicant would have been in a position to draft the documents in a way that gave it a competitive advantage for the procurement contract at issue.
- 66 Finally, the case-law cited by the applicant (judgment of 3 March 2005 in *Fabricom*, cited in paragraph 63 above, EU:C:2005:127, paragraphs 29 and 36) does not support the applicant's argument, but rather substantiates the Commission's position, namely that a person who has participated in certain preparatory works may be at an advantage when formulating his tender on account of the information concerning the public contract in question which he has received when carrying out that work. However, all tenderers must have equality of opportunity when formulating their tenders. Therefore, the Commission submits that it is enough to have established the existence of a risk of a competitive advantage without it being necessary to demonstrate that that advantage has had specific consequences in the present case.
- 67 It should be noted that the award of public works contracts by the Commission is governed by the provisions of Title V in Part One of the Financial Regulation.
- 68 The legal basis for the letter of 10 August 2012 is found at Article 94 of the Financial Regulation, set out in paragraph 15 of the contract documents. The regulation in question applies, according to its own terms, to all public contracts financed in whole or in part by the Community (now the Union) budget.

69 Article 94 of the Financial Regulation contains the following provisions:

‘Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:

(a) are subject to a conflict of interest ...’

70 Paragraph 15 of the tender specification entitled ‘Grounds for exclusion’, provides:

‘tenderers must submit, together with the offer, a signed declaration, included in the standard form, certifying that they are not in one of the situations of exclusion listed at paragraph 2.3.3 of the [Practical Guide].’

71 In the words of paragraph 2.3.3 of the Practical Guide:

‘A contract shall not be awarded to candidates or tenderers who, during the procurement procedure for that contract:

(a) are subject to a conflict of interests;

...

It should be observed that, before proposing (the Evaluation Committee) and deciding (the Contracting Authority) to exclude one candidate/tenderer/applicant, principles such as the right of defence and proportionality should be taken into consideration. To that end, unless the evidence is such that no further query is necessary (e.g. explicit recognition by the candidate/tenderer/applicant of the facts leading to exclusion), the exclusion shall be based on a contradictory procedure with the concerned candidate/tenderer/applicant.’

72 At paragraph 2.3.6 of the Practical Guide, referred to in the letter of 10 August 2012, the concept of conflict of interests is explained as follows:

‘Conflict of interest: Conflict of interest occurs when the impartial and objective exercise of the functions of the Contracting Authority, or respect for the principles of competition, non-discrimination or equality of treatment of candidates/tenderers/applicants/contractors with regards to the award procedure or contract, is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with the beneficiary of EU funded programmes. A conflict of interest may therefore arise where, for instance, an individual participating in the procedure (Evaluation Committee, Contracting Authority, etc.) may grant itself or others unjustified direct or indirect advantages by influencing the outcome of such procedures; or where an expert/company [has] the opportunity to obtain privileged information leading to unfair competition in subsequent or related procedures.

For instance, any firm or expert participating in the preparation of a project (for example, drafting of the Terms of Reference) must be, as a rule, excluded from participating in tenders based on this preparatory work, unless [it] can prove to the Contracting Authority that the involvement in previous stages of the project does not constitute unfair competition.

Candidates/tenderers/applicants in a position of conflict of interests in relation to a contract award/grant award procedure must be excluded from the concerned procedure. The reasons for the exclusion have to be analysed on a case by case basis. Pursuant to constant case-law by the Court of Justice of the European Union, the exclusion should be based on an actual risk of conflict based on the specific circumstances of the case in question. An automatic exclusion deprives the candidate/tenderer/applicant of the right to present supporting evidence which might remove all suspicion of a conflict of interest.

...

- 73 In the present case, it is necessary to examine whether the contracting authority could consider that a risk of conflict of interests existed in relation to the applicant, with regard to Article 94(a) of the Financial Regulation, as interpreted by the case-law, on the basis of the information at its disposal at the time the decision, contained in the letter of 10 August 2012, was taken.
- 74 In that regard, it should be recalled that Article 94 of the Financial Regulation permits exclusion of a tenderer from a procurement procedure only if the situation of conflict of interest to which it refers is real and not hypothetical. That does not mean that a risk of conflict of interest is not sufficient to exclude a tender. In principle, it is only when the contract is performed that a conflict of interest can become real. Before conclusion of the contract, a conflict of interest can be only potential and Article 94 of the Financial Regulation therefore implies an assessment in terms of risk. That risk must actually be found to exist, following a specific assessment of the tender and the tenderer's situation, for that tenderer to be excluded from the procedure. The mere possibility of a conflict of interest cannot suffice for that purpose. (judgment in *Deloitte Business Advisory v Commission*, cited in paragraph 62 above, EU:T:2007:107, paragraph 67).
- 75 The concept of a conflict of interests is objective in nature and, in order to establish it, it is appropriate to disregard the intentions of those concerned, in particular whether they acted in good faith (see judgment of 20 March 2013 in *Nexans France v Entreprise commune Fusion for Energy*, T-415/10, ECR, EU:T:2013:141, paragraph 115 and the case-law cited).
- 76 The awarding authorities are under no absolute obligation to exclude systematically tenderers in a situation of a conflict of interests, such exclusion not being justified in cases in which it is possible to show that that situation had no impact on their conduct in the context of the tender procedure and that it entails no actual risk of practices liable to distort competition between tenderers. On the other hand, the exclusion of a tenderer where there is a conflict of interests is essential where there is no more appropriate remedy to avoid any breach of the principles of equal treatment of tenderers and transparency (judgment in *Nexans France v Entreprise commune Fusion for Energy*, cited in paragraph 75 above, EU:T:2013:141, paragraphs 116 and 117).
- 77 Thus, according to settled case-law, 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 (see judgment of 12 July 2007 in *Evropaiki Dynamiki v Commission*, T-250/05, EU:T:2007:225, paragraph 45 and the case-law cited).
- 78 More specifically, the principle of equal treatment requires, according to the case-law, all tenderers to be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions. The principle of transparency, which is its corollary, is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up clearly, precisely and unequivocally in the notice or contract documents (judgment of 9 September 2009 in *Brink's Security Luxembourg v Commission*, T-437/05, ECR, EU:T:2009:318, paragraphs 114 and 115). The principle of transparency therefore 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 (see judgment of 29 January 2014 in *European Dynamics Belgium and others v EMA*, T-158/12, EU:T:2014:36, paragraph 60 and the case-law cited).

- 79 It is apparent from the case-law, cited above at paragraphs 74 to 78, that the reasoning in terms of risk of conflict of interests requires a concrete assessment, first, of the tender and, second, of the situation of the tenderer concerned, and that the exclusion of that tenderer is a remedy designed to ensure respect for the principles of transparency and equality of opportunity for tenderers.
- 80 In order to determine whether, in the present case, there has been an infringement of Article 94 of the Financial Regulation it is, therefore, necessary to examine, in the context of an objective analysis without taking into account the applicant's intentions, whether the risk of a conflict of interests stems from the applicant's situation and from a concrete assessment of its tender.
- 81 In the first place, it should be noted that, according to the Commission, the exclusion of the applicant because of a conflict of interests has the purpose of ensuring observance of the principle of equal treatment of tenderers. It argues that the applicant had access, before the others, to certain documents used as the basis for some of the activities connected with the call for tenders at issue, on the ground that the applicant was part of the consortium which drafted the documents in question for another call for tenders. It is apparent from the letter of 10 August 2012 that that access would have made available to the applicant 'privileged information' within the meaning of paragraph 2.3.6 of the Practical Guide. The Commission therefore takes the view, in accordance with what appears in the letter in question, that that access, before the other tenderers, would have given the applicant a competitive advantage in relation to those tenderers.
- 82 However, it cannot be accepted that the risk of a conflict of interests can be based on the mere fact that the applicant had access, before the other tenderers, to the documents specific to another call for tenders because it belonged to the consortium which prepared those documents which, subsequently, were retained to be used as a reference for the activities associated with the call for tenders at issue in the present case.
- 83 The Commission's argument that the applicant, as part of the consortium which prepared the documents in question, would have been able to influence the drafting so as to give it a competitive advantage in the call for tenders at issue in the present case cannot succeed. In that respect, it is clear from the case-law referred to at paragraphs 74 and 75 above, that the conflict of interests must be of an objective nature, requiring the intentions of the interested party to be disregarded and that the mere possibility of a conflict of interests cannot suffice, for that risk must actually be found to exist in the case in point. Consequently, the risk of a conflict of interests cannot be based on the simple presumption that at the time of the drafting of the documents in question, in the context of another call for tenders, the applicant was aware of the contracting authority's intention to publish a new invitation to tender and of its intention to select the documents drafted by the consortium of which it was part as the basis for some of the activities concerned in the public contract referred to in the new call for tenders.
- 84 Within the meaning of the case-law cited at paragraph 66 above and that of paragraph 2.3.6 of the Practical Guide, the risk of a conflict of interests exists for the person responsible for the preparatory work for a public contract who participates in that same contract. In this respect it should be noted that, when the Court of Justice used the expression 'preparatory work' at paragraph 29 of the judgment in *Fabricom*, cited in paragraph 63 above (EU:C:2005:127), it was referring to work carried out in the context of one and the same call for tenders.
- 85 Therefore, the Commission was not entitled to treat the preparation of documents drafted in the course of another call for tenders in the same way as preparatory works under the tendering procedure at issue, within the meaning of the case-law mentioned at paragraph 63 above, unless to show objectively and specifically, first, that those documents had been prepared in the light of the tendering procedure at issue and, secondly, that they had given the applicant a real advantage. If this is not demonstrated, the documents prepared in the course of another tendering procedure, and chosen subsequently by the contracting authority as a reference for part of the activities in a different

tendering procedure, are not considered 'preparatory works' within the meaning of the case-law previously cited, nor within the meaning of paragraph 2.3.6 of the Practical Guide, which identifies, inter alia, as preparatory work that relating to the 'preparation of the project' such as the drafting of the tendering specifications.

- 86 In the present case it must be stated that the applicant's exclusion from the award of the contract was based on the mere fact that it was part of a consortium which drafted the documents under a previous tendering procedure, whereas it has not been argued that the other tenderers did not have access to those same documents in sufficient time. Furthermore, the preparation of those documents did not involve the applicant's participation in the preparation of the tendering specifications in the call for tenders at issue. Therefore, it has not been established that the applicant was in possession of more information than the other tenderers, which would have amounted to a breach of the principles of equal treatment and of transparency.
- 87 It follows that the documents at issue do not constitute 'privileged information' within the meaning of paragraph 2.3.6 of the Practical Guide. The exclusion of the applicant, contrary to what is claimed by the Commission, is not therefore covered by that paragraph in the Practical Guide, and is thus not justified by an infringement of the principles of equal treatment and transparency.
- 88 Moreover, to classify the documents prepared in the context of another tendering procedure as 'preparatory work', on the basis that they have been retained by the contracting authority as a reference for the activities connected to a subsequent tendering procedure, would lead, as the applicant rightly maintains, to it being automatically considered that the experience acquired through participation in an earlier call for tenders is liable to distort competition.
- 89 In the second place, it does not appear that the decision contained in the letter of 10 August 2012 was taken following a specific assessment of the applicant's tender. That letter states only, without further details, that the risk of conflict of interests attributed to the applicant, as referred to in paragraph 2.3.6 of the Practical Guide, could not properly be established other than after an examination of the candidatures of the tenderers case by case.
- 90 In fact the reference to a 'case by case' examination as it appears in the letter of 10 August 2012 repeats the wording of paragraph 2.3.6 of the Practical Guide, which is based on the case-law referred to in paragraph 74 above. However, it must be stated that such a reference is not supported by any evidence showing that an actual examination took place.
- 91 In that regard it should be observed that for the first time in the defence, and without it being noted in the letter of 10 August 2012, the Commission put forward the premise that the applicant, owing to its alleged 'privileged access' to certain documents chosen as a basis for a significant part of the activities covered by the ongoing contract, benefited from a competitive advantage in the choice of experts qualified to carry out those activities.
- 92 However, first, the Commission provides no evidence making it possible to ascertain whether it followed from the formulation of the applicant's bid that the applicant had more information than the other tenderers, given that, as is set out at paragraph 86 above, it is not disputed that the documents in question were drafted in the context of another tendering procedure, did not involve the drafting of the tendering specifications for the call for tenders at issue, and were made available to all the tenderers in the present tendering procedure.
- 93 Secondly, in relation to the Commission's argument concerning the choice of qualified experts, it should be noted that there is no evidence in the file that could establish a connection between the documents concerned and the choice made by the applicant, nor *a fortiori* that that choice would have had an effect on the chances of success of the applicant's bid.

- 94 It follows from all the foregoing observations that the contracting authority had no valid grounds for considering that a risk of conflict of interests, in relation to the applicant, could be established following an actual assessment of its bid. On the other hand, it must be held that the risk of a conflict of interests has not been objectively established and the rejection of the bid of the consortium of which the applicant was part was not justified and contrary to the provisions of Article 94 of the Financial Regulation.
- 95 Consequently, without it being necessary to examine the first plea in law nor the first complaint in the second plea in law raised by the applicant, the second plea in law must be upheld and the decision contained in the letter of 10 August 2012 annulled, in that it established that the contract could not be awarded to the consortium of which the applicant was part. On the other hand, as follows from paragraph 59 above, the application for the annulment of the alleged implicit decision to reject the applicant's complaint is dismissed as inadmissible.

Costs

- 96 Under Article 134(1) 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. Since the applicant applied for costs and the Commission has essentially been unsuccessful, the Commission must be ordered to pay its own costs and those incurred by the applicant in the present action and the application for interim measures brought by the applicant.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

- 1. Annuls the decision rejecting the tender of the consortium of which Intrasoft International SA was part, contained in the letter of 10 August 2012 drafted by the Delegation of the European Union to the Republic of Serbia as the European Commission's subdelegated contracting authority and relating to the tendering procedure EuropeAid/131367/C/SER/RS, entitled 'Technical assistance to the Customs Administration of Serbia to support the modernisation of the customs system';**
- 2. Dismisses the remainder of the action;**
- 3. Orders the Commission to pay the costs including those relating to the proceedings for interim relief.**

Martins Ribeiro

Gervasoni

Madise

Delivered in open court in Luxembourg on 13 October 2015.

[Signatures]