

ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)

14 May 2008^{*}

In Joined Cases T-383/06 and T-71/07,

Icuna.Com SCRL, established in Braine-le-Château (Belgium), represented by
J. Windey and P. De Bandt, lawyers,

applicant,

v

European Parliament, represented by O. Caisou-Rousseau and M. Ecker, acting as
Agents,

defendant,

ACTION in Case T-383/06, first, for annulment of the decision of the European Parliament of 1 December 2006 rejecting the tender submitted by the applicant in the framework of lot 2 (programme contents) of the tendering procedure EP/DGINFO/WEBTV/2006/0003 relating to the creation and establishment of the European Parliament web television channel and, secondly, for damages to compensate for the loss allegedly suffered by the applicant following the adoption of the decision of 1 December 2006; and, in Case T-71/07, first, for annulment of the decision

^{*} Language of the case: French.

of the European Parliament of 31 January 2007 annulling the tendering procedure EP/DGINFO/WEBTV/2006/0003 relating to the creation and establishment of the European Parliament web television channel, in so far as concerns lot 2 (programme contents) and, secondly, for damages to compensate for the loss allegedly suffered by the applicant following the adoption of the decision of 31 January 2007,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and S. Soldevila Frago, Judges,

Registrar: E. Coulon,

makes the following

Order

Legal framework

- ¹ Under Article 100 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 (OJ 2002 L 248, p. 1) ('the Financial Regulation');

‘1. The authorising officer shall decide to whom the contract is to be awarded, in compliance with the selection and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules.

2. The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.

...’

² Article 101 of the Financial Regulation provides:

‘The contracting authority may, before the contract is signed, either abandon the procurement or cancel the award procedure without the candidates or tenderers being entitled to claim any compensation.

The decision must be substantiated and be brought to the attention of the candidates or tenderers.’

³ According to Article 149(1) and (3) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1) (‘the implementing regulation’), as amended by Commission Regulation (EC, Euratom) No 1261/2005 of 20 July 2005 (OJ 2005 L 201, p. 3):

‘1. The contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the award of the contract ..., including the grounds for any decision not to award a contract ... for which there has been competitive tendering or to recommence the procedure.

...

3. In the case of contracts awarded by the Community institutions on their own account, under Article 105 of the Financial Regulation, the contracting authority shall inform all unsuccessful tenderers or candidates ... that their application or tender has not been accepted; specifying in each case the reasons why the tender or application has not been accepted.

The contracting authority shall, at the same time as the unsuccessful candidates or tenderers are informed that their tenders or applications have not been accepted, inform the successful tenderer of the award decision, specifying that the decision notified does not constitute a commitment on the part of the contracting authority.

...’

Background to the dispute

⁴ On 6 May 2006, the European Parliament published a contract notice in the Supplement to the *Official Journal of the European Union* (OJ 2006 S 87) concerning a European Parliament web television channel. That call for tenders, bearing the reference

number EP/DGINFO/WEBTV/2006/0003, comprised two lots relating, respectively, to architecture and design (lot 1) and to programme contents (lot 2).

- 5 By letter dated 14 July 2006, the applicant, Icuna.Com SCRL, responded to the invitation to tender for lot 2, 'programme contents', in conjunction with Parallèles productions, with which it planned to form a consortium.
- 6 By letter dated 7 August 2006, the Parliament informed the applicant that it had been awarded the contract ('the decision of 7 August 2006'). Towards the end of August 2006, there was contact between the person responsible for the file at the Parliament and the applicant with a view to scheduling a date for the meeting to sign the contract. That date, which was initially set at 1 September 2006, was, however, postponed a number of times.
- 7 On 14 and 18 August 2006, two unsuccessful tenderers sent letters of complaint to the Parliament. By e-mail of 8 September 2006, the person responsible for the file at the Parliament informed the applicant of those complaints and of the fact that the file was therefore to be subject to further review.
- 8 On 14 September 2006, the Director of Media at the Parliament and authorising officer in respect of the tendering procedure in question informed the applicant that, following further review of the file, he had found evidence of a manifest error of assessment made by the evaluation committee and that, consequently, he had decided to annul the decision of 7 August 2006 'in the spirit of Article 149(3)' of the implementing regulation. The authorising officer also decided to ask a new evaluation committee to re-examine all the tenders received. The applicant replied to that letter by letter of 19 September 2006.
- 9 By e-mail of 28 September 2006, the Parliament asked the applicant to provide, first, an extract from its judicial record and, secondly, a reference list of projects it had recently carried out, together with the relevant certificates, and a description of the

technical equipment to be used to ensure the performance of the services which formed the subject-matter of the contract. The applicant replied to that request by letter of 2 October 2006, by which it sent the requested documents.

- 10 On 26 October 2006, the new evaluation committee concluded that the tender by Mostra was the most advantageous from an economic perspective and suggested that the contract should be awarded to that company.
- 11 On 21 November 2006, the applicant sent a letter to the authorising officer in which, in essence, if necessary, having regard to the new decision which had to be taken by the evaluation committee, it proposed to clarify its tender, if need be, at a meeting with him.
- 12 By decision of 1 December 2006, the Parliament rejected the tender submitted by the applicant ('the decision of 1 December 2006'). Furthermore, it is apparent from the file that the disputed contract was awarded to Mostra.

Proceedings before the Court of First Instance

- 13 By application lodged at the Registry of the Court of First Instance on 19 December 2006 (Case T-383/06), the applicant brought its first action for annulment of the decision of 1 December 2006 and for damages for the loss suffered on account of the adoption of that decision.

- 14 By separate document lodged at the Registry on the same day (Case T-383/06 R), the applicant made an application for interim measures, seeking suspension of the operation of the decision of 1 December 2006 and of the contract which may have been concluded by the Parliament with Mostra, and also the production of certain documents.
- 15 On the morning of 21 December 2006, the Parliament and Mostra signed the contract concerning lot 2.
- 16 On the afternoon of 21 December 2006, the President of the Court of First Instance made an order suspending the operation of the decision of 1 December 2006 on the basis of Article 105(2) of the Rules of Procedure of the Court of First Instance. He also ordered the Parliament, in so far as it had already concluded the contract with Mostra, to suspend the operation thereof until a final order had been made (order of the President of the Court of First Instance of 21 December 2006 in Case T-383/06 R *Icuna.Com v Parliament* (not published in the ECR)) ('the order of 21 December 2006').
- 17 The hearing in the application for interim measures in Case T-383/06 R was held on 22 January 2007. The minutes of that hearing show that the President of the Court of First Instance asked the Parliament to 'consider the possibility of annulling the tendering procedure forming the subject-matter of the ... application for interim measures in accordance with Article 101 of the [Financial] Regulation and initiating a new award procedure'.
- 18 In reply to a letter of 26 January 2007 sent to the Registry by the applicant, the Parliament, by letter of 31 January 2007, sent a copy of a supplementary agreement, signed on 30 January 2007 with Mostra, under which the contract signed on 21 December 2006 concerning lot 2 of the disputed tendering procedure had been annulled with effect from the date and time at which Mostra had become aware of the order suspending the operation of the decision of 1 December 2006, namely 17.14 on 21 December 2006. In that letter, the Parliament also stated its intention of 'subsequently withdrawing the decision awarding the contract'.

- 19 By decision of 31 January 2007, the authorising officer decided to annul the procedure by virtue of which the contract for lot 2 had been awarded to Mostra ('the decision of 31 January 2007'). He also recommended initiating a new tendering procedure as rapidly as possible.
- 20 By letter of 7 February 2007, the applicant stated that, in the light of the Parliament's lack of competence to annul the tendering procedure, it intended to maintain its application for interim measures in Case T-383/06 R relating to the decision of 1 December 2006.
- 21 By order of 26 February 2007 (Case T-383/06 R *Icuna.Com v Parliament* (not published in the ECR)), the President of the Court of First Instance found that there was no longer any need to adjudicate on the application for interim measures in Case T-383/06 R, since the contract signed between the Parliament and Mostra had been annulled by common accord of the contracting parties and the Parliament had clearly stated that it no longer intended to implement the decision of 1 December 2006.
- 22 By application lodged at the Registry on 9 March 2007 (Case T-71/07), the applicant brought an action for annulment of the decision of 31 January 2007 and for damages for the loss suffered on account of the adoption of that decision.
- 23 By separate document lodged at the Registry on the same day, the applicant also requested that the Court of First Instance adjudicate on that action under the expedited procedure, in accordance with Article 76a of the Rules of Procedure.
- 24 By separate document lodged at the Registry on the same day (Case T-71/07 R), the applicant made an application for interim measures, requesting, first, that the President of the Court of First Instance make a ruling, pursuant to Article 105(2) of the Rules of Procedure, before the Parliament submitted its observations, and, secondly, that the operation of the decision of 31 January 2007 be suspended.

- 25 On 16 March 2007, a new call for tenders for the disputed contract was published in the Supplement to the *Official Journal of the European Union* (OJ 2007 S 53).
- 26 On 22 March 2007, the Parliament lodged, by separate document, an objection of inadmissibility in Case T-71/07, pursuant to Article 114(1) of the Rules of Procedure.
- 27 On 2 April 2007, the Second Chamber of the Court of First Instance decided to dismiss the applicant's application to have the case adjudicated on under the expedited procedure in Case T-71/07.
- 28 By order of 4 May 2007 (Case T-71/07 R *Icuna.Com v Parliament* (not published in the ECR)), the President of the Court of First Instance rejected the application for interim measures in Case T-71/07 R and reserved the costs.
- 29 On 20 December 2007 and 7 January 2008 respectively, at the request of the Court of First Instance, the Parliament and the applicant submitted their observations on a possible joinder of Cases T-383/06 and T-71/07.
- 30 The President of the Second Chamber referred the decision on the joinder to that chamber, in accordance with Article 50(1) of the Rules of Procedure. As the actions in Cases T-383/06 and T-71/07 are related, the Court has decided that they should be joined for the purposes of the present order.

Forms of order sought

31 In Case T-383/06, the applicant claims that the Court should:

- annul the decision of 1 December 2006;
- declare that the Community is non-contractually liable, order the Parliament to pay to the applicant, first, the sum of EUR 58 700 as compensation for the costs incurred in connection with the call for tenders and, secondly, an amount for non-pecuniary damages for harm to its reputation, and appoint an expert to assess that non-pecuniary damage;
- order the Parliament to pay the costs.

32 In Case T-383/06, the Parliament contends that the Court should:

- dismiss the application for annulment;
- dismiss the claim for compensation and the request for an expert to be appointed;
- order the applicant to pay the costs.

33

In Case T-71/07, the applicant claims that the Court should:

- dismiss the objection of inadmissibility as manifestly unfounded;
- in the alternative, consider the objection of inadmissibility together with the substance of the case;
- in any event, order the Parliament to pay the additional costs incurred due to the objection of inadmissibility;
- annul the decision of 31 January 2007;
- declare that the Community is non-contractually liable, order the Parliament to pay compensation to the applicant for all the damage suffered as a result of the decision of 31 January 2007 and appoint an expert to assess that damage;
- order the Parliament to pay the costs.

34

In the objection of inadmissibility raised in Case T-71/07, the Parliament contends that the Court should:

- dismiss the action as inadmissible;

— order the applicant to pay the costs.

Law

35 Under Article 111 of the Rules of Procedure, where an action is manifestly lacking any foundation in law, the Court of First Instance may, by reasoned order and without taking further steps in the proceedings, give a decision on the action.

36 Furthermore, under Article 113 of the Rules of Procedure, the Court of First Instance may at any time, of its own motion, after hearing the parties, declare that the action has become devoid of purpose and that there is no longer any need to adjudicate on it.

1. *The action in Case T-71/07*

37 In Case T-71/07, it is appropriate to consider the objection of inadmissibility raised by the Parliament together with the substance of the case, in accordance with the first subparagraph of Article 114(4) of the Rules of Procedure.

Admissibility

Arguments of the parties

- 38 In its objection of inadmissibility, the Parliament submits, first, that the decision of 31 January 2007 is not of direct or individual concern to the applicant and, secondly, that the applicant has no interest in the annulment of that decision, which does not adversely affect it.
- 39 The Parliament adds that the tendering procedure forms an inseparable whole and the award of the contract to Mostra is the culmination thereof. It submits that no decision other than that of rejecting the applicant's tender and awarding the contract to Mostra was possible. According to the Parliament, in any event, it was not conceivable to award the contract to an undertaking which did not meet the selection criteria. The Parliament could not restrict itself merely to withdrawing the decision of 1 December 2006, which rejected the applicant's tender, whilst maintaining the part of the evaluation procedure which was favourable to the applicant.
- 40 The applicant disputes the Parliament's arguments. First, it submits that the decision of 31 January 2007 affects it directly because that decision has the effect of annulling the decision of 7 August 2006, which named it as the tenderer to which the contract had been awarded, forces it to incur expenses to participate in the new tendering procedure and ensure that its legal interests are protected and prevents it from obtaining, in the context of the action in Case T-383/06, damages to compensate for the loss suffered on account of the adoption of the decision of 1 December 2006.
- 41 Secondly, the applicant submits that it is individually concerned by the decision of 31 January 2007 because it is at the root of that decision, which was adopted following the proceedings for interim measures in Case T-383/06 R brought by it. Furthermore, the applicant's position is different from that of the other tenderers in that it

is the only one to which the contract in question was initially awarded. Lastly, the decision of 31 January 2007 negatively affects the outcome of its claim for damages in Case T-383/06.

Findings of the Court

⁴² Under the fourth paragraph of Article 230 EC, any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former.

⁴³ In the present case, the decision of 31 January 2007 is not addressed to the applicant.

⁴⁴ It has consistently been held that, in order to be of direct concern to an individual within the meaning of the fourth paragraph of Article 230 EC, the contested Community measure must directly affect the applicant's legal situation and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules (see Case C-386/96 P *Dreyfus v Commission* [1998] ECR I-2309, paragraph 43, and case-law cited).

⁴⁵ Furthermore, it is settled case-law that persons other than the addressees of a decision can claim to be individually concerned only if the decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed (Case 25/62 *Plaumann v Commission* [1963] ECR 95, 107; Case 11/82 *Piraiki-Patraiki and*

Others v Commission [1985] ECR 207, paragraph 11; and Case T-435/93 *ASPEC and Others v Commission* [1995] ECR II-1281, paragraph 62).

⁴⁶ Lastly, an action for annulment brought by a natural or legal person is not admissible unless the applicant has an interest in seeing the contested measure annulled. That interest must be vested and present and is evaluated as at the date on which the action is brought (see Case T-141/03 *Sniace v Commission* [2005] ECR II-1197, paragraph 25, and case-law cited, and Case T-136/05 *Salvat père & fils and Others v Commission* [2007] ECR II-4063, paragraph 34).

⁴⁷ In the present case, the decision of 31 January 2007 directly affects the applicant's legal situation. As regards the annulment of the tendering procedure in its entirety, the decision of 31 January 2007 resulted in the annulment of the decision of 1 December 2006 rejecting the applicant's tender, but also that of the decision of 14 September 2006, which annulled the decision awarding the applicant the contract, and that of the decision of 7 August 2006, which awarded the applicant the contract. The decision of 31 January 2007 is therefore of direct concern to the applicant. For the same reason, the decision of 31 January 2007 adversely affects the applicant, who thus has an interest in seeing it annulled.

⁴⁸ The decision of 31 January 2007 is also of individual concern to the applicant in that it was the only tenderer to be awarded the contract in the context of the annulled tendering procedure. That factor is such as to distinguish the applicant individually in relation to all the other unsuccessful tenderers.

⁴⁹ Accordingly, the objection of inadmissibility raised by the Parliament with regard to the action brought by the applicant in Case T-71/07 must be rejected.

The application for annulment

Arguments of the applicant

50 In support of its action for annulment in Case T-71/07, the applicant relies on two pleas in law. The first plea alleges the lack of competence of the author of the act and infringement of Article 101 of the Financial Regulation. The second plea alleges a failure to state reasons. The Parliament did not submit a defence in Case T-71/07 and did not, therefore, take a view on the pleas relied on in support of the application for annulment.

— The first plea, alleging the lack of competence of the author of the act and infringement of Article 101 of the Financial Regulation

51 The applicant submits that there is no provision of Community law that authorises the contracting authority to annul the award of a contract after the signature of the contract with the successful tenderer. In particular, neither the order of 21 December 2006 nor the request made by the President of the Court of First Instance at the interim measures hearing on 22 January 2007 can constitute a legal basis for the decision of 31 January 2007.

52 Even if the decision of 31 January 2007 were based on Article 101 of the Financial Regulation, the conditions for the application of that provision have not been satisfied in the present case. Article 101 of the Financial Regulation restricts the competence of the contracting authority to annul a tendering procedure, with the result that the contracting authority has the competence to adopt such a decision only before the contract with the person to whom the contract is to be awarded is signed. The Parliament signed the contract with Mostra on 21 December 2006, that is to say, more than a month before the adoption of the decision of 31 January 2007.

53 Furthermore, as far as the applicant is concerned, annulment of the tendering procedure could no longer be considered because the contract had already been lawfully awarded to it by the decision of 7 August 2006.

54 In addition, the termination of the contract with Mostra does not imply that the contract was not signed. Furthermore, the proposed termination does not cover all the effects of the contract, which was annulled with effect from the date and time at which Mostra became aware of the suspension of the operation of the contract. Therefore, according to the applicant, any effect which occurred before Mostra became aware thereof must be maintained.

55 The applicant further maintains that the decision of 31 January 2007 infringes Article 101 of the Financial Regulation, since the annulment of the tendering procedure applies only to lot 2. That provision does not authorise the partial annulment of the tendering procedure. According to the applicant, it is clear that, in so far as lots 1 and 2 are part of the same tendering procedure, any annulment should have applied to the whole of the procedure, that is to say, to the procedure relating to the award of lot 1 as well.

— The second plea, alleging infringement of the obligation to state reasons

56 The applicant maintains that the decision of 31 January 2007 infringes the obligation to state reasons which prevails as a general principle and is laid down in Article 101 of the Financial Regulation and Article 149(1) of the implementing regulation.

57 The decision of 31 January 2007 does not make it possible to understand the reasons which led the Parliament to adopt the measure in question. The reference to the ‘request’ of the President of the Court of First Instance cannot suffice as a statement of reasons for the decision of 31 January 2007. Furthermore, it conflicts with the rest of the decision of 31 January 2007, since the Parliament took the view

that the decision of 31 January 2007 ‘in no way represent[ed] an acknowledgement that the decision of [14] September 2006 annulling the initial decision of award and appointing a new evaluation committee had not been the correct way to act’.

Findings of the Court

— The first plea, alleging the lack of competence of the author of the act and infringement of Article 101 of the Financial Regulation

58 The Court finds that the Parliament was competent to adopt the decision of 31 January 2007. The contrary opinion of the applicant is based on a misinterpretation of the first paragraph of Article 101 of the Financial Regulation, which is intended to settle the conflict between the private interests of the tenderers and the successful tenderer, on the one hand, and, on the other hand, the general interest which the contracting authority is supposed to pursue, where the contracting authority abandons the procurement or annuls the tendering procedure. It is necessary to distinguish two stages in connection with the application of that provision.

59 First, the contracting authority is not bound before the signature of the contract with the tenderer chosen and may thus, in the context of its task relating to the general interest, freely abandon the procurement or annul the award procedure. In that case, Article 101 of the Financial Regulation precludes any entitlement to compensation on the part of the candidates or tenderers on account of such an abandonment or cancellation.

60 Secondly, after the signature of the contract, the contracting authority is bound contractually towards the selected tenderer. It can therefore, as a rule, no longer unilaterally abandon the procurement or annul the tendering procedure. The situation can be different only as a result of exceptional circumstances such as those

in the present case where the contracting parties decided, by common accord, to abandon the contract.

61 The contrary interpretation of the first paragraph of Article 101 of the Financial Regulation suggested by the applicant, according to which the contracting authority no longer has the competence to annul the award procedure once the contract with the successful tenderer has been signed, even if the successful tenderer has abandoned his contractual position, would, in cases like the present case, where the contracting authority found, after signature of the contract, that there may have been irregularities in the award procedure, risk placing the parties to that procedure in an impasse. First, the performance of the contract would, in such a situation, expose them to the risk of being ordered to suspend the operation of that contract, which was, incidentally, ordered provisionally in the present case, or to the annulment of the award decision, following an action brought by an unsuccessful tenderer before the Court of First Instance. Secondly, the contracting authority could not annul the procedure or abandon the procurement even if the successful tenderer were prepared to abandon the contract as it was here. Article 101 of the Financial Regulation cannot be interpreted as running counter to the common intention of the parties to the contract to terminate that contract without having begun to implement it. In such circumstances, the contracting authority therefore has the right to annul the tendering procedure.

62 Consequently, the legal rationale behind Article 101 of the Financial Regulation and the principle of legal certainty mean that, in the circumstances of the present case, the Parliament must be held to have had the competence to annul the tendering procedure.

63 In addition, the Parliament did not infringe Article 101 of the Financial Regulation by drawing a distinction between two lots. Although those two lots are to a certain degree interdependent in the sense that they form part of the same tendering procedure, they are nevertheless independent. First, the two lots concern different subject-matters, namely, architecture and design (lot 1) and programme contents (lot 2) respectively. Secondly, the procedure relating to lot 1 was run completely independently from the procedure relating to lot 2, as each of those lots could be awarded to different and unconnected tenderers.

— The second plea, alleging infringement of the obligation to state reasons

⁶⁴ It must be borne in mind that the second paragraph of Article 101 of the Financial Regulation provides that the decision to annul the award procedure must be substantiated and be brought to the attention of the candidates or tenderers.

⁶⁵ Article 149(1) of the implementing regulation provides that the contracting authorities must as soon as possible inform candidates and tenderers of decisions reached concerning the award of the contract, stating the grounds for any decision not to award a contract.

⁶⁶ Under those provisions and, more generally, the general obligation to state reasons pursuant to Article 253 EC, the Parliament was under an obligation, at the same time as informing the applicant of the decision to annul the tendering procedure, to inform it also of the reasons for that decision (see, to that effect, Case T-271/04 *Citymo v Commission* [2007] ECR II-1375, paragraph 100).

⁶⁷ According to settled case-law, the scope of the obligation to state reasons must be appropriate to the act at issue and the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution in such a way as to enable the persons concerned to ascertain the reasons for the measure so that they can defend their rights and ascertain whether or not the measure is well founded and to enable the competent Community Court to exercise its power of review (Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case T-109/01 *Fleuren Compost v Commission* [2004] ECR II-127, paragraph 119; and order of the President of the Court of First Instance in Case T-195/05 R *Deloitte Business Advisory v Commission* [2005] ECR II-3485, paragraph 108).

⁶⁸ Lastly and more specifically as regards the reference to the legal basis of a lawful measure, it is apparent from the case-law that failure to refer to a precise provision

need not necessarily constitute an infringement of essential procedural requirements when the legal basis for the measure may be determined from other parts of the measure, as such explicit reference is indispensable only where, in its absence, the parties concerned and the Community judicature are left uncertain as to the precise legal basis (Case 45/86 *Commission v Council* [1987] ECR 1493, paragraph 9).

69 In the present case, it must be pointed out, first of all, that the applicant received, in the context of the interim proceedings in Case T-71/07 R, a copy of the Parliament's observations of 31 January 2007 on the minutes of the interim hearing of 22 January 2007, including, in particular, a copy of a draft decision of annulment of the procedure and a copy of the decision of 31 January 2007 annulling the tendering procedure.

70 As the applicant admits, moreover, in its application in Case T-71/07, the Parliament stated, in its observations of 31 January 2007, that it intended to base the decision of 31 January 2007 on Article 101 of the Financial Regulation. Furthermore, the recitals in the preamble to that decision stated, inter alia, that the order of 21 December 2006 prohibited the Parliament from implementing the contract until a final decision had been given, that at the interim hearing the Parliament had been asked by the President of the Court of First Instance to consider the possibility of annulling the award procedure and initiating a new procedure and that the Parliament and Mostra agreed that the order of 21 December 2006 made it impossible to implement the contract within a reasonable period and that, therefore, they had agreed to abandon that contract.

71 It is therefore apparent from the circumstances which surrounded the adoption of the decision of 31 January 2007 and from the reasons for that decision that the Parliament considered that it had no choice but to annul the tendering procedure, on the basis of Article 101 of the Financial Regulation, in order to avoid a significant delay in the implementation of its web television project. It must therefore be held that the statement of reasons given by the Parliament in its decision of 31 January 2007 clearly shows the reasoning followed.

72 Such a statement of reasons enables the applicant to assert its rights and enables the Court to exercise its power of review.

73 In the light of the foregoing, the two pleas in law put forward by the applicant must be rejected and the application for annulment in Case T-71/07 must be dismissed as manifestly lacking any foundation in law.

The claim for damages

Arguments of the applicant

74 The applicant submits that the Community is non-contractually liable under the second paragraph of Article 288 EC. It takes the view that, in respect of all the grounds on which it relies in support of the application for annulment, it is clear that the Parliament committed various unlawful acts in the course of the procedure which culminated in the adoption of the decision of 31 January 2007. Those unlawful acts, taken individually or as a whole, are such as to constitute a serious breach of Community law.

75 First, the applicant maintains that it suffered loss as a result of being deprived of the benefits of the decision of 7 August 2006 on account of the initiation of an unlawful procedure by the Parliament, which culminated in the award of the contract to another tenderer, and of the adoption of the decision of 31 January 2007. That damage is difficult to quantify, but it consists of expenses, imminent and foreseeable, incurred in participating in a new invitation to tender. Secondly, the applicant claims that it suffered non-pecuniary damage. The negative assessment which was put forward as a basis for the rejection of its tender by the decision of 1 December 2006 is reiterated in the decision of 31 January 2007 and that adversely affects its reputation. That non-pecuniary damage amounts to around 10% of the total value of the contract, a sum which an expert appointed by the Court could estimate precisely.

76 The Parliament did not submit a defence in Case T-71/07 and has not, therefore, taken a view on the pleas in law submitted in support of the claim for damages.

Findings of the Court

77 According to settled case-law, for the Community to incur non-contractual liability within the meaning of the second paragraph of Article 288 EC, a series of conditions must be met, namely, the conduct of which the institutions are accused must have been unlawful, the damage must be real and a causal connection must exist between that conduct and the damage in question (Case 153/73 *Holtz & Willemsen v Council and Commission* [1974] ECR 675, paragraph 7, and Case T-19/01 *Chiquita Brands and Others v Commission* [2005] ECR II-315, paragraph 76).

78 Since those three conditions for the incurring of liability are cumulative, failure to meet one of them is sufficient for an action for damages to be dismissed (Case C-257/98 P *Lucaccioni v Commission* [1999] ECR I-5251, paragraph 14, and Case T-43/98 *Emesa Sugar v Council* [2001] ECR II-3519, paragraph 59).

79 With regard to the first of those conditions, the unlawful conduct alleged against a Community institution must consist of a sufficiently serious breach of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraph 42).

80 In the present case, the applicant relies, in essence, on the pleas submitted in support of its application for annulment to claim that there were unlawful acts of such a kind as to constitute a sufficiently serious breach of Community law.

81 It was held above that the application for annulment made by the applicant is manifestly lacking any foundation in law in the absence of unlawful conduct on the part of the Parliament. Since the claim for damages in this case is based on the same arguments as those relied on in support of the application for annulment, it must be held that it is also lacking any foundation in law, since there is no sufficiently serious breach of a rule of law intended to confer rights on individuals.

82 Consequently, the claim for compensation in Case T-71/07 must be dismissed as manifestly lacking any foundation in law.

2. The action in Case T-383/06

The application for annulment

83 Following a request on the part of the Court of First Instance, the parties submitted their views, during the second round of written submissions in Case T-383/06, on the consequences to be drawn, for that case, from the decision of 31 January 2007 annulling the procedure for awarding the disputed contract.

Arguments of the parties

84 The applicant maintains that the decision of 31 January 2007 was adopted by an institution which was not competent to do so and that, therefore, it cannot render the decision of 1 December 2006 ineffectual. According to the applicant, the tendering

procedure and the decisions relating thereto continue to produce all their effects. Therefore, the action for annulment in Case T-383/06 is not devoid of purpose.

85 In support of that submission, the applicant puts forward arguments which are, in essence, identical to those on which it elaborated in the first plea in support of its claim for annulment in Case T-71/07 (see paragraphs 51 to 55 above).

86 The Parliament disputes the applicant's arguments and submits, first, that the annulment of the entire tendering procedure by the decision of 31 January 2007 automatically entailed the withdrawal of the decision of 1 December 2006 and, secondly, that it was competent to take that decision.

Findings of the Court

87 It must be borne in mind that the applicant's claim for annulment concerns the decision of 1 December 2006, which was annulled by the decision of 31 January 2007. The lawfulness of the decision of 31 January 2007 annulling the tendering procedure is the subject-matter of the action for annulment in Case T-71/07, which was dismissed as manifestly unfounded in paragraph 73 above.

88 Consequently, the decision of 31 January 2007 continues to produce all its effects. Accordingly, the Court considers that the annulment of the decision of 1 December 2006 by the decision of 31 January 2007 has procured the result that the applicant sought to obtain by its application for annulment in Case T-383/06, namely, the elimination of the decision of 1 December 2006 (see, to that effect, the order in Case T-26/97 *Antillean Rice Mills v Commission* [1997] ECR II-1347, paragraph 15).

89 It follows that the application for annulment in Case T-383/06 has become devoid of purpose and, consequently, pursuant to Article 113 of the Rules of Procedure, there is no longer any need to adjudicate on it.

The claim for damages

Arguments of the parties

90 The applicant submits that the Community is non-contractually liable under the second paragraph of Article 288 EC. It takes the view that, for all the grounds which it put forward in support of the application for annulment, it is clear that the Parliament committed various unlawful acts in the course of the procedure which culminated in the adoption of the decision of 1 December 2006.

91 In its application for annulment in Case T-383/06, first, the applicant alleged that the procedure which culminated in the adoption of the decision of 1 December 2006 was manifestly irregular on account of the Parliament's lack of competence, the infringement of Article 101 of the Financial Regulation and the infringement of Article 149 of the implementing regulation. Secondly, the applicant submitted that the criteria set out in the invitation to tender had been disregarded and that there had been infringement of the principles of equal treatment and transparency and the obligation to state reasons.

92 According to the applicant, those unlawful acts, taken individually or in any event as a whole, are such as to constitute a serious breach of Community law.

93 The loss suffered by the applicant is difficult to quantify. It consists, first, of expenses incurred in participating in the tendering procedure in the amount of EUR 58 700 and, secondly, of imminent and foreseeable non-pecuniary damage relating to the harm which the applicant's reputation is likely to suffer. That non-pecuniary damage amounts to around 10% of the total value of the contract, a sum which an expert to be appointed by the Court could estimate precisely.

94 The Parliament submits that the applicant is not justified in claiming damages to cover the costs of its participation in the tendering procedure because, first, Article 4 of the general terms and conditions applicable to contracts of the Parliament expressly excludes that possibility and, secondly, the applicant has not adduced the slightest evidence to justify a derogation from the principle developed in the case-law to the effect that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot constitute damage which is capable of being remedied by an award of damages.

Findings of the Court

95 The Court observes, first, as regards the alleged damage consisting in the costs of participating in the cancelled award procedure, that the applicant has not established a causal link between the alleged conduct of the Parliament, namely, the alleged unlawful acts committed in the course of the procedure for awarding the disputed contract, on the one hand, and the damage consisting in the costs of the applicant's participation in that procedure, on the other hand. Even if the procedure which led to the decisions of 14 September 2006 and 1 December 2006 and those decisions themselves were unlawful, with the result that the applicant could still enjoy the effects of the decision of 7 August 2006 which initially awarded it the contract, that decision gave the applicant no right to the conclusion of the contract. On the contrary, the decision of 7 August 2006 stated expressly, in accordance with the second subparagraph of Article 149(3) of the implementing regulation, that it did not constitute any commitment on the part of the Parliament and that the Parliament, as contracting authority, could, up until the time of signature of the contract, cancel the award procedure without the applicant being entitled to any compensation. That situation arose in the present case, in the form of the decision of 31 January 2007. In those circumstances, there is clearly no causal link between the alleged conduct of the Parliament and the loss alleged by the applicant.

96 Secondly, nor has the non-pecuniary damage alleged by the applicant been established. The applicant states that the reason for the rejection of its tender, in the decision of 1 December 2006, was a very negative assessment which could be disseminated rapidly in the circles concerned and could thus seriously undermine its reputation.

97 However, the applicant does not specify which are the negative assessments undermining its reputation. In the decision of 1 December 2006 rejecting the applicant's tender, the Parliament explained that the applicant had not satisfied the selection criteria with regard to its technical and financial means. It is clear that such explanations necessarily give rise to negative assessments, either as regards the qualities of the tender or those of the tenderer. However, it cannot generally be deduced from such negative assessments that they undermine the reputation of the tenderer in question, provided that they are expressed in an uncontroversial manner and in accordance with the facts.

98 It was a matter for the Parliament, for the purposes of the award decision to be taken, and in particular for the purposes of the statement of reasons for that decision, to check that the tenders submitted complied with the selection criteria. In that regard, there can be no criticism of the decision of 1 December 2006 in which it was explained, in appropriate terms, that the applicant's managerial staff, experience, turnover and operating results in recent financial years were considered too poor for the Parliament to be able to entrust it with a project on a scale such as the contract in question. Such comments cannot per se, in connection with the rejection of a tender, be regarded as adversely affecting the applicant's reputation.

99 In the light of the foregoing, the applicant's claim for damages in Case T-383/06 must be dismissed as manifestly lacking any foundation in law.

Costs

100 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

101 Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the Court of First Instance. Furthermore,

under the first paragraph of Article 87(3) of the Rules of Procedure, the Court of First Instance may order that the costs be shared or that the parties bear their own costs where each party succeeds on some and fails on other heads of claim, or where the circumstances are exceptional.

102 The decision of 1 December 2006, which forms the subject-matter of the action in Case T-383/06, was annulled after the action had been brought by a decision adopted by the Parliament in accordance with the procedure laid down concerning invitations to tender. However, it is conceivable, in view of the file both in these cases and in the corresponding proceedings for interim relief, that the Parliament's conduct in connection with the procedure for the award of the contract gave rise to the commencement of the action in Case T-383/06 and the application for interim measures in Case T-383/06 R. Accordingly, the applicant must bear half of its own costs in Cases T-383/06 and T-383/06 R, while the Parliament must pay half of the applicant's costs in addition to its own costs.

103 In Case T-71/07, since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Parliament, including those relating to the proceedings for interim relief in Case T-71/07 R and to the objection of inadmissibility.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

1. Cases T-383/06 and T-71/07 are joined for the purposes of the order.

- 2. In Case T-71/07, the objection of inadmissibility shall be considered together with the substance of the case.**
- 3. The action in Case T-71/07 is dismissed as manifestly lacking any foundation in law.**
- 4. There is no longer any need to adjudicate on the application for annulment in Case T-383/06.**
- 5. The application for damages in Case T-383/06 is dismissed as manifestly lacking any foundation in law.**
- 6. In Case T-383/06, the European Parliament shall bear its own costs and pay half of the costs of Icuna.Com SCRL, including those relating to the proceedings for interim relief. Icuna.Com shall bear half of its own costs.**
- 7. In Case T-71/07, Icuna.Com shall bear its own costs and pay those incurred by the Parliament, including those relating to the proceedings for interim relief and to the objection of inadmissibility.**

Luxembourg, 14 May 2008.

E. Coulon

Registrar

I. Pelikánová

President