JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

21 May 2008*

In Case T-495/04,

Belfass SPRL, established in Forest (Belgium), represented by L. Vogel, lawyer,

applicant,

v

Council of the European Union, represented by B. Driessen and A. Vitro, acting as Agents,

defendant,

APPLICATION, first, for annulment of the decision of the Council of the European Union of 13 October 2004 to reject both the tenders submitted by the applicant under tender procedure UCA-033/04 and, secondly, for compensation in respect of the damage allegedly suffered by the applicant by reason of the Council's conduct,

* Language of the case: French.

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

composed of M. Vilaras, President, M.E. Martins Ribeiro and K. Jürimäe (Rapporteur), Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 21 June 2007,

gives the following

Judgment

Legal context

1 Procedures for the award of service contracts by the Council of the European Union are subject to Title V of Part One 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') and 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 Rules'). Those provisions are based on the

Community directives in the field, in particular on Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), on Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and on Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended.

2 Article 97 of the Financial Regulation states:

'1. The selection criteria for evaluating the capability of candidates or tenderers and the award criteria for evaluating the content of the tenders shall be defined in advance and set out in the call for tender.

2. Contracts may be awarded by the automatic award procedure or by the best-value-for-money procedure.'

3 Article 99 of the Financial Regulation provides:

'While the procurement procedure is under way, all contacts between the contracting authority and candidates or tenderers must satisfy conditions ensuring transparency and equal treatment. They may not lead to amendment of the conditions of the contract or the terms of the original tender.'

4 Article 100(2) of the Financial Regulation states:

'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.

However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.'

5 The first paragraph of 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.'

6 The second subparagraph of Article 122(2) of the Implementing Rules, in the version in force at the relevant time, provided that contracts to be awarded by call for tender:

'… are restricted where all economic operators may ask to take part but only candidates satisfying the selection criteria referred to in Article 135 and invited simultaneously and in writing by the contracting authorities may submit a tender.'

7 Article 128(1) and (3) of the Implementing Rules, which applies where the restricted procedure involving a call for expressions of interest is involved, states in particular:

‘1. A call for expressions of interest shall constitute a means of preselecting candidates who will be invited to submit tenders in response to future restricted invitations to tender …

…

3. Where a specific contract is to be awarded, the contracting authority shall invite either all candidates entered on the list or only some of them, on the basis of objective and non-discriminatory selection criteria specific to that contract, to submit a tender.’

8 Article 130(1) of the Implementing Rules, in the version in force at the relevant time, provided:

‘The documents relating to the invitation to tender shall include at least:

(a) the invitation to submit a tender or to negotiate;

(b) the attached specifications, to which shall be annexed the general terms and conditions applicable to contracts;

(c) the model contract.

…’

9 Article 130(3)(a)(b) and (c) of the Implementing Rules, in the version in force at the relevant time, stated:

'The specifications shall at least:

(a) specify the exclusion and selection criteria applying to the contract, save in the restricted procedure and in the negotiated procedures following publication of a notice referred to in Article 127; in such cases those criteria shall appear solely in the contract notice or the call for expressions of interest;

(b) specify the award criteria and their relative weighting, if this is not specified in the contract notice;

(c) set out the technical specifications referred to in Article 131;

…'

10 Article 138 of the Implementing Rules, in the version in force at the relevant time, provided:

'1. Contracts shall be awarded in one of the following two ways:

(a) under the automatic award procedure, in which case the contract is awarded to the tender which, while being in order and satisfying the conditions laid down, quotes the lowest price;

(b) under the best-value-for-money procedure.

2. The tender offering the best value for money shall be the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability, completion or delivery times, after-sales service and technical assistance.

3. The contracting authority shall specify, in the contract notice or in the specifications, the weighting it will apply to each of the criteria for determining best value for money.

The weighting applied to price in relation to the other criteria must not result in the neutralisation of price in the choice of contractor.

If, in exceptional cases, weighting is technically impossible, particularly on account of the subject of the contract, the contracting authority shall merely specify the decreasing order of importance in which the criteria are to be applied.'

11 Article 139(1) of the Implementing Rules, in the version in force at the relevant time, stated:

'If, for a given contract, tenders appear to be abnormally low, the contracting authority shall, before rejecting such tenders on that ground alone, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements, after due hearing of the parties, taking account of the explanations received.

The contracting authority may, in particular, take into consideration explanations relating to:

(a) the economics of the manufacturing process, of the provision of services or of the construction method;

(b) the technical solutions chosen or the exceptionally favourable conditions available to the tenderer;

(c) the originality of the tender.'

12 Article 148(1) and (3) of the Implementing Rules provides:

'1. Contact between the contracting authority and tenderers during the contract award procedure may take place, by way of exception, under the conditions set out in paragraphs 2 and 3.

…

3. If, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may contact the tenderer, although such contact may not lead to any alteration of the terms of the tender.'

Facts

13 On 4 March 2004, acting pursuant to the Financial Regulation and the Implementing Rules, the Council published a call for tenders in the *Supplement to the Official*

Journal of the European Union (OJ 2004 S 45) with reference UCA-033/04, under the restricted procedure. The call related to the provision of cleaning and maintenance services in two buildings occupied by the General Secretariat of the Council in Brussels. The procedure was divided into two lots, each of which related to services to be provided in a specific location, namely the 'Woluwé Heights' building (Lot No 1) and the 'Frère Orban' building (Lot No 2).

14 The specifications provided that the award criterion to be applied was that of the tender offering best value for money. The final evaluation of the tenders in respect of each lot was to be carried out by awarding to each tender a number of marks calculated as follows: 'Number of points in respect of "quality" x 100/price index'. The tender to be considered as being the best value for money was to be the tender which had, on conclusion of that final evaluation, obtained the highest number of marks but had, at the same time, been awarded the minimum number of marks under the heading 'Quality'.

15 The specifications also stated that the quality of each tender was to be assessed on the basis of a maximum of 100 marks and under reference to eight criteria. The eighth criterion, which carried a maximum of 50 marks, referred to 'Hours worked, calculated by applying the totals of A, B, C and D in the spreadsheet set out in Annex 3'.

16 The 50 marks available under the last-mentioned criterion were to be awarded on a basis which was proportional to the difference between, first, the total number of annual hours proposed in the tender subjected to evaluation (Ho) and, secondly, the average of the total number of hours proposed, for each accounting period, in each of the tenders found to be admissible (Hm). A tender which proposed the Hm average was to be assessed as satisfactory and to be awarded 40 marks (that is to say, 80% of the cap of 50 marks). The specifications provided that where the Hm threshold was exceeded by up to 12.5% the tender would benefit from the award of additional marks, subject always to the cap of 50 marks. Conversely, a failure to attain the Hm threshold by a factor of more than 12.5% would be penalised by the deduction of marks, subject to a minimum score of 30 marks, below which the tender fell to be eliminated.

17 In addition, the specifications provided that the average hourly rate in respect of each tender should not, if the tender was not to be eliminated, be lower than the average hourly rate fixed by the Union générale belge de nettoyage (Belgian General

Cleaners' Union) ('the UGBN') for a category 1A cost price, on the basis of the rate in force on the date on which the tender was submitted. As at 1 July 2004, that average hourly rate was fixed at EUR 19.6962.

18 On 23 June 2004, the specifications relating to the call for tenders at issue were issued to the tenderers.

19 On 23 July 2004, the applicant, Belfass SPRL, submitted a tender in respect of each of the lots to be awarded under the UCA-033/04 call for tenders. The total annual price under the applicant's tender for Lot No 1 was EUR 234 059.67.

20 By letter of 13 October 2004, the Council informed the applicant that both its tenders had been rejected on the following grounds: '… With respect to Lot [No] 1, calculation of the average hourly rate contained in your tender gives a result which is lower than the minimum rate fixed by the UGBN of EUR 19.6962 as at [1 July 2004]. As regards Lot [No] 2, your tender was not awarded the minimum number of marks as regards quality by the evaluation committee, in accordance with the criteria referred to in the specifications …'

21 On 15 October 2004, the applicant asked the Council to provide it with further and detailed information as to the circumstances in which its tender in respect of Lot No 2 had been rejected.

22 On 22 October 2004, the Council replied to that request, stating, inter alia, as follows:

'… your tender, which specified a number of hours which was 20% lower than the average number of hours in all tenders, was accordingly eliminated at that stage, in accordance with the formula set out on page 2.'

Procedure and forms of order sought

23 By application lodged at the Registry of the Court of First Instance on 23 December 2004, the applicant brought the present action.

24 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure.

25 On 13 December 2006, in reply to a request for the production of documents by the Court of 28 November 2006, issued by way of measures of organisation of procedure, the Council lodged the contract notice and the specifications relating to the UCA-033/04 call for tenders with the Court, together with the original report of the evaluation committee (non-confidential version) in respect of that call for tenders.

26 At the hearing on 21 June 2007, the parties presented oral argument and answered the questions put to them by the Court.

27 The applicant claims that the Court should:

— declare the application to be admissible and well founded;

— annul the Council's decision of 13 October 2004 not to accept each of its tenders submitted in relation to the UCA-033/04 call for tenders;

— order the Council to pay damages in respect of its loss assessed at EUR 1 481 317.65, together with interest at the rate of 7% a year;

— order the Council to pay the whole of the costs.

28 The Council contends that the Court should:

— dismiss the action as inadmissible as regards Lot No 2;

— declare the action for annulment to be unfounded;

— declare the application for damages to be unfounded;

— order the applicant to pay the costs.

The admissibility of the action against the decision of 13 October 2004, in so far as it relates to Lot No 2

Arguments of the parties

29 The Council, without raising a formal plea of inadmissibility, submits that, to the extent that it relates to Lot No 2, the action against the decision of 13 October 2004 is inadmissible. The applicant does not challenge the decision to exclude it from the tender process, as such, but the lawfulness of the Council's decision to include the criterion which led to its exclusion, namely the average of the total number of hours proposed by tenderers, in the specifications.

30 At the hearing, the Council stated that it was clear from the case-law of the Court of Justice that a person who considers that the specifications in a call for tenders, as prescribed by decision of the contracting authority, discriminate against him cannot await notification of the decision awarding the contract in question and then challenge it, on the ground specifically that those specifications are discriminatory, without infringing the objectives of speed and effectiveness of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 92/50 (Case C-230/02 *Grossmann Air Service* [2004] ECR I-1829, paragraph 37).

31 It takes the view that, since the specifications were sent to each of the candidates, and thus to the applicant, on 23 June 2004, the prescribed period of two months for challenging the lawfulness of the decision to include that criterion had expired on the date on which the present action was brought.

32 The applicant submits, as its principal argument, that specifications are not a challengeable act for the purposes of Article 230 EC. They constitute a preparatory act

of general scope and, according to settled case-law, such an act, whatever the time at which it may take place, can never be the subject of an action for annulment.

33 It also argues that specifications are addressed to all undertakings which, belonging to a category defined generally and in the abstract, wished to tender for the award of a public procurement contract. In the present case, the specifications were neither a decision which was addressed to the applicant nor a decision which was of direct and individual concern to it. It infers from that that only an action against the decision to award the contract was capable of allowing it to challenge the lawfulness of the criterion included in the specifications which related to the total number of hours proposed by tenderers.

34 In the alternative, the applicant invokes a plea of illegality under Article 241 EC as regards the specifications.

Findings of the Court

35 As a preliminary point, the Court finds that the Council's position consists of challenging the admissibility of the present action inasmuch as, according to the Council, it is truly directed only against the specifications. The latter constitute a challengeable act, the lawfulness of which was not contested within the prescribed period.

36 It must, however, be held that the annulment sought in the present action is that of the Council's decision of 13 October 2004 not to accept the applicant's tenders submitted in response to the call for tenders and that it is for the purposes of the annulment, and thus incidentally, that the applicant challenges the lawfulness of the specifications.

37 Accordingly, the issue which arises is not that of the admissibility of the action for annulment in so far as that action is alleged to be directed against the specifications, but that of the admissibility of the plea relating to the unlawfulness of that document which is invoked in that action for annulment.

38 In order to rule on that issue, it is necessary to determine whether a document relating to a call for tenders, such as the specifications at issue, is an act which is capable, as the Council submits, of being the subject of a direct action brought under the fourth paragraph of Article 230 EC and, accordingly, whether the applicant should have brought proceedings to challenge the specifications, on the basis of that provision, within the period of two months laid down under the fifth paragraph of Article 230 EC.

39 The fourth paragraph of Article 230 EC provides that 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 regulation or a decision addressed to another person, is of direct and individual concern to the former.

40 According to settled case-law, natural or legal persons other than the person to whom a measure is addressed can claim to be individually concerned, for the purposes of the fourth paragraph of Article 230 EC, only if they are affected by the measure in question by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 36; and Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425, paragraph 45).

41 In the present case, the Court finds that it is not possible to take the view that the specifications in question are of individual concern to the applicant.

42 First, contrary to what the Council submits, the fact that the specifications were sent individually to preselected tenderers, and thus to the applicant, on 23 June 2004, under the restricted procedure, cannot distinguish the applicant individually for the purposes of the fourth paragraph of Article 230 EC. The specifications, like each of the other documents relating to the call for tenders issued by the Council in the present case and of which the specifications form part, apply to objectively determined situations and produce legal effects with respect to categories of persons envisaged generally and in the abstract. They are therefore of a general nature and it cannot be held that their communication to each of a number of undertakings preselected by the contracting authority allows each of those undertakings to be distinguished individually from all other persons for the purposes of the fourth paragraph of Article 230 EC.

43 Secondly, the Council is wrong to rely on the judgment in *Grossmann Air Service*, cited in paragraph 30 above, in order to establish that it was open to the applicant to challenge the specifications in question. It must be pointed out that that judgment was delivered by the Court of Justice in response to a question referred for a preliminary ruling relating to the interpretation of Article 1(3) and Article 2(1)(b) of Directive 89/665. The Council did not deny that the provisions of Directive 89/665, as amended, are therefore binding only on the Member States and not on the Community institutions. Furthermore, as the Council acknowledged at the hearing, it is clear that the Community legislation relating to the award of public service contracts by the Community institutions which is applicable in the present case contains no provision similar to those which are set out in Directive 89/665. Lastly, contrary to the situation which gave rise to the judgment in *Grossmann Air Service*, cited in paragraph 30 above, the criterion which features in the specifications and is challenged by the applicant did not prevent it from participating effectively in the contract award procedure in question. On the contrary, the documents before the Court show that the applicant, like the other tenderers included in the list drawn up after the preselection stage, was able to submit a tender for Lot No 2. Consequently, the interpretation given by the Court of Justice in the judgment in *Grossmann Air Service*, cited in paragraph 30 above, of the provisions of Directive 89/665, as amended, cannot be applied, by way of analogy, for the purposes of determining the admissibility of the present action in so far as it relates to Lot No 2.

44 It follows from the above that, since the specifications in question were not of individual concern to the applicant, it had no right to bring an action for annulment against the specifications under the fourth paragraph of Article 230 EC. Accordingly,

there is no basis on which the Council can plead that the applicant had the right to challenge those specifications as a basis for opposing the incidental challenge by the applicant in these proceedings to the lawfulness of that document.

Substance

The action against the decision of 13 October 2004, in so far as it relates to Lot No 1

Arguments of the parties

45 In support of its action for annulment of the decision of 13 October 2004, in so far as it relates to Lot No 1, the applicant puts forward a single plea in law, alleging a manifest error of assessment.

46 The applicant essentially submits that the Council committed a manifest error of assessment in failing to give the applicant's tender in respect of Lot No 1 careful scrutiny.

47 Contrary to what the Council inferred from its tender, it argues that the average hourly rate in its tender amounted to EUR 22.123 and was accordingly higher than the minimum average hourly rate of EUR 19.6962 fixed by the UGBN.

48 It is true that the applicant acknowledges that that error on the Council's part is linked to an arithmetical error appearing in its tender as regards the total of categories A, B, C and D (EUR 234 059.67 instead of EUR 271 811.67.

49 However, it takes the view that the principle of sound administration required the Council, when assessing the applicant's tender, to take steps to ensure that the tender submitted for assessment by it did not contain an obvious clerical error of that kind, which it could have corrected on its own initiative.

50 It states that the Council could, merely by verifying the calculation, have established that the correct minimum hourly rate under its tender stood at EUR 20.92, as is clearly and precisely set out at page 40 of the tender.

51 At the very least, the applicant considers that, since the error was obvious and since to correct it would not have altered either the conditions of the contract or the original tender, the Council could, in accordance with Article 99 of the Financial Regulation and as Article 10 of the specifications relating to the calls for tenders in question provided, have made use of its right to contact the applicant.

52 The applicant claims that, contrary to what the Council contends, the conclusions drawn by the Court in its judgment in Case T-19/95 *Adia interim* v *Commission* [1996] ECR II-321, paragraph 47, cannot be applied in the present case. That judgment involved a systematic calculation error which it was difficult for the contracting authority to detect. In the present case, the applicant takes the view that the error in question is merely an error in the addition of categories A, B, C and D, which the Council ought easily to have been able to detect and correct.

53 The applicant likewise claims that the Council cannot argue that it did not detect that error when the correct, and therefore corrected, total price is set out in the 'ordinary' and 'theoretical' comparative evaluations of the applicant's tender in the annex to its defence.

54 It goes on to submit that the general principle laid down by the Court of Justice in Case 90/71 *Bernardi* v *Parliament* [1972] ECR 603, paragraph 10, according to which a party cannot invoke before the Court irregularities which may have been the consequence of its own behaviour, also does not apply in its case. Its conduct was neither intentional nor was it the source of the error committed by the Council. It adds that it had no interest in its error, which was in this case nothing more than an unintentional arithmetical error, not being corrected.

55 The applicant adds, in reply to the Council's arguments, that, while the notification provided for in Article 100 of the Financial Regulation confers on tenderers whose tenders are rejected a right to draw the contracting authority's attention to any errors of assessment which might have undermined the evaluation of their tender, the principles of sound administration and transparency require the contracting authority expressly to inform the recipient, in that notification, of the existence of that right. In its letter of 13 October 2004, the Council at no point informed it of the existence of such a right. There was accordingly a breach of the principle of equal treatment.

56 It infers from that that the error committed by the Council as to the calculation of the average hourly rate in its tender in respect of Lot No 1 is the result of the Council's failure to give that tender careful scrutiny and that, as a result, the final decision to reject that tender is vitiated by a manifest error of assessment of a particularly serious nature.

57 The Council argues in reply that, as is clear from the wording in the specifications relating to the call for tenders, the average hourly rate is equal to the total price of the tender under consideration divided by the total number of hours included in that tender. That is the reason for which it states that it was content to make the calculation on the basis of the total reference price of EUR 234 059.67 given by the applicant in its tender.

58 The Council is of the view that it was not under any duty to verify the addition of the total of categories A, B, C and D in the applicant's tender and, having done so, to establish that the correct total price was EUR 271 811.67 rather than EUR 234 059.67. Similarly, the Council considers that the information set out in the 'ordinary' and

'theoretical' comparative evaluations of the tender concerned included in the annex to its defence cannot be used to demonstrate that it had established the existence of that error when the tender was being assessed. It carried out those evaluations in the course of preparing its defence to the present action.

59 It adds that a contracting authority can contact tenderers only in order to correct obvious clerical errors. The error in the present case was not obvious at all, with the result that it could not have detected it.

60 The Council also relies on the general principle of law recognised by the Court of Justice in its judgment in *Bernardi* v *Council*, cited in paragraph 54 above, whereby a party cannot invoke before the Court irregularities which may have been the consequences of its own behaviour.

61 It likewise considers that, even if it should have detected the error in question, it would have been impossible for it, without risking infringing Article 99 of the Financial Regulation and Article 148(3) of the Implementing Rules, to make contact with the tenderer for the purposes of correcting the error concerned. In support of that argument, it relies in particular on *Adia interim* v *Commission*, cited in paragraph 52 above.

62 Lastly, the Council argues that one of the objectives of the notification provided for in Article 100 of the Financial Regulation, which follows the award of the contract and its signature, is to allow tenderers whose tenders are rejected to draw the contracting authority's attention to any errors of assessment which may have undermined the evaluation of the tender. There was no reaction whatever on the applicant's part once it had received the letter of 13 October 2004 informing it of the reasons for which its tender in respect of Lot No 1 had been rejected.

Findings of the Court

63 It is settled case-law that the Council has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and that the Court's review must be limited to verifying that there has been no serious and manifest error (Case 56/77 *Agence européenne d'interims* v *Commission* [1978] ECR 2215, paragraph 20; *Adia interim* v *Commission*, cited in paragraph 52 above, paragraph 49; and Case T-139/99 *AICS* v *Parliament* [2000] ECR II-2849, paragraph 39).

64 In addition, Article 148 of the Implementing Rules provides that if, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may, by way of exception, contact the tenderer.

65 In the present case, it is necessary to verify whether the clerical error committed by the applicant, namely an arithmetical error in its tender relating to the total of categories A, B, C and D (EUR 234 059.67 instead of EUR 271 811.67), was an obvious clerical error which the Council should have detected.

66 In that regard, the Court finds, first, that the method of calculation of the hourly rate of tenderers' bids did not require the Council to make a fresh calculation of the total of categories A, B, C and D. It is common ground that the average hourly rate was to be calculated on the basis of the total price included in the tender and the total number of working hours proposed, as set out by the applicant in its tender.

67 Secondly, it cannot be the case that, as the applicant argues, the correct hourly rate under its tender was set at a minimum figure of EUR 20.92, with that amount being clearly and precisely shown at page 40 of the tender, and that the Council should, for that reason, have considered whether it was likely that there had been

an arithmetical error in the calculation of the average hourly rate in the applicant's tender. That amount was entered at page 40 of the applicant's tender under category E, which expressly related to the hourly rate for additional work undertaken, on request, by the cleaning staff 'on working days (Monday to Friday) between 16.00 hrs and 22.00 hrs'. Accordingly, the hourly rate of EUR 20.92 thus referred to concerned a particular type of services, namely additional work, which is, therefore, a different kind of work from the services referred to in categories A, B, C and D.

68 Thirdly, contrary to what the applicant maintains, it cannot be accepted that the 'ordinary' and 'theoretical' evaluation tables produced by the Council as an annex to its defence in these proceedings show that the latter was aware of the error committed by the applicant. It is clear from the Council's written pleadings that it drew up those tables for the purposes of these proceedings. The Court also notes that the applicant has not established that the contrary is the case.

69 Furthermore, contrary to what the applicant claims, the Court considers that the Council cannot be criticised for not having informed the applicant, at the time of the notification provided for under Article 100 of the Financial Regulation, of the latter's right to draw the attention of the contracting authority to any errors of assessment that might have undermined the evaluation of its tender. According to the case-law, in the absence of express provisions of Community law, the Community administration and judicature cannot be placed under a general obligation to inform individuals of the remedies available or of the conditions under which they may exercise them (order in Case C-153/98 P *Guérin automobiles* v *Commission* [1999] ECR I-1441, paragraph 15, and Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 210). In the present case, Article 100 of the Financial Regulation does not impose any such express obligation.

70 In any event, it is clear that when the applicant received the Council's letter of 13 October 2004, when it decided to seek clarification as to the reasons for which its tender in respect of Lot No 2 was rejected, it said nothing as regards the existence of an obvious clerical error in its tender in respect of Lot No 1.

71 It follows that the clerical error committed by the applicant was not obvious, within the meaning of Article 148(3) of the Implementing Rules. Accordingly, the Council cannot be criticised for not having detected that error, and thus for not correcting it or, at the very least, for not contacting the applicant in order to allow it to rectify that error.

72 Consequently, the single plea in law, alleging a manifest error of assessment committed by the Council in the decision of 13 October 2004, in so far as it relates to Lot No 1, is unfounded. The action for annulment brought against the decision of 13 October 2004, in so far as it relates to Lot No 1, must therefore be rejected.

The action against the decision of 13 October 2004, in so far as it relates to Lot No 2

Arguments of the parties

73 In support of its action against the decision of 13 October 2004, in so far as it relates to Lot No 2, the applicant raises three pleas in law alleging breach of the general principle of sound administration, a manifest error of assessment and breach of the principle of non-discrimination. In addition, the applicant has raised a fourth plea in its reply, alleging that, by failing to contact it before its tender was rejected, the Council infringed Article 139(1) of the Implementing Rules.

74 The applicant essentially submits that the first three pleas, alleging breach of the general principle of sound administration, breach of the principle of non-discrimination and a manifest error of assessment, are well founded inasmuch as its tender in respect of Lot No 2 was rejected automatically, without further consideration, on the sole ground that the total number of working hours included in that tender was more than 12.5% lower than the average of the total number of hours proposed in the tenders that were found to be admissible.

75 In the first place, the applicant argues that, for similar reasons, the selection criterion in the specifications regarding the average of the total number of hours proposed, on which the Council based its rejection of the applicant's tender, without giving it further consideration, infringes the principle of sound administration and is vitiated by a manifest error of assessment. The result was that preference was given to tenders that provided for a greater number of hours to be worked than was truly necessary and which were therefore more expensive.

76 In that regard, the applicant first of all argues that the criterion adopted by the Council does not allow for an objective evaluation of what is needed in order to provide the services in question. It states that it has, entirely to the Council's satisfaction, been providing cleaning and maintenance services for the building covered by Lot No 2 since 1 January 1998 and has been doing so on the basis of a total number of hours equivalent to that included in its tender. While acknowledging that the Council could not take that experience into account, it takes the view that such experience simply provides objective evidence that the total number of hours needed to provide the services in question, in, at the very least, equivalent conditions, was lower than that included in the tender that was ultimately accepted and, accordingly, that the criterion applied by the Council encouraged the number of hours in question to be overestimated.

77 It also considers that the evaluation of the volume of the services in question cannot reasonably be dependent on the bids submitted by the tenderers themselves, since the latter could, in collusion with one another, have an interest in artificially inflating the volume of the services tendered for. Finally, the number of hours worked cannot be the main criterion for assessing the quality of the work to be undertaken. As regards the last-mentioned point, the applicant states that, were it to have artificially inflated the number of hours proposed in its tender, that tender would not have been automatically excluded.

78 Secondly, the applicant argues that the Council cannot rely on the fact that although the successful tenderer's bid was 3.7% more expensive than that of the applicant, that tenderer proposed a number of hours that was 25.2% greater than the number of hours proposed in the applicant's tender. It states once again that the total number of hours proposed by the successful tenderer was higher than the number of hours that was actually necessary to carry out the work referred to in the specifications in

compliance with the requisite quality standards. Accordingly, the overestimation of the services to be provided by the successful tenderer led to damage being done to the Council and those who fund it. It adds that the true position is that the selected tenderer does not provide all of the hours referred to in its tender and that that point confirms that the number of hours proposed by it corresponds with what was necessary in respect of the cleaning of the premises covered by Lot No 2.

79 In the second place, the applicant submits that the selection criterion adopted is discriminatory in so far as it leads to tenders being automatically excluded, without being given further consideration, that are objectively advantageous to the Council in budgetary terms and perfectly satisfactory from a qualitative point of view.

80 In the third place, the applicant submits that the Council infringed the provisions of Article 139(1) of the Implementing Rules. It argues that before rejecting its tender on account of the total number of hours of services proposed being abnormally low, the Council should have verified that tender, after due hearing of the parties, in accordance with Article 139(1) of the Implementing Rules. Furthermore, it is clear from the case-law that the automatic elimination of abnormally low tenders on the basis of the application of a mathematical criterion is prohibited (Case 103/88 *Fratelli Costanzo* [1989] ECR 1839).

81 The Council states that, according to the case-law, the award of a contract to the tenderer who submitted the tender offering best value for money does not mean that the successful tender is necessarily the cheapest.

82 It adds that a particular objective of the regular use of the competitive tendering procedure is to show that it is possible to do better or to do more. In a competitive market, the average of the total number of hours proposed by all tenderers is likely to represent a robust and reliable estimate of the means required for the service to be properly provided from a qualitative point of view. The Council takes the view that, if a greater number of hours are allocated to cleaning, that will mean that a higher level of quality will be achieved. In the present case, the Council notes that, while the successful tenderer had submitted a bid that was 3.7% more expensive than that of the applicant, by contrast, it was proposing 25.2% more hours of work than the applicant. In addition, it points out that although the price criterion was worth a maximum of 50% in the tender evaluation procedure, the disputed criterion relating

to the total number of hours proposed counted for only 25% of the total number of marks to be awarded. The successful tenderer's bid was therefore better value for money and the applicant's services were, for their part, considerably more expensive. The Council also states that the time-cards of the successful tenderer's employees show that the services provided are those which that tenderer is obliged to provide in accordance with the terms of the contract.

83 As regards the applicant's claims that there is a risk of collusion between tenderers, who might agree among themselves that the volume of services should be artificially inflated, the Council invites the applicant, to the extent that it has any evidence in that respect, to contact the competition authorities.

84 In relation to the third plea, alleging infringement of the principle of non-discrimination, the Council replies that that principle prohibited it from taking into account the quality of the services previously provided by the applicant when awarding the contract.

85 Lastly, the Council submits that since the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules, was raised by the applicant in its reply, it is a new plea and is, accordingly, inadmissible. In any event, the Council states that the applicant's tender was not abnormally low. It essentially argues that, in the case of an abnormally low tender, it is necessary to comply with the requirement laid down in Article 139(1) of the Implementing Rules to verify the constituent elements of a tender, after due hearing of the parties, applies only in relation to the pricing of that tender. It states that while the applicant proposed a total number of hours in its tender that was 25.2% lower than the successful tenderer's bid its price was only 3.7% lower than that proposed by the latter. It accordingly takes the view that the applicant's services were considerably more expensive than those of the successful tenderer.

Findings of the Court

86 Before considering the substance of the action for annulment against the decision of 13 October 2004, in so far as it relates to Lot No 2, it is necessary first of all to rule on the admissibility of the fourth plea, alleging infringement of the provisions of Article 139(1) of the Implementing Rules.

— The admissibility of the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules

87 According to settled case-law, it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure of the Court of First Instance that the original application must contain the subject-matter of the proceedings and a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a submission or argument which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (Case 108/81 *Amylum* v *Council* [1982] ECR 3107, paragraph 25; Case 306/81 *Verros* v *Parliament* [1983] ECR 1755, paragraph 9; and Case T-216/95 *Moles García Ortúzar* v *Commission* [1997] ECR-SC I-A-403 and II-1083, paragraph 87).

88 The case-law also provides that, under Article 139(1) of the Implementing Rules, the contracting authority is obliged to allow the tenderer to clarify, or even explain, the characteristics of its tender before rejecting it, if it considers that a tender is abnormally low (Case T-148/04 *TQ3 Travel Solutions Belgium* v *Commission* [2005] ECR II-2627, paragraph 49).

89 In the present case, the Court finds that, in paragraph 17 of its application, the applicant places particular reliance, in support of it action against the decision of 13 October 2004, in so far as it relates to Lot No 2, on the infringement of the general principle of sound administration, infringement of the principle of non-discrimination and a manifest error of assessment, in that its tender was rejected, without being given further consideration, on the sole ground that the total number of hours of work in that tender was more than 12.5% lower than the average of the total number of hours proposed. Similarly, in paragraph 26 of its application, it submits that the implementation of that criterion is discriminatory in that it leads to the automatic exclusion, without further consideration, of objectively more advantageous tenders. It follows that the applicant, in its application, expressly criticised the Council for having rejected its tender without further consideration, by reason of its being abnormally low.

90 It follows that although the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules, was not expressly raised by the applicant until its reply, that plea represents an amplification of the three pleas put forward in the original application and is closely connected with them. That plea must accordingly be declared admissible.

— The substance of the action against the decision of 13 October 2004, in so far as it relates to Lot No 291

91 As was mentioned in paragraph 89 above, the three pleas raised in the application and alleging infringement of the principle of sound administration, a manifest error of assessment and infringement of the principle of non-discrimination essentially seek to show that the Council was wrong not to invite the applicant, prior to the automatic elimination of the latter's tender by reason of the abnormally low number of hours proposed by the applicant and in accordance with the principle that the constituent elements of that tender should be verified after due hearing of the parties laid down in Article 139(1) of the Implementing Rules, to provide it with evidence that the tender was a genuine one. Consequently, it is appropriate to start by examining the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules.

92 In that respect, it is necessary, in the first place, to determine whether the concept of abnormally low tender extends, as the Council submits, only to the price criterion in the tender assessed by the contracting authority or, as the applicant essentially claims, that concept also extends to other criteria which apply to the evaluation of tenders.

93 According to the case-law, since the requirements laid down by Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), by Article 37(1) of Directive 92/50 and by Article 30(4) of Directive 93/37 are in substance identical to those laid down by Article 139(1) of the Implementing Rules, the following considerations apply equally in relation to the interpretation of the last-mentioned provision (see, by way of analogy, Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 50).

94 It must also be pointed out that the Court of Justice held in paragraph 67 of the judgment in *Lombardini and Mantovani*, cited in paragraph 93 above, that it was undisputed that Article 30(4) of Directive 93/37 did not define the concept of an abnormally low tender and, a fortiori, did not determine the method of calculating an anomaly threshold. In the same case, the Advocate General was of the opinion that the concept of an abnormally low tender was not an abstract one, but was very precise and had to be determined for each contract according to the specific purpose it was intended to fulfil (Opinion of Advocate General Ruiz-Jarabo Colomer in *Lombardini and Mantovani*, cited in paragraph 93 above, points 32 and 35).

95 In the present case, the Court finds, first, that there is no definition of the anomaly threshold and of the concept of abnormally low tender, within the meaning of Article 139(1) of the Implementing Rules, in the Financial Regulation or the Implementing Rules. Secondly, there is no express provision in that article to the effect that the concept of abnormally low tender cannot be applied to criteria other than that of price.

96 Consequently, in order to define the material scope of the concept of abnormally low tender within the meaning of Article 139(1) of the Implementing Rules, it is necessary, first of all, to take as a basis the objective pursued by that provision.

97 As was mentioned in paragraph 88 above, where a contracting authority considers that a tender is abnormally low, Article 139(1) of the Implementing Rules obliges it to allow the tenderer to clarify or even to explain the nature of its tender before rejecting that tender. More precisely, it is clear from the case-law that it is essential that each tenderer suspected of submitting an abnormally low tender should have the opportunity effectively to state its point of view in that respect, giving it the opportunity to supply all explanations as to the various elements of its tender at a time when it is aware not only of the anomaly threshold applicable to the contract in question and of the fact that its tender has appeared abnormally low, but also of the precise points which have raised questions on the part of the contracting authority (*Lombardini and Mantovani*, cited in paragraph 93 above, paragraph 53). At the same time, the Court of Justice stated that the existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer constitutes a fundamental requirement, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings (*Lombardini and Mantovani*, cited in paragraph 93 above, paragraph 57).

98 It follows that Article 139(1) of the Implementing Rules enshrines a fundamental requirement in the field of public procurement, which obliges a contracting authority to verify, after due hearing of the parties and having regard to its constituent elements, every tender appearing to be abnormally low before rejecting it.

99 Next, the Court notes that Article 97(2) of the Financial Regulation provides that contracts may be awarded by the automatic award procedure or by the best-value-for-money procedure and that, as regards the latter form of procedure, Article 138(2) of the Implementing Rules states that the tender to be accepted is the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability, completion or delivery times, after-sales service and technical assistance.

100 The Court is accordingly of the view that, where the contract is awarded to the tender offering best value for money, the fundamental requirement referred to in paragraph 98 above applies not only to the price criterion under the tender evaluated but also to the other criteria referred to in Article 138(2) of the Implementing Rules, since those criteria allow an anomaly threshold to be determined beneath which a tender submitted in the tender procedure in question is suspected to be abnormally low, within the meaning of Article 139(1) of the Implementing Rules.

101 In the second place, it is necessary to determine in the light of the above whether the Council was, as the applicant submits, obliged in the present case to comply with the procedure for verification after due hearing of the parties laid down in Article 139(1) of the Implementing Rules.

102 In that regard, the Court notes that the award procedure in question was that of the tender offering best value for money. In addition, it is not in dispute that, of the criteria which were relevant, the criterion regarding the average of the total number of hours proposed related to the qualitative aspect of the applicant's tender and constituted one of the various elements of its tender for the purposes of the case-law referred to in paragraph 97 above. Lastly, in accordance with the provisions of the specifications referred to in paragraph 16 above, that criterion allowed an anomaly threshold to be determined, beneath which the tender in question was to be automatically eliminated.

103 As is clear from the Council's letter of 22 October 2004 and as the Council expressly confirmed at the hearing in reply to a question from the Court, it is on the basis of the latter criterion that the applicant's tender was rejected, on the sole ground of the excessively low nature of the total number of hours included in that tender. Moreover, it is plain that the Council did not arrange any hearing of the parties, within the meaning of Article 139(1) of the Implementing Rules, in relation to the applicant's tender prior to its being eliminated automatically.

104 That being the case, the Council has infringed the provisions of Article 139(1) of the Implementing Rules.

105 That conclusion cannot be affected by the fact that, as the Council argues in its reply, while the applicant's total number of hours was 25.2% lower than that of the successful tenderer, its total price was, by contrast, 3.7% beneath that of that tenderer. It is sufficient to point out once again that, as is clear from the Council's letter of 22 October 2004, the applicant's tender was excluded on the sole ground that the total number of hours included in that tender was excessively low.

106 It follows from the foregoing that the fourth plea, alleging infringement of Article 139(1) of the Implementing Rules, is well founded.

107 Consequently, without it being necessary to rule on the merits of the first three pleas raised in support of the action for annulment, the decision of 13 October 2004 should be annulled, in so far as it relates to Lot No 2.

The claims for damages

Arguments of the parties

108 The applicant considers that the wrongful rejection of each of its tenders by the Council has caused it damage and seeks compensation for that damage, which it assesses, by multiplying the annual price of its tender by the period of the contract (three years), at EUR 1 481 317.65, together with interest at the rate of 7% a year.

109 With respect to the existence of a wrongful act, it submits that the Council plainly committed a serious and manifest wrongful act, as regards Lot No 1, by failing to verify that its tender was correct and, as regards Lot No 2, by infringing the provisions of the Financial Regulation and the Implementing Rules.

110 With regard to the actual harm suffered, the applicant argues that the wrongful rejection of each of its tenders has led to a considerable loss of profits, which threatens its very survival.

111 First, and in the alternative, the applicant invites the Court, should the latter not be satisfied in the present case with its claims for compensation for the damage suffered by it as a result of the rejection of each of its tenders, to make an immediate award in its favour of EUR 500 000 by way of interim damages. Secondly, it proposes that prior to adjudicating definitively on the amount of the damages the Court should appoint an accountant to calculate the profits, both direct and indirect, that it would have earned from the award of each of the contracts.

112 As regards the existence of a causal link between the wrongful act and the damage suffered, the applicant is of the view that the principle of proximate causes requires that the Court examine whether it would have suffered the same damage in the absence of any wrongful act committed by the Council. It argues in that regard that since the Council excluded both of its tenders automatically it is not possible in the present case to assess the damage in this way.

113 According to the applicant, since the Council did not annex the original evaluation report to its defence, the Court cannot scrutinise the Council's reasoning and determine on what basis the applicant's tenders might, even without the Council acting wrongfully, have been excluded from the tender procedure at issue.

114 The Council considers, as regards Lot No 1, that it did not commit any manifest error of assessment. It adds that, even if it were to be accepted that it should be held liable for such an error, the applicant has not established that such an error was serious and manifest, that there was any actual harm suffered or the existence of a causal link between them.

115 As regards Lot No 2, the Council is of the view that it did not infringe the principles of sound administration and non-discrimination, and that it also did not commit a manifest error of assessment. It adds that, even if it were to be accepted that it should be held liable for such an infringement, the applicant has not established that such an error was serious and manifest, that there was any actual harm suffered or the existence of a causal link between them.

116 It submits that, contrary to what the applicant maintains, the criteria for awarding marks in respect of Lot No 2 clearly allowed it to evaluate the applicant's tender. The Council notes that 75% of those marks were allocated pursuant to calculations based on information provided by tenderers, while the remaining 25% were allocated pursuant to the evaluation that had been carried out.

117 Lastly, under reference to an 'ordinary' evaluation (described by the Council as being 'based on the documentation actually submitted by the applicant on the assumption that it was not excluded from the tender process') and a 'theoretical' evaluation (described by the Council as being 'based on the award to the applicant [of the maximum number of marks awarded] to the tenderer who was given the highest number of marks for each criterion, save where the criterion is based on mathematical information contained in the tender'), the Council claims that it can show that, as regards both Lot No 1 and Lot No 2, the applicant's tenders did not rank first and that, as a result, the requirement that actual harm must have been suffered is not satisfied in the present case.

118 In any event, both as regards Lot No 1 and Lot No 2, even if the Court were, contrary to all probability, to accept the applicant's claims for damages, the Council is of the view that the damages sought by the applicant should be recalculated and limited to

the net annual profits which it can show it would have earned under the contract in question.

Findings of the Court

119 It is settled case-law that, in order for the Community to incur non-contractual liability under the second paragraph of Article 288 EC for unlawful conduct of its institutions, a number of conditions must be satisfied: the institution's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44; Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30; and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20).

120 Where one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to examine the other conditions (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraphs 19 and 81, and Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37).

121 Although the applicant invokes a right to damages on the basis of the loss it claims to have suffered by reason of the rejection of each of its tenders, taken together, it is necessary to consider its claims for damages by distinguishing between that part of the decision of 13 October 2004 which relates to Lot No 1 and that part of the decision which relates to Lot No 2.

The claims for damages with respect to Lot No 1

122 It is settled case-law that an application for compensation for damage must be dismissed where there is a close connection between it and an application for annulment which has itself been dismissed (see Case T-340/99 *Arne Mathisen* v *Council* [2002] ECR II-2905, paragraph 134 and the case-law cited).

123 Since the claims for damages in respect of Lot No 1 were rejected, on the basis that the applicant's allegations of unlawfulness were unfounded, and since the application for damages is closely connected with those claims, the latter must be rejected as regards Lot No 1.

The claim for damages with respect to Lot No 2

124 The applicant seeks damages in the amount which it would have invoiced to the Council had the contract, and thus inter alia Lot No 2, been awarded to it. That claim must therefore be understood as being based not on the loss of an opportunity to enter into the contract but on the loss of the contract itself.

125 However, the applicant puts forward no evidence to show that, had the unlawful conduct established in relation to Lot No 2 not taken place, it would have been certain that it would have been awarded that lot of the contract. Put at its highest, it submits that since the Council did not annex its original evaluation report to its pleadings it is impossible to verify on what basis the applicant's tenders could have been excluded from the disputed tender procedure, even if the Council had not acted wrongfully.

126 In that last regard, since the Council has, in reply to a written question put by the Court, produced the original evaluation report and that report has been notified to the applicant, the only finding the Court can make is that the latter would in any event not have been awarded the contract in respect of Lot No 2, even in the absence of the unlawful conduct established in paragraph 106 above. The applicant's tender is ranked in the original evaluation report produced by the Council in eighth and last place.

127 It follows that the damage alleged by the applicant with respect to Lot No 2, that is to say, the loss of the contract itself, is not actual and certain, but hypothetical, with the result that it cannot give rise to compensation. That, of itself, is sufficient to reject the claim for damages. In addition and for the avoidance of doubt, there is nothing to suggest, nor does the applicant put forward anything to show, that by reason of the unlawful conduct that has been established it lost even an opportunity to obtain the contract.

128 Consequently, the applicant's claim for damages in respect of Lot No 2 must be rejected.

129 It follows from all of the above that the claims for damages must be rejected in their entirety.

Costs

130 Pursuant to Article 87(3) of the Rules of Procedure, the Court of First Instance may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads. In the circumstances of the present case, each party must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Annuls the decision of the Council of the European Union of 13 October 2004 to reject the tenders of Belfass SPRL under tender procedure UCA-033/04, in so far as that decision rejected Belfass' tender with respect to Lot No 2;**

2. **Dismisses the action as to the remainder;**

3. **Orders each party to bear its own costs.**

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 21 May 2008.

E. Coulon M. Vilaras

Registrar President

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