

JUDGMENT OF THE GENERAL COURT (Third Chamber)

16 October 2018 (*)

(Public service contracts — Tender procedure — Request for services that were split into two lots — Website services — Rejection of the tender submitted by a tenderer — Award criteria — Transparency — Equal treatment — Manifest error of assessment — Non-contractual liability)

In Case T-10/17,

Proof IT SIA, established in Riga (Latvia), represented by J. Jerņeva and D. Pāvila, lawyers,

applicant,

v

European Institute for Gender Equality (EIGE), represented by J. Stuyck, V. Ost and M. Vanderstraeten, lawyers,

defendant,

APPLICATION, first, under Article 263 TFEU for annulment of EIGE's decision rejecting the tender submitted by the applicant in the context of Lot 1 relating to invitation to tender EIGE/2016/OPER/03 entitled 'Framework contract for online services', and awarding the framework contract to another tenderer, and, second, under Article 268 TFEU seeking compensation for the damage allegedly suffered by the applicant on account of loss of opportunity or loss of the contract itself,

THE GENERAL COURT (Third Chamber),

composed of S. Frimodt Nielsen, President, V. Kreuschitz and N. Póltorak (Rapporteur), Judges,

Registrar: E. Coulon,

gives the following

Judgment

Background to the dispute

- 1 The applicant, Proof IT SIA, is an undertaking operating in the information technology sector.
- 2 The European Institute for Gender Equality (EIGE) was established by Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality (OJ 2006 L 403, p. 9). It has its seat in Vilnius (Lithuania).
- 3 As set out in Article 2 of Regulation No 1922/2006, the objectives of EIGE are to contribute to and strengthen the promotion of gender equality, including gender mainstreaming in all EU policies and the resulting national policies, and the fight against discrimination based on sex, and to raise Union citizens' awareness of gender equality by providing technical assistance to the EU institutions, in particular the European Commission, and the authorities of the Member States.
- 4 Under Article 5 of Regulation No 1922/2006, EIGE has legal personality. In particular, it may acquire or dispose of movable or immovable property and may be a party to legal proceedings.
- 5 Furthermore, as set out in Article 4(5) of Regulation No 1922/2006, EIGE 'may enter into contractual relations, in particular subcontracting arrangements, with other organisations, in order to accomplish any tasks which it may entrust to them'.
- 6 By a contract notice of 2 August 2016 published in the Supplement to the *Official Journal of the European Union* (OJ 2016/S 147-265477), EIGE launched an invitation to tender under reference EIGE/2016/OPER/03 for the award of a framework contract, entitled 'Framework contract for online services' ('the framework contract'), of four years' duration in respect of two lots
- 7 According to the summary which is set out on page 3 of the tender specifications annexed to the invitation to tender, a single framework service contract was to be signed for each lot at the end of the procurement procedure. The maximum volume of the framework contract was EUR 900 000 for Lot 1 and EUR 400 000 for Lot 2 and its subject matter was:
 - Lot 1: Website services (Drupal);
 - Lot 2: Intranet services (MS SharePoint, Ms Project Server and Ms Dynamics CRM).

- 8 According to point 3.3 of the tender specifications, the contract was to be awarded to the most economically advantageous offer on the basis of the quality/price ratio, in accordance with the formula $F = Q * 1000 / P$, where F is the final score for tender X (for specific lot Y), Q is the total quality score (out of 100) for all the criteria of tender X (for specific lot Y) and P is the price of tender X (for specific lot Y).
- 9 The tenderer obtaining the highest score was to be awarded the contract subject to compliance with the condition relating to absence of conflict of interests and with other requirements linked to the exclusion criteria.
- 10 The following table concerning the award criteria and sub-criteria and their weighting is set out in point 3.2 of the tender specifications:

Criteria number	Criteria description	Maximum points per criteria	Minimum required score per criterion
1	Understanding of the objectives of the framework contract	20	10
2	Clear and appropriate methodological approach, including sound methodology, quality assurance and quality control plan for delivering the expected results: - Overall methodology - Methodology for scenario 1 - Methodology for scenario 2	10	5
		10	5
		10	5
3	Risk management during the contract implementation: - Clear and appropriate management of requests for changes - Clear and appropriate strategy for working under pressure - Clear and appropriate management of any other risk envisaged	8	4
		6	3
		6	3
4	Organisation of the project team: structure, roles, responsibilities, communication methods, information flows, coordination with the different project members: - Overall organisation of the project team - Organisation of the project team for scenario 1 - Organisation of the project team for scenario 2	10	5
		10	5
		10	5

- 11 On 9 September 2016, the applicant submitted its tender for Lot 1 in response to the contract notice.
- 12 By letter of 28 October 2016, EIGE informed the applicant that its tender for Lot 1 had not been successful because it ‘was not the most economically advantageous tender’ (‘the letter of 28 October 2016’).
- 13 On the same day, EIGE approved the evaluation report and awarded the contract for Lot 1 to the successful tenderer.
- 14 By letter of 3 November 2016, EIGE provided at the applicant’s request information concerning the evaluation and score of the tender submitted by the successful tenderer.
- 15 By letter of 7 November 2016, the applicant set out observations and objections in respect of the letter of 28 October 2016.
- 16 By letter of 21 November 2016, EIGE informed the applicant that it would not alter the decision to reject its tender and to award the contract for Lot 1 to the successful tenderer and stated that, ‘during the evaluation of the tenders, the methodology described in the tender specifications was followed and there was no alteration in the weighting of the criteria and sub-criteria’.
- 17 In response to an enquiry from the applicant by email of 2 January 2017, EIGE confirmed that it had concluded the framework contract relating to Lot 1 that had been awarded following the procurement procedure at issue.

Procedure and forms of order sought

- 18 By application lodged at the Court Registry on 9 January 2017, the applicant brought the present action.
- 19 EIGE submitted its defence on 19 May 2017.
- 20 By letter registered at the Court Registry on 15 March 2017, the applicant requested confidential treatment of certain annexes to the application that were said to contain trade secrets.
- 21 The applicant did not lodge a reply within the prescribed period.
- 22 The parties did not lodge a request for a hearing pursuant to Article 106 of the Rules of Procedure of the General Court within the prescribed period.
- 23 The Court (Third Chamber) decided, pursuant to Article 106(3) of the Rules of Procedure, to rule on the action without an oral part of the procedure.
- 24 The applicant claims that the Court should:
- annul EIGE’s decision rejecting its tender and awarding the framework contract to the successful tenderer (‘the contested decision’);
 - order EIGE to pay it damages for loss of opportunity or for loss of the contract itself in the amount of EUR 72 270;
 - order EIGE to pay the costs.
- 25 EIGE contends that the Court should:
- dismiss the action as unfounded;
 - order the applicant to pay the costs.

Law

The application for annulment

- 26 In support of the application for annulment, the applicant relies on three pleas in law. The first alleges that the contract award criteria were imprecise and that the evaluation process lacked transparency, having the effect of conferring on EIGE an unrestricted freedom of choice as regards award of the contract at issue, in breach of the principles of equal treatment and transparency. The second alleges that EIGE committed manifest errors of assessment in evaluation of the applicant’s tender, the correction of which would lead to a different result of the award procedure, in that the applicant’s tender would be ranked first and the contract would be awarded to it. The third alleges breach of the principle of equal treatment in that EIGE interpreted the award criteria in such a way that the successful tenderer benefited from knowledge acquired in performing previously a similar contract concluded with EIGE.

The first and second pleas: the contract award criteria were imprecise, the evaluation process lacked transparency and EIGE committed manifest errors of assessment in evaluation of the applicant's tender

27 By its first and second pleas, which it is appropriate to deal with together, the applicant submits, first, that the contract award criteria were imprecise and that the evaluation process lacked transparency, having the effect of conferring on EIGE an unrestricted freedom of choice as regards award of the contract in question, in breach of the principles of equal treatment and transparency, and second, that EIGE committed manifest errors of assessment in evaluation of its tender, the correction of which would lead to a different result of the award procedure in that its tender would be ranked first and the contract would be awarded to it.

Preliminary observations

28 In the first place, it should be pointed out that EIGE's public procurement is subject to Title V of its financial rules adopted by the Management Board on 16 January 2014.

29 Article 85(1) of the financial rules provides that Title V of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1), as amended, in particular, by Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 (OJ 2015 L 286, p. 1) which applied from 1 January 2016 ('the Financial Regulation'), and Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ 2012 L 362, p. 1), as amended by Commission Delegated Regulation (EU) 2015/2462 of 30 October 2015 (OJ 2015 L 342, p. 7) ('the Rules of Application'), are, subject to Article 86 of the financial rules, to apply to procurement.

30 Public procurement procedures organised by EIGE are therefore subject to Articles 101 to 120 of the Financial Regulation and Articles 121 to 172 of the Rules of Application.

31 In particular, under Article 102(1) of the Financial Regulation, 'all public contracts financed in whole or in part by the budget shall respect the principles of transparency, proportionality, equal treatment and non-discrimination'.

32 In order to ensure compliance with the principles of transparency, equal treatment and non-discrimination, Article 105(2) of the Financial Regulation requires the contracting authority to specify, in the procurement documents, 'the applicable exclusion, selection and award criteria'.

33 In the second place, it should be pointed out that, according to settled case-law, the contracting authority is required to ensure, at each stage of a procurement procedure, observance of the principle of equal treatment and, thereby, equality of opportunity for all the tenderers (judgments of 29 April 2004, *Commission v CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 108; of 17 March 2005, *AFCon Management Consultants and Others v Commission*, T-160/03, EU:T:2005:107, paragraph 75; and of 17 December 1998, *Embassy Limousines & Services v Parliament*, T-203/96, EU:T:1998:302, paragraph 85).

34 Under the principle of equal treatment as between tenderers, the aim of which is in particular to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions (see, to that effect, judgments of 18 October 2001, *SIAC Construction*, C-19/00, EU:C:2001:553, paragraph 34, and of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 93).

35 The case-law also shows that the principle of equal treatment implies an obligation of transparency so that it is possible to verify that that principle has been complied with (judgments of 18 June 2002, *HI*, C-92/00, EU:C:2002:379, paragraph 45, and of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 91).

36 In the context of public procurement, the principle of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the procurement procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications (judgment of 29 April 2004, *Commission v CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 111).

37 The principle of transparency therefore implies that all technical information relevant for the purpose of a sound understanding of the contract notice or the tender specifications must be made available as soon as possible to all the undertakings taking part in a procurement procedure in order, first, to enable all reasonably well-informed tenderers exercising ordinary care to understand their exact significance and to interpret them in the same manner and, second, to enable the contracting authority to verify whether in fact the tenderers' bids meet the criteria of the contract in question (judgment of 12 March 2008, *Evropaiki Dynamiki v Commission*, T-345/03, EU:T:2008:67, paragraph 145).

38 In the third place, for the purpose of examining whether the evaluation of the applicant's tender is vitiated by manifest errors of assessment, it should be pointed out that, according to settled case-law, the contracting authority has broad discretion with regard to the factors to be taken into account when an invitation to tender is launched and that the review by the Court must be

limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers (see judgment of 12 December 2012, *Evropaiki Dynamiki v EFSA*, T-457/07, not published, EU:T:2012:671, paragraph 40 and the case-law cited).

Award criterion 1 ('Understanding of the objectives of the framework contract')

Extract from the evaluation report

39 As regards Award Criterion 1, the extract from the evaluation report of EIGE's evaluation committee, annexed to the letter of 28 October 2016, contains the following criticism to justify the award of a score of 13.67 out of 20 to the applicant's tender:

'The tender presents a rather incomplete and mechanical understanding of the objectives of the [framework contract]. The included list of tasks is copy-pasted from the tender request and a short explanation is added to Objective 6 (web monitoring) only. There is no strong connection to EIGE's work or values apparent in the tender.'

40 In respect of that extract, the applicant essentially puts forward two complaints.

The first complaint

41 By its first complaint, the applicant submits that the criterion at issue is very vague and unclear and that it has no sub-criteria. According to the applicant, a list of the overall and specific objectives of the project is contained in point 1.3 of the tender specifications. In addition, point 2.4.4 of the tender specifications states that 'the technical offer has to describe clearly ... the knowledge about the issues related to the objectives described for this Framework Contract'. There is no further information in the tender specifications as to what EIGE expects from the tenderers in relation to this criterion.

42 The applicant further contends that the evaluation process is vitiated by a manifest lack of transparency. In particular, in the applicant's submission, first, it is not clear according to what methodology or weighting factors the members of the evaluation committee had to decide on allocation of the maximum score of 20 points for this first criterion. Second, as the applicant's tender was awarded a score of 13.67 points, it is obvious that the members of the evaluation committee were very specific in the award of the points, because, instead of awarding points in whole numbers, they calculated the score to two decimal places. However, EIGE did not provide in the tender specifications and the letters sent to the applicant any explanation whatsoever of the methodology according to which it awarded the points in such a specific manner.

43 EIGE contests the applicant's arguments.

44 As regards the alleged vagueness and lack of clarity of Award Criterion 1 (see the table in paragraph 10 above), in the first place it must be stated that, contrary to the applicant's submissions, the criterion at issue is drawn up, in the tender specifications, in a clear, precise and unequivocal manner, enabling the applicant to understand its exact significance and to interpret it in the same manner as any other reasonably well-informed tenderer exercising ordinary care.

45 Indeed, point 2.4.4 of the tender specifications specifies the structure of the technical offer that tenderers must adhere to, stating that the offer must, first of all, demonstrate a clear understanding of the contract's objectives and assignments. Point 2.4.4 also states that 'the technical offer has to describe clearly ... the knowledge about the issues related to the objectives described for this Framework Contract'. Accordingly, it is clear from the tender specifications that the award criterion at issue concerns the understanding of the objectives and assignments described for the framework contract and of the issues related to those objectives.

46 Point 1.3 of the tender specifications, after stating the project's overall objective, lists seven specific objectives which tenderers for each lot are required to take into account and provides for each of those objectives detailed information intended to help their content to be understood. Furthermore, in point 1.4, eight pages of the tender specifications are devoted to a detailed and meticulous presentation of the activities and results expected for Lots 1 and 2.

47 In the light of the foregoing, it must be concluded that the tender specifications provided all the necessary information, sufficient to enable all reasonably well-informed tenderers exercising ordinary care to understand what EIGE expected so far as concerned Award Criterion 1.

48 Nor can that conclusion be called into question by the fact that, unlike the other criteria, Award Criterion 1 had no sub-criteria. Whilst it is true that EIGE, as contracting authority, must specify in the contract notice or the tender specifications the relative weighting that it gives to each of the award criteria chosen in order to determine the most economically advantageous tender (see, to that effect, judgment of 14 July 2016, *TNS Dimarso*, C-6/15, EU:C:2016:555, paragraph 20), and it cannot apply, in respect of the award criteria, sub-criteria which it has not previously brought to the tenderers' attention (see, to that effect, judgment of 21 July 2011, *Evropaiki Dynamiki v EMSA*, C-252/10 P, not published, EU:C:2011:512, paragraph 31), it is not obliged to determine in the tender specifications sub-criteria for each award criterion. Such an obligation is not apparent from either the wording of the provisions of the Financial Regulation or the case-law.

49 In the second place, the Court of Justice has already held that, in order to ascertain whether the tenderer concerned was in fact unable to understand the award criteria at issue or whether he should have understood them by applying the standard of a reasonably well-informed tenderer exercising ordinary care, it is necessary to take into account the fact that the tenderer concerned and the other tenderers were capable of submitting tenders and that the tenderer concerned, before submitting his

tender, did not request clarification from the contracting authority (see, to that effect, judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraphs 54 to 56).

50 In the present case, since the award criteria are specified in the tender specifications, the applicant had been aware of them, including Award Criterion 1, from the time when the tender specifications were published. However, as EIGE rightly observes, before the submission of its tender, and despite the fact that the tender specifications allowed it to obtain additional information by sending a request by email, the applicant, unlike other potential tenderers, never requested clarification from the contracting authority concerning Award Criterion 1. Moreover, three other tenderers were able to submit tenders without requesting clarification concerning that award criterion.

51 As regards the argument that the evaluation process is vitiated by a manifest lack of transparency in that, in the tender specifications and the letters sent to the applicant, EIGE did not provide any explanation of the methodology according to which it awarded the points, although the members of the evaluation committee, instead of awarding points in whole numbers, calculated the score to two decimal places, it should be pointed out that the Court of Justice has already held that there is no obligation on the contracting authority to bring to the attention of potential tenderers, by publication in the contract notice or in the tender specifications, the method of evaluation applied by the contracting authority in order to specifically evaluate and rank the tenders in the light of the contract award criteria and of their relative weighting that are established in advance in the documentation relating to the contract in question (judgment of 14 July 2016, *TNS Dimarso*, C-6/15, EU:C:2016:555, paragraphs 27 and 28).

52 Also, the General Court has held that the contracting authority is not obliged to divulge its system of marking or its methodology of evaluation and that it is obliged only to communicate the award criteria applicable, any sub-criteria and their relative weighting (judgment of 4 July 2016, *Orange Business Belgium v Commission*, T-349/13, not published, EU:T:2016:385, paragraphs 138 and 139), which was done in the present instance.

53 In this connection, the Court of Justice has held that an evaluation committee must be able to have some leeway in carrying out its task and that it may thus, without amending the contract award criteria set out in the tender specifications or the contract notice, structure its own work of examining and analysing the submitted tenders (see judgment of 14 July 2016, *TNS Dimarso*, C-6/15, EU:C:2016:555, paragraph 29 and the case-law cited).

54 That leeway is also justified by practical considerations. The contracting authority must be able to adapt the method of evaluation that it will apply in order to assess and rank the tenders in accordance with the circumstances of the case (judgment of 14 July 2016, *TNS Dimarso*, C-6/15, EU:C:2016:555, paragraph 30).

55 In the light of the foregoing, the argument put forward by the applicant to the effect that the evaluation process lacked transparency must be rejected. Moreover, as the evaluation committee was composed of three members, EIGE's argument that the applicant's score containing two digits after the decimal point, namely 13.67 out of 20, is the arithmetic average of the individual scores given by each member of the evaluation committee proves credible in the present case.

The second complaint

56 By the second complaint, the applicant submits that the evaluation committee's criticism of its tender in relation to Award Criterion 1 is manifestly unfounded for various reasons. First of all, EIGE has not explained what exactly makes its tender 'incomplete'. Not only do the tender specifications not set out any requirements for the information to be provided in the tenders regarding this criterion, but also, since the procurement procedure for the contract in question was for the award of a framework contract, the scope and hence the objectives of each work order may change, and cannot therefore be precisely predicted at the stage of submission of the tender. Next, the criticism that 'the included list of tasks is copy-pasted' from the tender specifications is not correct, as the applicant's proposal concerning this criterion is set out on ten pages, whereas in the tender specifications five pages are devoted to the description of the objectives of the project (point 1.3). Furthermore, the tenders should always correspond to the tender specifications, given that, according to point 2.4.4 of the tender specifications, 'offers deviating from the Technical Specifications may be rejected for non-conformity'. Finally, the criticism that the applicant did not show a 'strong connection to EIGE's work or values' cannot be accepted because it is too general and vague and there is no publicly available information on EIGE's work or values other than that referred to in the applicant's tender.

57 EIGE contests the applicant's arguments.

58 As regards the argument that EIGE has not explained what makes the applicant's tender 'incomplete', it should be stated at the outset that this argument in fact comes under a failure to state reasons in the evaluation report, so that the applicant cannot rely on this argument in support of a complaint alleging a manifest error of assessment on the part of the evaluation committee. In any event, as EIGE submits, the word 'incomplete' is explained in the following sentences of the extract from the evaluation report referred to in paragraph 39 above and in particular by the following observations:

'The included list of tasks is copy-pasted from the tender request and a short explanation is added to Objective 6 (web monitoring) only. There is no strong connection to EIGE's work or values apparent in the tender.'

59 As regards the argument that the tender specifications do not set out any requirements for the information to be provided in the tenders regarding this criterion, by which the applicant seeks to challenge the merits of the criticism made by the evaluation committee, namely that its tender was incomplete, it must be stated that, contrary to the applicant's submissions and as is pointed out in paragraph 47 above, the tender specifications provided all the necessary information, sufficient to enable all reasonably well-informed tenderers exercising ordinary care to understand what EIGE expected in respect of this first criterion,

so that every tenderer was in a position to be able to draw up a tender meeting the criterion at issue. Furthermore, contrary to what the applicant submits, the fact that the procurement procedure at issue related to the award of a framework contract did not prevent tenderers exercising ordinary care from demonstrating a clear understanding of the objectives and assignments described in the tender specifications.

- 60 As regards the argument directed at contesting the criticism that ‘the included list of tasks is copy-pasted’ from the tender specifications, it should be stated, in the first place, that Subsection 1 of Section 4 of the applicant’s tender, which is devoted to demonstrating a clear understanding of the framework contract’s objectives and assignments, consists of ten and a half pages, nine of which, falling within the part headed ‘Objectives, respective underlying activities and deliverables’, reproduce the text of the list of the objectives and ‘expected activities and deliverables’ for Lot I which is set out in points 1.3 and 1.4 of the tender specifications. The list of activities is preceded by a few introductory lines in which the applicant merely paraphrases the content of the objectives as referred to in the tender specifications. As the evaluation committee noted, the only exception in this regard concerns Objective 6, namely ‘Monitor the performance of EIGE’s websites’, in respect of which the applicant’s tender specifies, very succinctly, what some of the activities referred to consist of.
- 61 Accordingly, the evaluation committee’s comment that ‘the included list of tasks is copy-pasted’ from the tender specifications does not prove, in those circumstances, to be vitiated by a manifest error of assessment.
- 62 In the second place, it should be pointed out that, after stating that the technical offer was of a great importance in the assessment of the bids, the award of the framework contract and the future execution of any resulting contract, the tender specifications, in point 2.4.4, stipulated clearly, in bold, that a simple repetition of the tender specifications would be awarded a very low technical score and that the level of detail of the tender would be very important for the evaluation of the tender. Accordingly, the applicant cannot criticise EIGE’s evaluation committee for having awarded it a low score.
- 63 Furthermore, whilst it is true that the tender specifications also state that offers deviating from the technical specifications may be rejected for non-conformity, that statement does not authorise the tenderer to copy the tender specifications: he must rather reformulate their content, in order to highlight his knowledge and competences in the field of the contract at issue.
- 64 Finally, as regards the argument directed at contesting, as too vague and general, the criticism of the evaluation committee that the applicant did not show a ‘strong connection to EIGE’s work or values’, it should be pointed out, in the first place, that understanding of the objectives of the framework contract also included understanding of the general background and the scope of the contract at issue, which entailed understanding of EIGE’s work or values.
- 65 In that regard, points 1.1 and 1.2 of the tender specifications, respectively devoted to the general background and the scope of the contract at issue, provide specific and detailed information concerning EIGE’s work and the values which it pursues. In particular, point 1.1 of the tender specifications explains that the call for tenders at issue was launched in order to conclude a contract with a professional company capable of contributing to the implementation of EIGE’s tasks and of its objectives as defined in Article 2 of Regulation No 1922/2006, a provision noted in paragraph 3 above.
- 66 In addition, point 1.2 of the tender specifications states that the project which is the subject of the invitation to tender falls within the framework of EIGE’s 2016-2018 Single Programming Document and its 2016-2018 Knowledge Management and Communications Strategy. In particular, it is apparent from page 7 of EIGE’s 2016-2018 Single Programming Document that EIGE has the mission of supporting the European Union in making gender equality a reality and of becoming the knowledge centre on gender equality in the European Union, gender equality being a fundamental value of the European Union. Likewise, point 1.2 of the tender specifications states that EIGE’s 2016-2018 Knowledge Management and Communications Strategy introduces EIGE’s approach to fulfilling its mandate and vision to become the knowledge centre on gender equality in the European Union.
- 67 It follows that, when drawing up the part of the tender relating to understanding of the objectives of the contract at issue, a well-informed tenderer exercising care should have taken into account — in addition to the overall and specific objectives of the contract at issue listed in point 1.3 of the tender specifications and the tasks listed in point 1.4 thereof — the mission, the vision and the values pursued by EIGE as defined in points 1.1 and 1.2 of the tender specifications and in the documents which are referred to there.
- 68 However, in its tender, the applicant confines itself, in essence, first, to presenting briefly and in outline the list of the documents that are set out in point 1.2 of the tender specifications, and on the basis of which EIGE launched the invitation to tender at issue, and second, as has been noted in paragraph 60 above, to reproducing the text of the list of the objectives and ‘expected activities and deliverables’ for Lot I which is set out in points 1.3 and 1.4 of the tender specifications. No reformulation intended to highlight the connection between the two parts is put forward by the applicant. Nor, as the evaluation committee stated, does the applicant’s tender highlight the connection between, on the one hand, understanding of the objectives of the contract at issue and, on the other, EIGE’s work and values.
- 69 In the second place, the evaluation committee’s criticism that the applicant did not show a ‘strong connection to EIGE’s work or values’ is just one of the three observations forming the assessment of EIGE’s evaluation committee in respect of the applicant’s tender so far as concerns Award Criterion 1. As has been noted in paragraph 39 above, EIGE’s evaluation committee stated as regards that criterion that ‘the tender present[ed] a rather incomplete and mechanical understanding of the [framework contract]’, that ‘the included list of tasks [was] copy-pasted from the tender request’, that ‘a short explanation [was] added to Objective 6 (web monitoring) only’ and that ‘there [was] no strong connection to EIGE’s work or values apparent in the tender’.
- 70 Accordingly, even if the criticism relating to the connection between the tender and EIGE’s work or values could be classified as manifestly erroneous, it is not apparent from the documents before the Court that the other two criticisms are vitiated by

manifest errors. On the contrary, it is apparent from the observations set out in paragraphs 58 to 63 above that those criticisms are well founded. Therefore, the finding that the latter are well founded is sufficient to hold that the evaluation of Award Criterion 1 and thus the score of 13.67 out of 20 awarded to the applicant's tender are not vitiated by a manifest error since the score awarded to the applicant's tender in respect of this first criterion, far from being based on the single supposedly incorrect comment, is also based on other comments which are free from manifest errors of assessment (see, to that effect, judgment of 26 September 2014, *Evropaiki Dynamiki v Commission*, T-498/11, not published, EU:T:2014:831, paragraphs 196 and 197 and the case-law cited), the comment therefore being part of a broader evaluation including several other criteria which were rightly taken into account by the contracting authority.

71 In the third place, the award criteria defined in the tender specifications were intended to determine the most economically advantageous tender. Thus, it was on the basis of a comparative evaluation of the tenders carried out by the evaluation committee that the contract was awarded to the tenders offering the best value for money and not on the basis of mere verification of conformity with the tender specifications (see, to that effect, judgment of 15 March 2012, *Evropaiki Dynamiki v Commission*, T-236/09, not published, EU:T:2012:127, paragraph 98). It is apparent from the report of the evaluation committee that, as regards Award Criterion 1, the tender submitted by the successful tenderer, unlike the applicant's tender, analysed EIGE's work and mission and related the knowledge in that regard to the various activities to be undertaken in order to comply with the framework contract.

72 It follows that EIGE's evaluation committee cannot be considered to have committed a manifest error of assessment and that the points awarded to the applicant's tender were not awarded on manifestly unfounded grounds. Therefore, it must be concluded that EIGE did not commit a manifest error of assessment so far as concerns Award Criterion 1.

Sub-criterion 1 ('Overall methodology') of Award Criterion 2 ('Clear and appropriate methodological approach, including sound methodology, quality assurance and quality control plan for delivering the expected results')

Extract from the evaluation report

73 As regards Sub-criterion 1 of Award Criterion 2 (see the table in paragraph 10 above), the extract from the evaluation report of EIGE's evaluation committee, annexed to the letter of 28 October 2016, contains the following comment to justify the award of a score of 6 points out of 10 to the applicant's tender:

'The SCRUM methodology of project management is suggested and well described and is in line with the requested methodology.

Team roles linked with their appropriate SCRUM roles.

Quality assurance is clearly described and elaborated on.

The quality assurance and quality control activities are clearly described and include the development of Key Performance Indicators, audits, error reporting, action lists, lessons learnt, in line with the tender specifications.

The offer does not address how communication with EIGE will be handled or how EIGE's requirements will be received and analysed.'

74 The applicant essentially puts forward two complaints in respect of that extract.

The first complaint

75 By its first complaint, the applicant contends that the sub-criterion at issue is vague. In particular, in its submission, the only guidance on methodology is included in point 1.7 of the tender specifications and mainly contains general phrases. In its submission, it is not clear from point 2.4.4 of the tender specifications what description of methodology EIGE will consider to be 'clear and appropriate' or 'sound' or according to what factors the 10 points envisaged for the sub-criterion at issue will be allocated.

76 EIGE contests the applicant's arguments.

77 It should be stated, first of all, that, as has been pointed out in paragraph 50 above, before the submission of its tender, and despite the fact that the tender specifications allowed it to obtain additional information by sending a request by email, a possibility to which other tenderers moreover had recourse, the applicant never requested clarification from EIGE concerning Award Criterion 2 and its sub-criteria. Accordingly, having regard to the case-law referred to in paragraph 49 above, the applicant cannot complain before the Court that the sub-criterion at issue is vague.

78 Next, whilst there was nothing in the tender specifications stating what EIGE considered to be a 'clear and appropriate' or 'sound' methodology, on the basis of reading point 1.7 of the tender specifications in conjunction with point 2.4.4 thereof, the tenderers, contrary to the applicant's submissions, had available to them all the details necessary to understand the precise scope of the award sub-criterion at issue.

79 Point 2.4.4 specifies the methodology that tenderers must describe clearly in their technical offer, namely what activities will be implemented to cover the full spectrum of the tasks under the framework contract and in accordance with what methodology. That information is supplemented by the general guidance on methodology which is set out in point 1.7 of the tender specifications and provides detailed information concerning the methodology to be followed. Whilst some of that guidance

consists of general phrases, other parts of it go into greater technical detail. For example, one of the pieces of guidance states that the tenderer is expected to propose and follow an agile development process and that his methodology should allow adaptive planning, evolutionary development, early value delivery, continuous improvement and be flexible to change.

80 It follows that the guidance on methodology referred to in paragraph 79 above clarifies what EIGE means by a ‘clear and appropriate’ or ‘sound’ methodology while providing an indication of the matters which are taken into account in awarding the weighting points established by the tender specifications in the case of the sub-criterion at issue.

81 Finally, unless it wished to prejudice competition between the tenderers participating in the public procurement at issue, it was not for EIGE to describe in the tender specifications the methodology that it expected from tenderers. The very objective of the ‘methodology’ criterion is that the tenderers present proposals which the contracting authority then takes over, having regard to its own practices and objectives.

82 Accordingly, the applicant cannot rely on the alleged vagueness of Sub-criterion 1 of Award Criterion 2 to call into question the evaluation of its tender carried out by EIGE’s evaluation committee and, in particular, the points awarded to it by the latter.

The second complaint

83 By its second complaint, the applicant contends that the evaluation committee’s criticism regarding elements said to be missing from its tender is manifestly unfounded. In particular, that criticism does not have a sufficiently clear, precise and unambiguous basis in the wording of the award sub-criterion at issue, so that the points were deducted for manifestly unfounded reasons.

84 The applicant adds that the only reason for the deduction of 4 out of 10 points is based on EIGE’s argument that ‘the offer does not address how communication with EIGE will be handled or how EIGE’s requirements will be received and analysed’ (see paragraph 73 above). However, in the applicant’s submission, the tender specifications do not require the tender to contain explanation on communication with EIGE or on taking its requirements into account. It was therefore not necessary for it to elaborate on these issues in Subsection 2 of Section 4 of its tender, the issues of communication and of taking requirements into account being dealt with in others sections of the tender.

85 In the present instance, the applicant states that in Subsection 3, headed ‘Project management, organisation of the project team and communication’, of Section 4 of its tender, the part headed ‘Information flow, communication and coordination (including with subcontractors)’ addresses and defines practical aspects of information flow, communication and coordination, including with subcontractors, as the title of the part indicates. Furthermore, it contends that it addressed communication issues in the part of Subsection 2 of Section 4 of its tender that is headed ‘Project meetings’, envisaging three types of regular project meetings, including with EIGE, whilst in the part of Subsection 2 that is headed ‘Reporting, Collaboration and Interfaces’ it addressed communication issues relating to ‘quality assurance’, defining reporting and collaboration practices and procedures to be followed by the quality manager. Finally, it notes that the procurement procedure in question was for the award of a framework contract and that the taking of requirements into account was a part of each work order and might or might not vary.

86 EIGE contests the applicant’s arguments.

87 In the first place, it must be stated that, by the arguments put forward in support of its second complaint in order to contest the merits of the evaluation committee’s criticism, the applicant does not deny the gap that was found by the evaluation committee, namely the fact that its offer ‘[did] not address how communication with EIGE [would] be handled or how EIGE’s requirements [would] be received and analysed’. By its arguments, it submits, in essence, that it does not follow in a sufficiently clear, precise and unambiguous manner from the wording of the award sub-criterion at issue that it should have addressed the issues of communication and of taking EIGE’s requirements into account in the subsection of the tender concerning methodology. Indeed, those issues are said to have been addressed in other subsections of the tender, namely in Subsections 2 and 3 of Section 4, which are specifically devoted to project management, organisation of the project team and communication.

88 In the second place, the applicant is wrong in submitting that the tender specifications do not require the tender to contain explanation on communication with EIGE or on taking its requirements into account. As EIGE observes, the tender specifications address in several places requirements concerning the taking into account and analysis of EIGE’s requirements and communication with it. The passages on pages 7, 9 and 16 of the tender specifications that are referred to by EIGE in the defence prove pertinent in this regard. Furthermore, the applicant’s tender belies, or even contradicts, its argument, given that immediately after the heading of Subsection 2 of Section 4 of the tender it cites the passages of the tender specifications from which it follows that the overall methodology described in the tender should have explained how EIGE’s requirements would be received and analysed by the tenderer and how communication with EIGE would be handled.

89 That said, it should be examined whether it is apparent from the wording of the sub-criterion at issue, taking account of the requirement for clarity and precision within the meaning of the case-law cited in paragraph 36 above, that the tenderers had to address the issues of communication and of taking EIGE’s requirements into account in the part of the tender concerning methodology.

90 In that regard, it should be pointed out that the sub-criterion at issue concerns the general methodology — that is to say, the heart of the tender — in which, as is stated in paragraph 79 above, the tenderer is supposed to specify the activities that will be implemented to cover the full spectrum of the tasks under the framework contract and how they will be implemented. In particular, as is apparent from the explanation provided in point 2.4.4 of the tender specifications, the corresponding section of the tender must describe the process that will be followed and will ensure that the execution of tasks meets the requirements of EIGE and is performed without defects or errors (quality assurance), and the process that will enable it to be checked whether the deliverables meet EIGE’s requirements and are flawless (quality control).

- 91 Also, it is apparent from point 1.7 of the tender specifications, first, that the methodology proposed must facilitate collaboration and engagement of all stakeholders of the project and, second, that the contractor is expected to work closely and coordinate the contract's implementation with EIGE's other service providers.
- 92 Accordingly, the award criterion at issue, as explained in points 1.7 and 2.4.4 of the tender specifications, signifies that the tender's overall methodology had to explain how EIGE's requirements would be received and analysed by the tenderer and how communication with EIGE would be handled. It follows that, contrary to the applicant's submissions, EIGE's criticism has a sufficiently clear, precise and unambiguous basis in the wording of the award sub-criterion at issue, so that a well-informed tenderer exercising care should have understood that the aforesaid issues concerning analysis and understanding of EIGE's requirements and communication with it should have been addressed in the part of the tender concerning the overall methodology.
- 93 Therefore, the applicant cannot dispute the merits of the evaluation committee's criticism or the award of the score of 6 points out of 10 upon which it decided. Furthermore, it should be pointed out that the evaluation committee's assessment is a general appreciation of the tender and each point does not correspond to a certain comment. The evaluation committee does not draft an answer making it possible for points to be deducted for each error made in the tenders, but awards a score corresponding to the overall quality of the tender (see, to that effect, judgment of 15 March 2012, *Evropaiki Dynamiki v Commission*, T-236/09, not published, EU:T:2012:127, paragraph 94).
- 94 The conclusion set out in paragraphs 92 and 93 above cannot be called into question by the applicant's argument that the issues of communication and of taking EIGE's requirements into account were addressed in other parts of its tender, in particular in Subsection 3 of Section 4 of the tender and in the parts of Subsection 2 of Section 4 of the tender that are headed 'Project meetings' and 'Reporting, Collaboration and Interfaces'. As regards the parts headed 'Project meetings' and 'Reporting, Collaboration and Interfaces' in Subsection 2, relating to methodology, of Section 4 of the tender, it must be stated that, contrary to the applicant's submissions, it is not apparent from the content of the part headed 'Project meetings' that the three types of regular project meetings that are envisaged there also involve meetings with EIGE. Indeed, EIGE is not even mentioned in that part of the tender.
- 95 It is true that, as the applicant submits, the part of the tender headed 'Reporting, Collaboration and Interfaces' addresses communication issues relating to 'quality assurance', defining reporting and collaboration practices and procedures to be followed by the quality manager. However, 'quality assurance' is just one of the four areas which, according to the tender specifications, the subsection concerning methodology had to comprise and the applicant adds nothing so far as concerns the other areas.
- 96 Finally, as regards Subsection 3 of Section 4 of the applicant's tender, it should be pointed out that, as EIGE observes, the tender specifications impose a specific structure to be followed by all tenderers when submitting their technical offer. In particular, it is clear from the guidance in the tender specifications concerning that structure that the methodological approach had to be dealt with separately from the other parts of the tender, namely in Subsection 2 of Section 4 of the tender. Accordingly, as each section or subsection was to be evaluated separately, the evaluation committee was unable to take into account information provided in the context of the various parts in order to determine the quality of the applicant's tender (see, to that effect, judgment of 15 October 2013, *Evropaiki Dynamiki v Commission*, T-474/10, not published, EU:T:2013:528, paragraph 177).
- 97 It is true that, according to the guidance in the tender specifications, Subsection 3 of Section 4 of the tender was to relate to project management, organisation of the project team and communication. However, the tender specifications also state that that subsection had to describe the operational structures provided to implement the activities and to fulfil the foreseen tasks, with particular attention to project management, coordination of tasks with subcontractors if applicable, coordination of expertise required and the strategy to manage different activities in a given timeline. In addition, that subsection is the subsection referred to by Award Criterion 4, which, according to the tender specifications, relates, in particular, to 'organisation of the project team: structure, roles, responsibilities, communication methods, information flows, coordination with the different project members'.
- 98 Accordingly, the communication that was referred to by Award Criterion 4 and had to be dealt in Subsection 3 of Section 4 of the tender was communication within the project team and not communication between the team and EIGE.
- 99 In any event, the applicant could not, in the light of the considerations set out in paragraphs 90 to 92 above, refrain from addressing issues regarding communication also in the subsection of the tender concerning methodology. In this connection, the argument that the procurement procedure in question was for the award of a framework contract and that the taking of requirements into account was a part of each work order and might or might not vary is ineffective.
- 100 Therefore, it must be concluded that the evaluation of the tender in the light of Sub-criterion 1 of Award Criterion 2 did not give rise to any manifest error of assessment by EIGE's evaluation committee.

Sub-criterion 2 ('Methodology for scenario 1') of Award Criterion 2 ('Clear and appropriate methodological approach, including sound methodology, quality assurance and quality control plan for delivering the expected results')

Extract from the evaluation report

- 101 As regards Sub-criterion 2 of Award Criterion 2 (see the table in paragraph 10 above), the extract from the evaluation report of EIGE's evaluation committee, annexed to the letter of 28 October 2016, contains the following comment to justify the award of

a score of 7 points out of 10 to the applicant's tender:

'The section presents a thorough description of usability testing, including a set of methods for analysing and evaluating EIGE's website.

EIGE is assumed to define user personas even though this should be a task for the contractor, with EIGE's input and feedback.

No specific methods for analysing the user requirements/personas are proposed.

The offer also does not suggest to utilise EIGE's existing expert contacts and their knowledge to develop the requirements and personas.

Web analytics will only be used to monitor searches on the website, not user behaviour in general.

No risk analysis is included.'

102 In respect of that extract, the applicant essentially puts forward two complaints.

The first complaint

103 By its first complaint, the applicant submits that the sub-criterion in question is vague and unclear. It is not clear from the tender specifications what methodology EIGE will consider 'clear and appropriate' or 'sound' or according to what factors the 10 points will be allocated for this sub-criterion. In the applicant's submission, the only guidance in the tender specifications regarding the sub-criterion at issue is in point 1.7, headed 'General guidance on methodology', and consists mainly of general phrases such as '[the technical offer] shall provide a sound approach within the scope defined'. The tender specifications mention only a few specific requirements, in particular the requirement to follow an 'agile development process' and to 'welcome change', with which the applicant's tender complies. The applicant's tender also addresses user needs and stakeholder needs and values throughout the tender, inter alia in the part headed 'Conflict due to different view on values of organisation' in Subsection 2 of Section 4 of the tender.

104 EIGE contests the applicant's arguments.

105 As regards the argument that Sub-criterion 2 of Award Criterion 2 is vague and unclear because it is not clear from the tender specifications what methodology EIGE will consider 'clear and appropriate' or 'sound', reference should be made to the considerations set out in paragraph 77 above finding that, before the submission of its tender, and despite the fact that the tender specifications allowed it to obtain additional information by sending a request by email, the applicant never requested clarification from EIGE so far as concerned the scope of Award Criterion 2 and Sub-criterion 2. Accordingly, having regard to the case-law referred to in paragraph 49 above, the applicant cannot contend before the Court that the sub-criterion at issue is vague and unclear.

106 In addition, as has been observed in respect of the same criticism advanced by the applicant in respect of the other award criteria and sub-criteria, whilst there is nothing in the tender specifications stating what EIGE considers to be a 'clear and appropriate' or 'sound' methodology, on the basis of reading point 1.7 of the tender specifications in conjunction with point 2.4.4 thereof the tenderers had all the details for understanding the precise scope of the award sub-criterion at issue.

107 Furthermore, as regards the first scenario, which relates to a usability evaluation of EIGE's website, in addition to the general guidance concerning methodology provided in point 1.7 of the tender specifications, Annex 1 to the tender specifications provides clear and detailed information that may guide tenderers in the drafting of the methodology. In particular, after specifying the aims of EIGE's website, the annex goes on to state that the contractor should design and perform a usability evaluation of EIGE's website to reveal the extent to which the website meets the needs of its target audience and possible improvements. It is added that the contractor should evaluate all elements of EIGE's website, including the navigation, graphical design, content readability, accessibility, search functionality and responsiveness to different viewing environments.

108 As regards the argument that it is not clear from the tender specifications according to what factors the 10 points will be allocated for the sub-criterion at issue, reference should be made to the considerations set out in paragraphs 51 to 54 above.

109 Finally, as regards the argument put forward by the applicant that it addressed the requirements imposed by the sub-criterion at issue throughout its tender, inter alia in the part headed 'Conflict due to different view on values of organisation' in Subsection 2 of Section 4, it is clear that that argument cannot demonstrate the alleged vagueness and unclearness of the sub-criterion in question. On the contrary, the argument confirms that the applicant properly understood the content and scope of that sub-criterion.

The second complaint

110 By its second complaint, the applicant submits, in essence, that the criticism of its tender regarding the sub-criterion at issue is manifestly unfounded, so that the points were deducted on the basis of manifestly unfounded reasons. In particular, it submits, first, that the criticism concerning a lack of information in its tender is based on requirements which do not follow sufficiently clearly from the wording and context of the award criterion at issue and which a reasonably well-informed tenderer exercising ordinary care could not have read into the sub-criterion. Second, the applicant contends that, in the market sector in question, it is standard for the customer, in this instance EIGE, to define the requirements and the personas, that is to say, the typical user profiles, forming part of such definition, and that information regarding personas is internal information held by EIGE that is not available to the applicant. Third, since the criticism that the applicant failed to propose methods for analysing the user

requirements and personas is similar to the criticism concerning Sub-criterion 1 of Criterion 2, the applicant repeats the objections made in that regard. Fourth, the criticism that ‘the offer also does not suggest to utilise EIGE’s existing expert contacts’ is based on a false assumption that all the tenderers were aware of the fact that EIGE had existing expert contacts, as if this were publicly available information, which is clearly not the case. EIGE based its evaluation on requirements which do not follow sufficiently clearly from the wording and context of the award criterion and sub-criterion at issue and which a reasonably well-informed tenderer exercising ordinary care could not have read into the sub-criterion. Fifth, it is not correct that the only tool proposed in the applicant’s tender is ‘web analytics’ and that it covers only searches, as the applicant’s tender covers the full spectrum of website architectural information update, requirement analysis, usability analysis and other tools and techniques in accordance with the best practices of the IT and web-development sector. Sixth, it is not appropriate to criticise the applicant’s tender for a lack of risk analysis in relation to the sub-criterion at issue, because the tender specifications do not require any risk analysis as part of the methodology for the first and second scenarios. Risk analysis should be assessed under Award Criterion 3.

- 111 EIGE notes, as a preliminary point, that the applicant obtained a score of 7 points out of 10 for the sub-criterion at issue. The evaluation committee’s negative remarks are therefore not critical but explain why the applicant lost a few points. On the substance, it contests the applicant’s arguments.
- 112 First of all, it should be stated that, by its first argument, the applicant merely asserts that the evaluation committee’s criticism concerning the lack of a definition of users in its tender is based on requirements which do not follow sufficiently clearly from the wording and context of the award criterion at issue.
- 113 In that regard, it should be pointed out that the development of user scenarios, uses cases and profiles forms part of the activities referred to by the tender specifications in the first group of activities concerning ‘Web and ICT’ consultation and project management, required to be carried out by the successful tenderer under Lot 1. Also, Annex 1 to the tender specifications, in the context of the first scenario relating to Lot 1, which concerns a usability evaluation of EIGE’s website, states that that site should help its users to find the information they need in a consistent manner. It is stated, furthermore, that there is a big variety in the type of users of the website and in the needs that the website should meet. For example, the user groups include policy makers, researchers and media, who need to have access to reports, research results, tool and methods, good practices and gender statistics in a wide range of topics such as gender-based violence, gender mainstreaming and decision-making.
- 114 In the light of the foregoing, the applicant cannot maintain that the obligation to define the user profile did not appear in the tender specifications or that it did not follow sufficiently clearly from the wording and context of the award sub-criterion in question in order to call into question the merits of the evaluation committee’s criticism in respect of its tender. It was possible for a diligent and experienced tenderer to understand, on a careful reading of the passages of the tender specifications that are referred to in paragraph 113 above, that the development of user profiles formed part of the activities that had to be carried out under the first scenario.
- 115 That conclusion cannot be called into question by the argument that, in the market sector in question, it is standard for the customer, in this instance EIGE, to define the requirements and the user profiles forming part of such definition or the argument that information regarding users is internal information held by EIGE that is not available to the applicant. The applicant’s assertion is merely an assertion of a general nature that is not supported by any concrete evidence.
- 116 As regards the objections to the criticism that the applicant did not propose methods for analysing user requirements and personas, it is sufficient to state that, despite the fact that the development of user profiles formed part of the activities that had to be carried out under the first scenario (see paragraph 114 above), Section 4 of the applicant’s tender, concerning the first scenario, did not contain any subsection proposing a specific methodology for analysing user requirements or profiles. It merely proposed, in three lines, a methodology relating to the discovery of ‘business’ requirements, consisting in conducting representative interviews. Accordingly, EIGE’s evaluation committee cannot be considered to have committed a manifest error of assessment.
- 117 As regards the objection to the criticism that ‘the offer also does not suggest to utilise EIGE’s existing expert contacts’, a criticism which, in the applicant’s submission, is based on a false assumption that all the tenderers were aware of the fact that EIGE had existing expert contacts, as if this were publicly available information, it should be pointed out, as EIGE has done, that information concerning its experts’ forum is published online. Thus, tenderers should have known of the existence of that forum, since it was incumbent upon them to be acquainted with the contracting authority in order to be in position to submit a bespoke tender.
- 118 Furthermore, as regards the argument that the criticism of the applicant’s tender in this regard involves a requirement which does not follow sufficiently clearly from the wording and context of the award criterion and sub-criterion at issue, it must be stated, in the first place, that that criticism must be read in the light of the more general criticism concerning the absence, in the applicant’s tender, of a specific method for analysing user requirements or profiles. As has been confirmed in paragraph 116 above, EIGE’s assessment concerning that lack is not manifestly erroneous.
- 119 In the second place, even though the possibility of having recourse to EIGE’s experts is not expressly provided for by the tender specifications, that possibility could have represented added value that could have enabled the applicant to improve the quality of its tender and obtain additional points so far as concerns the award sub-criterion at issue.
- 120 In any event, it should be pointed out that the Court has already held that the evaluation committee’s negative comments do not necessarily have to correspond literally to an explicit requirement of the tender specifications (see, to that effect, judgment of 1 February 2018, *European Dynamics Luxembourg and Others v ECHA*, T-477/15, not published, EU:T:2018:52,

paragraph 130 and the case-law cited). As has been noted in paragraph 53 above, an evaluation committee must be able to have some leeway in carrying out its task. Accordingly, it may, without amending the contract award criteria set out in the tender specifications or the contract notice, structure its own work of examining and analysing the submitted tenders.

- 121 In the light of the foregoing, EIGE cannot be considered to have committed a manifest error of assessment in that regard.
- 122 As regards the argument that it is not correct that the only tool proposed in the applicant's tender is 'web analytics' and that it covers only searches, it must be stated that, as EIGE observes, that argument is based on a misreading of the evaluation report. The evaluation report does not state that the applicant offers web analytics as the only solution to the first scenario, but that it proposes only to use web analytics to analyse searches on the site and no other aspect of user behaviour, a fact which is indeed confirmed by reading the applicant's tender.
- 123 Finally, as regards the argument that it is not appropriate to criticise the applicant's tender for a lack of risk analysis in relation to the sub-criterion in question, because the tender specifications do not require any risk analysis as part of the methodology for the first and second scenarios, risk analysis having to be assessed rather under Award Criterion 3, it should be observed, as EIGE has done, that risk analysis is part of every project development and that any reasonably experienced and informed tenderer would address this issue as part of his proposed methodology.
- 124 In particular, it is clear from point 2.4.4 of the tender specifications that for each scenario the tenderer must present the methodology for the success of the specific scenario. It is also clear from point 2.4.4 of the tender specifications that, in the case of Lots 1 and 2, the methodology proposed by tenderers must include 'quality assurance' and 'quality control', and also risk management. As the first scenario forms an integral part of Lot 1, a well-informed tenderer exercising care would also have applied the guidance concerning the methodology of Lot 1 to the methodology of the first scenario.
- 125 Furthermore, as has been noted in paragraph 71 above, the award criteria defined in the tender specifications were intended to identify the most economically advantageous tender. Thus, it was on the basis of a comparative evaluation of the tenders carried out by the evaluation committee that the contract was awarded to the tenders offering the best value for money and not on the basis of mere verification of conformity with the tender specifications (see, to that effect, judgment of 15 March 2012, *Evropaïki Dynamiki v Commission*, T-236/09, not published, EU:T:2012:127, paragraph 98).
- 126 It is clear from the evaluation committee's report that, as regards the methodology proposed for the first scenario, the tender submitted by the successful tenderer took account of the risks of the project and provided for measures to avoid or mitigate them, whereas there was no risk analysis in the applicant's tender.
- 127 Accordingly, the applicant's argument that risk analysis had to be assessed under Award Criterion 3 cannot succeed, in particular as the part of its tender relating to 'risk management during the contract implementation' does not contain any analysis of the specific risks connected with the first and second scenarios.
- 128 Moreover, the absence of analysis in respect of risk management is just one of the four negative comments set out by EIGE's evaluation committee in the light of Sub-criterion 2 of Award Criterion 2. Accordingly, even if the comment at issue could be classified as manifestly erroneous, it is not apparent from the documents before the Court that the other three negative comments are vitiated by manifest errors. On the contrary, it is apparent from the observations set out in paragraphs 112 to 122 above that they are well founded. Therefore, the finding that those three other comments are well founded is sufficient to hold that the evaluation of Sub-criterion 2 of Award Criterion 2 and thus the score of 7 points out of 20 awarded to the applicant's tender are not vitiated by a manifest error of assessment since the score awarded to the applicant's tender in respect of that sub-criterion, far from being based on the single supposedly incorrect comment, is also based on other comments which are free from manifest errors of assessment (see, to that effect, judgment of 26 September 2014, *Evropaïki Dynamiki v Commission*, T-498/11, not published, EU:T:2014:831, paragraphs 196 and 197 and the case-law cited). That comment is therefore part of a broader evaluation including several other criteria which were rightly taken into account by the contracting authority.
- 129 Consequently, it must be concluded that the evaluation of the tender in relation to Sub-criterion 2 of Award Criterion 2 did not give rise to any manifest error of assessment on the part of EIGE's evaluation committee.

Sub-criterion 3 ('Methodology for scenario 2') of Award Criterion 2 ('Clear and appropriate methodological approach, including sound methodology, quality assurance and quality control plan for delivering the expected results')

Extract from the evaluation report

- 130 As regards Sub-criterion 3 of Award Criterion 2 (see the table in paragraph 10 above), the extract from the evaluation report of EIGE's evaluation committee, annexed to the letter of 28 October 2016, contains the following comment to justify the award of a score of 6 points out of 10 to the applicant's tender:

'The section presents a general methodology for similar projects without adjusting it to EIGE's requirements or offering details on its implementation.

The methodology is based on Microsoft Guidelines and consists of many cycles.

Specific tasks for testing a Drupal's site performance in general are defined.

The offer suggest[s] to test the website's performance in testing environment and not in live environment which the Evaluation Committee considers an unreliable approach.

No risk analysis is included.'

131 In respect of that extract, the applicant essentially puts forward two complaints.

The first complaint

132 By its first complaint, the applicant submits that the sub-criterion at issue is vague and unclear. It is not clear from the tender specifications what methodology EIGE will consider 'clear and appropriate' or 'sound' or according to what factors the 10 points will be allocated for this sub-criterion. The only guidance in the tender specifications regarding this sub-criterion is in point 1.7, headed 'General guidance on methodology', and consists mainly of general phrases such as '[the technical offer] shall provide a sound approach within the scope defined'. The applicant complied with the specific requirements mentioned in the tender specifications, in particular the requirement to follow an 'agile development process' and to 'welcome change' in a part of Subsection 2 of Section 4 of the tender headed 'Management of change requests'. In addition, it addressed user needs and stakeholder needs and values throughout its tender, inter alia in a part of Subsection 2 of Section 4 of the tender, headed 'Conflict due to different view on values of organisation'.

133 EIGE contests the applicant's arguments.

134 In that regard, it should be pointed out that, before submitting its tender, the applicant never requested clarification regarding the understanding and scope of the sub-criterion at issue. It follows that, in the light of the case-law referred to in paragraph 49 above, it cannot complain before the Court that Sub-criterion 3 of Award Criterion 2 lacked clarity. Nor can that conclusion be affected by the fact that a question concerning the second scenario falling within the sub-criterion at issue was lodged before the tenders were submitted. That question concerned clarification of a technical aspect of the scenario and not the general scope of the sub-criterion at issue.

135 In addition, in the case of the second scenario of Lot 1, Annex 1 to the tender specifications provides, in addition to the general guidance referred to by the applicant itself that is in point 1.7 of the tender specifications, clear and specific particulars as to what EIGE understands by a 'clear and appropriate' or 'sound' methodology while giving a clear indication of the matters which are taken into account in awarding the weighting points established by the tender specifications for the sub-criterion at issue.

136 Indeed, the passage of the tender specifications concerning the second scenario explains that the contractor should design and perform all necessary actions to improve the response time and availability of EIGE's website. That includes identifying improvements in the hardware hosting the website, the software which hosts and manages the website, the implementation of the website and the hosting database. The contractor should also test and verify the improvement in the website's response time and availability.

137 In view of that rather specific technical guidance, the applicant cannot claim that the sub-criterion at issue is vague and unclear. Furthermore, the argument that it complied with the specific requirements mentioned in point 1.7 of the tender specifications in other sections of its tender, inter alia in Subsection 2 of Section 4, relating to the methodology of Lot 1, is not pertinent in this regard.

The second complaint

138 By its second complaint, the applicant submits that the evaluation committee's criticisms are manifestly unfounded and that the points deducted from its tender were deducted on the basis of manifestly unfounded reasons.

139 In the first place, the applicant submits that it is incorrect that the proposed methodology is not adjusted to EIGE's requirements, as two characteristics are specific to this project: first, it is a Drupal website project and, second, several serious performance problems need to be addressed. The applicant's tender acknowledges both of those issues and addresses them, for example in the part headed 'Scenario 2' of Subsection 4 — headed 'Response to the scenarios' — of Section 4 of the tender, where it is stated that it 'employ[s] testing engineers that are specialised on performance testing' and that it 'use[s] widely accepted industry guidelines' namely 'Microsoft Performance testing guidelines for Web Applications that [are] tailored for individual projects and websites'. Furthermore, according to the applicant, in the part headed 'Drupal specific performance tuning tasks and tools', 10 tasks and tools are described that are designed to solve performance issues particularly in Drupal websites.

140 No other specific requirements that EIGE might have under this sub-criterion are revealed in the tender specifications.

141 In the second place, the applicant contends that the evaluation committee was wrong to consider that testing in a testing environment is an unreliable approach. On the contrary, running tests — including performance tests, as one of the tests is called 'breaking point test' — in the production environment is risky, unnecessary and contrary to the best industry practices of software development.

142 In the third place, the applicant submits that it is not appropriate to criticise it for a lack of risk analysis in relation to the sub-criterion at issue, because the tender specifications do not require risk analysis as part of the methodology for the first and second scenarios, risk analysis having to be assessed under Criterion 3. It follows that the criticism, set out in the evaluation report, regarding elements missing from the applicant's tender does not have a sufficiently clear, precise and unambiguous basis in the wording of the award sub-criterion at issue.

143 EIGE contests the applicant's arguments.

144 As regards the argument by which the applicant submits that it is incorrect that the proposed methodology is not adjusted to EIGE's requirements, it must be stated that the evaluation committee could correctly conclude that the methodology proposed by the applicant did not meet those requirements, since that methodology was both very succinct and general. Moreover, the Court has already held that a tenderer must expect a tender which merely meets the necessary requirements to obtain a satisfactory score and one which exceeds the contracting authority's requirements to obtain a higher score (see, to that effect, judgment of 26 January 2017, *TVI v Commission*, T-700/14, not published, EU:T:2017:35, paragraph 169).

145 As regards the argument that the evaluation committee was wrong to consider that testing in a testing environment is an unreliable approach, because running tests in the production environment is risky, unnecessary and contrary to the best industry practices of software development, it must be stated that the applicant does not adduce any evidence to support the argument.

146 Finally, as regards the argument concerning the lack of risk analysis under the sub-criterion in question, reference should be made to the considerations set out in paragraphs 123 and 128 above concerning Sub-criterion 2 of Award Criterion 2, as the considerations set out with regard to the first scenario apply, *mutatis mutandis*, to the second scenario.

147 In the light of all the foregoing, it must be concluded that the evaluation of the tender relating to Sub-criterion 3 of Award Criterion 2 did not give rise to any manifest error of assessment by EIGE's evaluation committee, so that the applicant cannot call into question that evaluation and, in particular, the points awarded to it by the committee.

Sub-criterion 2 ('Clear and appropriate strategy for working under pressure') of Award Criterion 3 ('Risk management during the contract implementation')

Extract from the evaluation report

148 As regards Sub-criterion 2 of Award Criterion 3 (see the table in paragraph 10 above), the extract from the evaluation report of EIGE's evaluation committee, annexed to the letter of 28 October 2016, contains the following comment to justify the award of a score of 4.17 points out of 6 to the applicant's tender:

'No general strategy for working under pressure is described. The SCRUM methodology is presented as an end-all solution. The offer proposes the possibility to add resources in any phase of the project.'

149 In respect of that extract, the applicant essentially puts forward two complaints.

The first complaint

150 By its first complaint, the applicant submits, in essence, that this sub-criterion is vague. It points out that, as stated in point 2.4.4 of the tender specifications, the technical offer has to describe clearly the risk assessment and management process. In particular, the tenderer must describe at least the strategy that will be followed and will enable work under pressure to be coped with, for example in the event of tight deadlines or unexpected scarcity of resources. The applicant infers that it is not clear from those provisions what methodology is considered by EIGE to be 'clear and appropriate' or 'sound' or according to what factors the six points will be allocated.

151 EIGE contests the applicant's arguments.

152 In that regard, it should be pointed out that, before submitting its tender, the applicant never requested clarification regarding the sub-criterion at issue. It follows that, in the light of the case-law referred to in paragraph 49 above, it cannot complain before the Court that Sub-criterion 2 of Award Criterion 3 lacked clarity.

153 In addition, EIGE rightly submits that it is not for it to describe in the tender specifications the risk management strategy that it expects from its tenderers. Furthermore, in the passages of the tender specifications referred to by the applicant (see paragraph 150 above), contrary to the applicant's submissions EIGE provides clear and precise guidance, with the aid of two examples — namely when deadlines are tight or there is an unexpected scarcity of resources — of the potential situations entailing work under pressure which have to be faced up to by the tenderers, while giving the tenderers details useful for understanding the sub-criterion at issue and the factors according to which the six points will be allocated.

The second complaint

154 By its second complaint, the applicant submits that the evaluation committee's criticisms concerning the sub-criterion at issue are manifestly unfounded and that the evaluation committee therefore took points off it on the basis of manifestly unfounded reasons. In particular, in the applicant's submission, it is, first, not correct that it did not define a general strategy. In the part headed 'Strategy for working under pressure' of Subsection 2 — headed 'Methodological approach, including quality assurance, quality control and risk management' — of Section 4 of the tender, it stated that knowledge of EIGE's business, knowledge and previous experience of delivery of technical solutions, and a strong team and ability to expand were the key factors enabling the risk of working under pressure to be minimised. Second, it is also not correct that the applicant's tender proposed 'SCRUM' as an 'end-all solution'. Even though 'SCRUM' is a methodology that is specifically designed to deliver most under a strict timeline, in the part headed 'Strategy for working under pressure' of Subsection 2 — headed 'Methodological approach, including quality assurance, quality control and risk management' — of Section 4 of the tender, the applicant also proposed the tracking of key performance indicators, daily 'SCRUM meetings', and planning and review meetings, to mitigate the risk of having to work under pressure.

- 155 EIGE contests the applicant's arguments. In particular, as regards the applicant's argument that it is not correct that its tender proposes 'SCRUM' as an 'end-all solution' because the tender refers in this regard to the tracking of key performance indicators, daily 'SCRUM' meetings and bi-weekly planning and review meetings, EIGE appreciates those other measures while underlining the absence of a fully-fledged strategy for working under pressure.
- 156 In that regard, on reading the applicant's tender it must be concluded, as EIGE has done, that, contrary to what is required by the tender specifications, the applicant does not present a strategy for working under pressure. It merely draws up a list of reasons why working under pressure, in particular the risk of not complying with the final deadline, is not initially foreseen.
- 157 It is true that, in its defence, EIGE takes note of the measures other than the 'SCRUM' methodology that are proposed in order to reduce the risk of having to work under pressure (see paragraph 155 above). However, on the basis of reading the short passage in the applicant's tender concerning the approach to working under pressure, those measures are proposed, as the applicant itself states, as measures intended to avoid working under pressure and not to put right specific situations of working under pressure. They are not therefore such as to make up for the lack of a strategy for dealing with working under pressure that was found by the evaluation committee.
- 158 More generally, whilst it is true that the prevention of situations involving working under pressure may be regarded as being a good strategy for ensuring that the contract at issue is properly managed, it cannot in itself assure the contracting authority of the tenderer's ability to deal with such situations if the envisaged preventive measures fail.
- 159 Accordingly, as EIGE submits, taking account of the measures other than the 'SCRUM' methodology that were proposed by the applicant in order to avoid working under pressure does not alter the result of the evaluation of EIGE's evaluation committee, so that it cannot be considered to have committed a manifest error of assessment.

Sub-criterion 3 ('Clear and appropriate management of any other risk envisaged') of Award Criterion 3 ('Risk management during the contract implementation')

- 160 As regards Sub-criterion 3 of Award Criterion 3 (see the table in paragraph 10 above), the extract from the evaluation report of EIGE's evaluation committee, annexed to the letter of 28 October 2016, contains the following comment to justify the award of a score of 5 points out of 6 to the applicant's tender:

'A general risk management strategy is presented.'

- 161 In respect of that extract, the applicant contends, in essence, that it does not understand why, in the absence of criticism, its tender was awarded a score of 5 points out of 6 for the sub-criterion at issue. In its submission, a point was deducted without any reason whatsoever.
- 162 EIGE submits that one point was deducted from the overall score because the strategy in the applicant's tender was general, not specific, and was not elaborated in order to reflect EIGE's context.
- 163 In that regard, first of all, it should be pointed out that the evaluation committee's assessment is a general appreciation of the tender and each point does not correspond to a certain comment. The evaluation committee does not draft an answer making it possible for points to be deducted for each error made in the tenders, but awards a score corresponding to the overall quality of the tender (see, to that effect, judgment of 15 March 2012, *Evropaiki Dynamiki v Commission*, T-236/09, not published, EU:T:2012:127, paragraph 94).
- 164 Next, even assuming that the evaluation did not contain any negative remark, the Court has already held that the fact that the applicant did not obtain maximum points without any particular negative comment being made does not mean that its tender ought to have obtained maximum points (see, to that effect, judgment of 15 October 2013, *Evropaiki Dynamiki v Commission*, T-474/10, not published, EU:T:2013:528, paragraph 124).
- 165 Finally, the evaluation committee's comment referred to in paragraph 160 above does not show that the applicant's tender was perfect. The evaluation committee's finding that a general risk management strategy is presented by the applicant does not necessarily constitute a positive evaluation of its tender. On the other hand, as EIGE points out, presenting a general strategy and not elaborating a 'bespoke' strategy appropriate to EIGE's requirements may constitute a lacuna for EIGE.
- 166 It follows that, in the case of Award Sub-criterion 3 of Award Criterion 3, EIGE cannot be considered to have committed a manifest error of assessment.

Sub-criterion 1 ('Overall organisation of the project team') of Award Criterion 4 ('Organisation of the project team: structure, roles, responsibilities, communication methods, information flows, coordination with the different project members')

- 167 As regards Sub-criterion 1 of Award Criterion 4 (see the table in paragraph 10 above), the extract from the evaluation report of EIGE's evaluation committee, annexed to the letter of 28 October 2016, contains the following comment to justify the award of a score of 9 points out of 10 to the applicant's tender:

'Roles and responsibilities are clear and adjusted to the SCRUM methodology.'

The tenderer proposes two development teams working in parallel on different projects under one work order and one management team.

Communication within and between the teams is clearly described.

The tenderer's decision to use many subcontractors is a concern from the perspective of project management, but countermeasures and techniques (e.g. joint premises, project management tools) to combat the possible complications are described.'

168 In respect of that extract, the applicant submits, in essence, that it contains a single criticism of its tender, namely that 'the ... decision to use many subcontractors is a concern from the perspective of project management'. In addition, the applicant notes that the evaluation committee itself acknowledged, however, that 'countermeasures and techniques (e.g. joint premises, project management tools) to combat the possible complications [were] described'.

169 Furthermore, the applicant relies on the judgment of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646, paragraph 31), relating to Article 25 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, corrigendum at OJ 2004 L 351, p. 44), to contend that the interpretation of that article which, in its submission, envisages the possibility of using subcontractors without limit should apply *mutatis mutandis* to Articles 138(5), 147(3) and 148(6) of the Rules of Application. It infers from this that, in the case of the sub-criterion at issue, the evaluation committee had no legitimate ground for deducting a point from the final score for its tender.

170 EIGE contests the applicant's arguments.

171 In the first place, it must be stated that the tender specifications provide in point 2.4.1 for the possibility of having recourse to subcontracting, specifying that tenderers are required to identify all subcontractors whose share of the contract is above 10% and that, if recourse is had to subcontracting, the contractor will remain bound by his obligations to EIGE and will assume sole and full responsibility for performance of the contract. In addition, as EIGE confirms, the tender specifications do not impose limits on the use of subcontractors, in particular limits justified by requirements which are related and proportionate to the subject matter of the contract at issue. Nevertheless, in the evaluation report the evaluation committee considered that the decision to use a large number of subcontractors was a concern from the point of view of project management, despite countermeasures and techniques, such as joint premises and project management tools, that were proposed to combat the possible complications.

172 In the second place, whilst, as the applicant submits, the case-law of the Court of Justice affirms the possibility for tenderers to have recourse to subcontracting for performance of a contract, in principle without limit, it has also held that there may be services with special features necessitating a certain capacity the minimum level of which must be achieved by relying on a limited number of economic operators, as long as that requirement is related and proportionate to the subject matter of the contract at issue (see, to that effect, judgment of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 35). It follows that the case-law of the Court of Justice acknowledges the existence of particular circumstances in which recourse to subcontracting is not desirable from the point of view of the contracting authority, so that such recourse may be limited or precluded. Therefore and a fortiori, despite the measures envisaged in order to reduce any risk, the evaluation committee could reasonably express some concerns in respect of the use of large number of subcontractors on the part of the applicant, and all the more so in the context of comparing the tenders.

173 In the light of the foregoing, it must be concluded that EIGE did not commit any error of assessment that may be classified as 'manifest' and may be liable to have a decisive impact on the final result of the evaluation by the evaluation committee.

174 It follows that, in the case of Award Sub-criterion 1 of Award Criterion 4, EIGE cannot be considered to have committed a manifest error of assessment.

Sub-criterion 2 ('Organisation of the project team for scenario 1') of Award Criterion 4 ('Organisation of the project team: structure, roles, responsibilities, communication methods, information flows, coordination with the different project members')

175 As regards Sub-criterion 2 of Award Criterion 4 (see the table in paragraph 10 above), the extract from the evaluation report of EIGE's evaluation committee, annexed to the letter of 28 October 2016, contains the following comment to justify the award of a score of 6.33 points out of 10 to the applicant's tender:

'The presented list of tasks covers all expected activities.

The roles and responsibilities are not clearly defined. It is not clear who will conduct the interviews and usability test even though 6 whole work days have been allocated to them.

Furthermore, the Senior Web Developer is allocated 80 work days while the Web Designer is allocated 0 and the Quality Manager 3 — this does not reflect the workload and the distribution of work as described by EIGE.'

176 In respect of that extract, the applicant submits that the evaluation committee's comment is manifestly unfounded and that the points deducted were deducted on the basis of manifestly unfounded reasons. In particular, in the applicant's submission, it is not correct that its tender does not clarify who will conduct the interviews and usability tests as, in the part headed 'Allocation

of days per profile’ of Subsection 4 — headed ‘Response to the scenarios’ — of Section 4 of the tender, there is a clear correspondence between the profile of the product owner and that of the senior analyst as provided for by EIGE’s classification. Nor do the tender specifications describe the ‘workload and the distribution of work’, contrary to what is asserted in the evaluation report, which criticises the applicant for having failed to reflect those particulars in its tender. In the applicant’s submission, if the evaluation committee was referring to the evaluation criteria for the financial proposal, they are not relevant for assessment of the tender in respect of the sub-criterion at issue.

177 EIGE contests the applicant’s arguments.

178 In the first place, it should be stated that it is apparent on reading the applicant’s tender that, even though there is a clear correspondence between the profile of the product owner and that of the senior analyst, in accordance, at least partially, with the classification required by EIGE in point 1.8 of the tender specifications concerning the project team, it does not specify in detail and in accordance with the guidance in point 1.8 of the tender specifications the role which is associated with each profile of the team. Accordingly, the evaluation committee’s comment that the applicant does not deal with how those profiles will contribute to the process proves, in those circumstances, to be well founded.

179 In the second place, the absence of a specific indication of the role assigned to each profile makes the allocation of work days that is proposed by the applicant even more difficult to understand. That being so, the applicant cannot criticise the evaluation committee for having considered it disproportionate to allocate 80 work days to the senior web developer when the web designer is allocated no days and the quality manager three.

180 In the light of the foregoing considerations, it must be concluded that, in the case of Sub-criterion 2 of Award Criterion 4, the evaluation committee did not commit a manifest error of assessment.

181 It follows from all the foregoing that the first and second pleas in the action must be dismissed as unfounded.

The third plea: breach of the principle of equal treatment in that EIGE interpreted the award criteria in such a way that the successful tenderer benefited from knowledge acquired during performance of a similar contract concluded with it previously

182 By the third plea, alleging breach of the principle of equal treatment, the applicant complains that EIGE’s evaluation committee made an excessively broad use of the discretion conferred on it by the vague award criteria in giving more points to the successful tenderer because of the knowledge acquired by it during performance of a similar contract with EIGE in 2014.

183 In other words, the applicant complains, in essence, of an alleged advantage enjoyed by the successful tenderer on account of knowledge which it is said to have acquired when it participated in a similar contract concluded with EIGE in 2014, knowledge to which the applicant did not have access and which the tender specifications did not require. In particular, in the applicant’s submission, it appears from the extracts from the evaluation report for the tender submitted by the successful tenderer that, in several respects, the latter benefited from knowledge acquired when performing that contract.

184 In this instance, as regards Award Criterion 1, the applicant notes that the evaluation report for the tender submitted by the successful tenderer states that ‘the tenderer presents a deep understanding of the objectives of the framework contract that is at the same time holistic and highly specific’ and that ‘the offer presents an understanding of the objectives in three different levels: product development, IT infrastructure and user need levels’. The applicant further submits that IT infrastructure is not described in the tender specifications and information on it is not publicly available.

185 In the case of Sub-criterion 1 of Award Criterion 2, the applicant contends that it follows from the evaluation report that the successful tenderer proposed splitting the work into two categories, namely web development services and web consultation services, although the tender specifications do not lay down such a requirement.

186 EIGE contests the applicant’s arguments, emphasising, first of all, that the applicant’s tender obtained a reasonably high score (above the pass grade of 70%) and that, despite some critical remarks, it elicited positive commentaries from the evaluation committee. In respect of certain criteria or sub-criteria, such as Criterion 3 regarding risk management, the applicant obtained a score similar to or higher (17.17 points) than that of the successful tenderer (14.33 points). The decision not to award the contract to the applicant was based on the fact that its tender was economically less advantageous than that of the successful company. On the substance, EIGE contests the applicant’s arguments.

187 In the first place, it should be pointed out that the alleged advantage of the successful tenderer, on the assumption that it is proven, is not the consequence of any conduct on the part of the contracting authority. Unless such a contractor were automatically excluded from any new call for tenders or, indeed, were forbidden from having part of the contract subcontracted to it, it is in fact inevitable that an advantage will be conferred upon an existing contractor or the tenderer connected to that party by virtue of a subcontract, since that is inherent in any situation in which a contracting authority decides to initiate a tendering procedure for the award of a contract which has been performed, up to that point, by a single contractor. That fact constitutes, in effect, an ‘inherent de facto advantage’ (judgment of 12 March 2008, *Evropaïki Dynamiki v Commission*, T-345/03, EU:T:2008:67, paragraph 70).

188 In the second place, it is not apparent from EIGE’s evaluation report that the successful tenderer received a greater number of points because of its knowledge acquired in the course of performing the preceding contract. In this connection, the applicant refers to the comments made by the evaluation committee in respect of the tender submitted by the successful tenderer so far as concerned Award Criterion 1 and Award Sub-criterion 1 of Award Criterion 2.

- 189 However, as regards the comment relating to Award Sub-criterion 1 of Award Criterion 2, it is not apparent from the evaluation report that the successful tenderer received more points because it proposed splitting the work into two categories, namely web development services and web consultation services, The positive evaluation of its tender seems rather to be founded on the fact that it proposed a good description of EIGE's involvement in the project's various stages and, in particular, in the testing of the products.
- 190 As regards the comment on Award Criterion 1, the award of 20 points out of 20 to the tender submitted by the successful tenderer can be explained not only by the fact that the tenderer displayed a deep understanding of the objectives of the framework contract that is at the same time holistic and highly specific, but also by the fact that it analyses all the activities and tasks and relates the knowledge to the various activities to be undertaken in the context of the tender specifications, whereas the applicant's tender, as stated in paragraph 39 above, was confined to simply copy-pasting the list of activities and tasks that were mentioned in the tender specifications.
- 191 Consequently, it cannot, as the applicant suggests, be deduced from the comments on the tender submitted by the successful tenderer concerning Award Criterion 1 and Award Sub-criterion 1 of Award Criterion 2 that the successful tenderer benefited from knowledge acquired when performing a contract concluded with EIGE in 2014.
- 192 In the third place, as EIGE observes, although it is in the context of different projects the applicant itself has experience of previous work with EIGE. Accordingly, like the successful tenderer, it too was able to rely on knowledge already acquired in the course of its previous collaboration with EIGE, which it indeed did, given that, as EIGE notes, in its tender it presented its knowledge of EIGE's business as one of its strengths.
- 193 Accordingly, the applicant cannot claim that EIGE breached the principle of equal treatment by interpreting the award criteria in such a way that the successful tenderer benefited from knowledge acquired during performance of a similar contract concluded with EIGE previously.
- 194 Consequently, the plea alleging breach of the principle of equal treatment must be dismissed as unfounded.
- 195 Since the applicant has been unsuccessful in all of its pleas relating to the contested decision, the application for annulment of that decision must be dismissed.

The application for damages

- 196 By its action, the applicant also claims compensation for the damage caused by EIGE's allegedly unlawful conduct. That application for damages is based on the same unlawfulness as that relied upon in support of annulment of the contested decision and relates to a sum of EUR 72 270.
- 197 As regards the existence of a causal link between that unlawfulness — that is to say, breach of the principle of equal treatment of tenderers and of the principle of transparency and the manifest errors of assessment — and the damage allegedly suffered, the applicant submits that, if EIGE had not rejected its tender in breach of the principles of equal treatment and transparency and on the basis of manifest errors of assessment, it should have been awarded the framework contract.
- 198 As regards the damage allegedly suffered, the applicant submits that, even taking into account the broad discretion enjoyed by EIGE with respect to the award of the contract at issue, the loss of opportunity that it suffered in the present case, and the loss of the contract itself, constitute actual and certain damage in accordance with the case-law.
- 199 Finally, the applicant submits that in a situation such as that here, in which annulment of the contested decision most likely will not provide it with any advantage, with the result that the loss of opportunity is irremediable, it would be contrary to the principle of effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights of the European Union for the EU judicature to refuse to acknowledge the applicant's loss of such an opportunity or even the loss of the contract and to refuse to compensate it.
- 200 EIGE contests the applicant's arguments.
- 201 First, it should be recalled that, pursuant to the second paragraph of Article 340 TFEU, in the case of non-contractual liability, the European Union, in accordance with the general principles common to the laws of the Member States, is to make good any damage caused by its institutions or by its servants in the performance of their duties.
- 202 According to settled case-law, in order for the European Union to incur non-contractual liability under the second paragraph of Article 340 TFEU for unlawful conduct on the part of its institutions, a set of conditions must be fulfilled, namely the unlawfulness of the acts alleged against the institutions, the fact of damage and the existence of a causal link between that conduct and the damage pleaded. Where one of those conditions is not satisfied the action must be dismissed in its entirety, without there being any need to consider the other conditions (see judgments of 4 July 2000, *Bergaderm and Goupil v Commission*, C-352/98 P, EU:C:2000:361, paragraphs 39 to 42 and the case-law cited; of 9 September 2008, *FIAMM and Others v Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraphs 106 and 164 to 166 and the case-law cited; and of 15 October 2013, *Evropaiki Dynamiki v Commission*, T-474/10, not published, EU:T:2013:528, paragraph 215 and the case-law cited).
- 203 Pursuant to Article 18(2) of Regulation No 1922/2006, EIGE must, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or its servants in the performance of their duties. The

principles set out in paragraph 202 above must be regarded as applicable to non-contractual liability incurred on account of unlawful conduct by EIGE and of damage caused by it.

204 It is necessary, therefore, to examine whether those conditions are fulfilled in the present case.

205 In that regard, it should be noted that the applicant bases its application for damages on the same unlawfulness as that relied on in support of the contested decision's annulment.

206 In the present case, all the arguments which the applicant has put forward in support of its application for annulment in order to demonstrate the unlawfulness of the contested decision have been examined and rejected.

207 It follows that the applicant has failed to prove unlawful conduct on the part of EIGE.

208 The application for damages must therefore be dismissed without it being necessary to rule on the other conditions for non-contractual liability to be incurred by EIGE.

The request for confidential treatment

209 By letter registered at the Court Registry on 15 March 2017 (see paragraph 20 above), the applicant requested confidential treatment of pages 46 to 111 of Annex A.2 and pages 115 to 119 of Annex A.7 to the application.

210 These are, respectively, the technical offer and the financial offer submitted by the applicant in connection with the contract at issue.

211 In support of its request, the applicant submits, in essence, that pages 46 to 111 of Annex A.2 and pages 115 to 119 of Annex A.7 contain trade secrets so that their disclosure may reveal crucial economic, technical and financial information — which could reduce its competitiveness on the internal market for IT services and harm its business interests, causing it potential financial damage. Thus, such disclosure would infringe its fundamental rights related to the protection of intellectual property within the European Union.

212 As regards Annex A.7, it must be stated at the outset that, since the evaluation of the applicant's financial offer is not at issue in the present case, no reference is made to that annex in the present judgment.

213 As regards Annex A.2, namely the applicant's technical offer, no reference made in the present judgment to the content of that technical offer reveals crucial economic, technical and financial information containing trade secrets of the applicant.

214 Consequently, there is no legitimate reason to grant the applicant's request for confidential treatment of pages 46 to 111 of Annex A.2 and pages 115 to 119 of Annex A.7 to the application.

215 In the light of all the foregoing, the action must be dismissed in its entirety.

Costs

216 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by EIGE.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Proof IT SIA to pay the costs.**

Frimodt Nielsen Kreuschitz Póltorak

Delivered in open court in Luxembourg on 16 October 2018.

E. Coulon

M. Frimodt Nielsen

Registrar

President

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* Language of the case: English.