In Case 23/76,

LUIGI PELLEGRINI & C. S.A.S., Varese, represented and assisted by Attilio Spozio and Alessandro Migliazza, advocates at higher Italian courts, with an address for service in Luxembourg at the Chambers of Mr Arendt, 34 B/IV rue Phillippe II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Gianluigi Campogrande, a member of its Legal Department, with an address for service in Luxembourg at the offices of Mario Cervino, Legal Adviser to the Commission, place de la Gare,

defendant,

and

FLEXON-ITALIA SPA, Venice (Mestre), represented by G. B. Gasparini of the Venice Bar,

defendant,

Application for the implementation of a contract concluded between the applicant and the Commission and for compensation for the damage suffered because of the failure to observe the period of notice, submitted to the Court of Justice pursuant to an arbitration clause within the meaning of Article 153 of the EAEC Treaty and for the annulment of the decision by the Commission placing with the Flexon-Italia undertaking a contract for the cleaning of the establishment at Ispra.

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart and A. O'Keeffe, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and arguments of the parties developed during the written procedure may be summarized as follows:

I — Facts and Procedure

The cleaning work at the establishment of the Joint Nuclear Research Centre at Ispra (hereinafter referred to as 'the JNCR') was carried out from 1960 by Luigi Pellegrini, a private company. It appears that the work was originally placed with it by 'direct agreement' (a possibility which is provided for by the Financial Regulation).

In 1971 the contract for the cleaning of the establishment was put up for tender under the procedure for 'requests for tenders' provided for in Article 52 (1) of the Financial Regulation of 1968 (JO L 199, 1968, p. 1). The request for tenders was issued in the form of a draft agreement in the body of which the tenderer fills in the section headed 'price' which is left blank. In this procedure, 'the offer thought to be the most attractive may be freely chosen, taking into account the cost of performance, running costs involved and technical merit, together with the financial guarantees and the guarantees of professional competence put forward by each of the tenderers and the time for performance' (Article 53).

The applicant company submitted an offer in due form, but the offer of a tenderer other than the applicant was accepted. The other tenderer repudiated the cleaning contract shortly afterwards.

The cleaning of the establishment was then orally placed, by 'direct agreement', with the applicant company. The terms of the letter confirming this 'agreement', dated 20 December 1971, were as follows:

'With reference to the conversations which took place with Mr Sempels, we confirm to you that we instruct you to provide the cleaning services of the establishment for January and February 1972.

The services defined in the draft agreement which is now in your possession will apply, as will the tariffs which you proposed in your registered letter No 1113 of 27 November 1971'.

The 'draft agreement' was not completed by the name of the applicant company and was neither signed nor dated.

The draft agreement contains the following articles:

Article 2 — Term of contract

This agreement shall be concluded for a term of 36 months from 1 January 1972.

Article 3 — Unilateral repudiation

The Commission may at any time repudiate this agreement without incurring any liability for damages provided only that it gives 90 days' notice, notified by registered letter.

Article 14 — Amendments to the agreement.

The provisions of this agreement may be amended only in writing.

Article 15 — Law applicable and clause conferring jurisdiction

(a) This agreement shall be governed by Italian law.
(b) The Court of Justice of the European Communities shall have jurisdiction in any dispute between the Commission and the contractor relating to this agreement.

Letters in terms similar to that of 20 December 1971 were sent to the applicant on 22 February 1972, 27 February 1973, 25 June 1974 and 18 September 1975 but relating to the cleaning of the establishment during, respectively, March and April 1972, March 1973, July and August 1974 and October, November and December 1975.

In fact, the applicant provided the cleaning services at the establishment continuously until 31 January 1976.

On 18 September 1975 the Finances and Supply Division of the JNRC sent the applicant by registered letter, in addition to the general clauses and conditions applicable to contracts for the supply of services, two copies of the draft agreement relating to the cleaning services, requesting it to submit a tender in response to the fresh invitation to tender for 1976/1977 which was subject to a possible one year extension.

The applicant duly submitted a tender.

The date fixed in the conditions laid down by the invitation to tender for performance of the contract to begin was 1 January 1976. Although not obliged to do so, the authorizing officer requested beforehand the opinion of the Purchases and Contracts Advisory Committee on the content and the wording of the invitation to tender and on the procedure to be followed.

All those taking part in the request for tenders were able to carry out an inspection of the establishment, during which they were provided with any information requested.

The decision-making stage included obtaining the compulsory opinion of the Purchases and Contracts Advisory Committee (Article 62 of the Financial Regulation). As the authority empowered to take the decision, the Director of the establishment complied with this assessment.

By registered letter of 15 January 1976, the Directorate of the establishment at Ispra informed the applicant that

'We confirm what you were told at our talks in December concerning our decision to conclude the fresh cleaning contract with the Flexon undertaking.

We greatly appreciate the strong spirit of cooperation shown by your undertaking in agreeing to provide the services until 31 January 1976 in order to enable the duties to be transferred without any break in the continuity of the work.

We wish to express our thanks to you for the first rate work which you have carried out in the past as well as for your able collaboration on all occasions'.

The opinion of the Purchases and Contracts Advisory Committee in favour of choosing a company from Venice states two reasons for that choice: it is the only company of 'fully satisfactory industrial and commercial size and it alone makes provision for the training of specialist staff'.

It is not in dispute that the carrying out of the cleaning work at the establishment by Pellegrini was fully satisfactory and that the tender of the company from Venice, which was accepted, was higher, from the point of view of price, than that of Pellegrini. However the Commission maintains that Pellegrini's tender was not the lowest.

By a registered letter of 22 January 1976, the applicant addressed a complaint to

the Commission concerning the decision referred to in that letter.

The applicant points out in that complaint that provision was made for a right of unilateral repudiation (Article 3) in respect of the cleaning work at the establishment on the unequivocal condition that three months' notice should be given by registered letter. It asked that this period of notice be observed.

By a letter of 23 January 1976, the Directorate-General rejected that complaint.

On 9 March 1976 the applicant lodged this application.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Subject to reservation of all the rights of the applicant, declare that the Commission must implement the contract in question by recognizing the applicant's right to receive the three month's notice stipulated and order the Commission to pay damages, which will be determined and established during the proceedings;
2. On the basis of Article 146 of the Treaty establishing Euratom, declare unlawful, with all the consequences in law, the measure whereby the Commission, by granting to the company from Venice the contract for cleaning the interior of the establishment, refused to place the implementation of the contract for the supply of services with the applicant.
3. Order the Commission to bear the costs.

The *Commission* contends that the Court should:

(a) Dismiss the action;

(b) Order the applicant to bear the costs.

III — Submissions and arguments of the parties

The jurisdiction of the Court as regards the application for the implementation of the contract

The *Commission* expresses a doubt as to the validity of the arbitration clause as regards its form. An arbitration clause under Article 153 of the EAEC Treaty constitutes a genuine loss of jurisdiction, by making it possible to exclude potential disputes from the jurisdiction of all the national courts.

While care must be taken to avoid making the procedure onerous to no useful purpose for the party seeking to rely upon such a clause, none the less two other equally important requirements should be borne in mind:

First, to draw the attention of the conctractor to the importance of an agreement tending to exclude the settlement of possible disputes from the jurisdiction of the national courts;

Secondly, as far as possible to avoid uncertainties with regard to interpretation for the national courts before which such a case may be brought.

Indeed, in view of the total absence of a form of procedure, those courts might be prompted to declare that they had jurisdiction or, at the expence of procedural economy, would be obliged to have recourse to the procedure laid down in Article 150 of the EAEC Treaty in order to obtain the interpretation of Article 153, whilst subsequently retaining jurisdiction over the case which was before them.

However, in view of the intention of both parties from the outset that the Court of Justice should have jurisdiction, in this respect the Commission leaves the matter to the discretion of this Court.

The *applicant* asserts that the absence of any formal challenge by the Commission to the jurisdiction of the Court of Justice, together with the unequivocal acknowledgement of the intention of the parties to confer jurisdiction on that Court, amounts to full acceptance of its jurisdiction. Indeed, Community law, which spurns all formalism, contains no provision as to the form which a special agreement on jurisdiction between the parties should take, and the law of the Member States unanimously acknowledges that the absence of challenge to the jurisdiction of the courts before which the case is brought amounts to acceptance of the jurisdiction of that court when the court is not prevented by any reason of functional jurisdiction from so doing.

The law applicable

The applicant and the defendant agree that as regards the application for the implementation of the contract, Italian law applies.

The substance of the case

The application for the implementation of the contract

The *applicant* maintains that the Commission was under a duty to give it three months' notice when it (the Commission) had decided not to renew the cleaning contract any further. Under the contract, the relations between the parties were governed by the draft agreement and by Italian law. That draft provides for three months' notice.

Even if if is correct that the fixing of a precise date other than the date contained in the draft for the expiry of the contract was capable of altering the period initially prescribed, namely 36 months, and that such fixing made the notice clause ineffective in the case of a contract of two or three months duration since the period prescribed by the clause was either longer than or the same length as such contract, the situation in this instance was different because, in the applicant's opinion, the contract was a contract for the provision of services from time to time.

The applicant was informed only at the end of December 1975 of the Commission's decision to conclude the new contract with another undertaking. It was asked by the Commission to continue providing its own services until 31 January 1976, in order to enable the tasks to be transferred.

Thus Pellegrini extended the provision of its services, which should have ended on 31 December, and engaged resources and staff for that purpose for a period which was to last one month.

This legal situation is provided for by Italian law. Article 1563 (2) of the Italian Civil Code provides that, 'If the person to whom services are provided periodically has the power to fix the date for the performance of the various services, he shall give the person providing the services reasonable advance notice of the date thereof'. The 'draft agreement' lays down a period of notice of three months, considering that that length of time is necessary to dismantle the organization of the undertaking providing the services. Thus the Commission was able to ask Pellegrini to continue providing its services, but it cannot do so without having regard to Pellegrini's right to a reasonable period of notice in order to dismantle its organization without incurring loss.

It cannot be maintained that the applicant should have taken this action as from 18 September 1975, the date on which notice was given of the new request for tenders, for the simple reason that the Commission did not inform Pellegrini until the end of December that it had chosen another company, while at the same time asking it to keep its own organization in working order and to operate for a further month: the period

of notice was too short, taking into account the precise provisions of the draft agreement, as well as of the agreements taken as a whole, which had always provided for an extension of the contract for two or three months and never for one month only.

The establishment of the damages in respect of the loss arising from the excessive shortness of the period of notice given to Pellegrini raises considerable difficulties.

The Italian law applicable in this instance contains two provisions according to which they may be quantified.

The compensation for damages arising from non-performance or delay shall include both the loss sustained by the creditor and the loss of profit, in so far as they are a direct and immediate consequence thereof (Article 1223 of the Italian Civil Code).

If the exact amount of the damages cannot be proved, the court shall quantify the loss suffered according to the rules of natural justice (Article 1226 of the Italian Civil Code).

Accordingly Pellegrini leaves the matter to the assessment of this Court according to the rules of natural justice which, on the basis of the economic value of the contract, will be able to deduce therefrom all the necessary facts for the quantification.

The *Commission* replies that Article 1563 (2) of the Italian Civil Code is not relevant. In reality, when mention is made in that provision of the right to fix the date for the various occasions on which services are to be provided, it is intended to refer to the right to fix the various dates for performance and not the right to repudiate the contract. In fact the possibility of repudiation is provided for and regulated further by Article 1569, but only in respect of contracts of indeterminate length, fixed-term contracts being governed by the general principle that they terminate upon the expiry of the prescribed period.

In view of the possibility of budgetary restrictions, the Commission has always reserved to itself the right of unilaterally terminating the contract and, in the event of its doing so, it must observe a period of notice (Article 3 of the draft agreement). On the other hand, when the contract reaches its term, the relationship ends automatically.

After the expiry of the term originally agreed, the contract was renewed several times, always for a limited period.

Because it was asked in December 1975 to provide until 31 January the services previously supplied, and agreed to do so, the applicant therefore knew, without a shadow of a doubt, that it was given no guarantee of a further extension of the old contract or the award of the new contract.

The Commission contends that it cannot be complained that it has failed to fulfil any of its obligations. Therefore there are no grounds on which to base a judgment ordering it to carry out an obligation or to pay compensation for damage; the applicant has produced no evidence of any damage which it may have suffered.

The application for annulment

The *applicant* asserts that the measure declaring the company from Venice to be the successful tenderer for the cleaning services is vitiated by misuse of powers in that it fails to name Pellegrini as the successful tenderer for the cleaning services at the establishment in spite of the conclusive proof adduced by Pellegrini which follows, apart from a large number of documents, from the registered letter of 16 January 1976 from the Directorate-General, and even though Pellegrini submitted a tender with a price which was much more favourable to the Community.

Thus, instead of pursuing the specific aim of the measure which concludes the adjudication procedure and which consists in providing the Community with the necessary services on the most favourable terms, the Community body pursued a different aim not at all consistent with the Community's interests which finally gave an undue advantage to a third party.

The measure is also vitiated by a further misuse of powers, in so far as the lack of foresight and negligence shown by the Commission amounts to a failure to have regard to the legal purpose of the measure.

In its defence the *Commission* asserts that an administration which organizes a request for tenders is not bound to award the contract to the lowest bidder. On the contrary it must assess all the details of the tender within the economic context in which the request for tenders is taking place, and its choice does not necessarily fall upon the least expensive tender, but upon that which, in practice, gives the most substantial guarantees of meeting the interests of the public authority.

An infinitely more advantageous offer from the point of view of cost may well be deemed far less attractive if account is taken of the structure and the working methods of the tenderer's undertaking having regard to the requirements of the public authority for the period over which the contract is to be performed. Hitherto faultless supply of services may be inadequate in view of new management principles which the public authority intends to apply.

The ground of misuse of powers does not appear to be supported by objective, relevant and concordant evidence apt to prove that the aim of the Commission's decision was another than that of the interests of the service.

As regards the ground based on the clear lack of foresight and care, the Commission claims that all those who took part in the request for tenders carried out an inspection of the establishment during which any information asked for was provided, and that the decision-making stage included obtaining the compulsory opinion of the Purchases and Contracts Advisory Committee, the task of which is to evaluate the tenders submitted from the technical and economic point of view or to make an assessment of the advantages and disadvantages of the choice made by the Commission. Not only did the Commission observe the rules laid down by the provisions in force for the purpose of ensuring that the decision was consistent with the interests of the service, but it went to the trouble of seeking the opinion of a technical advisory body even though that was not compulsory.

Pellegrini replies that the decision of the Commission is based upon an opinion which is itself defective. In fact, the opinion only cites two grounds for the choice made: only the company from Venice was, according to the opinion, of 'fully satisfactory commercial and industrial size' and it alone makes provision for the training of specialist staff. It was not found that the company from Venice was the only one which possessed the other qualifications, references and financial requirements because, at all events, owing to the perfect course of the past dealings with Pellegrini, which had been acknowledged several times, it was impossible for Pellegrini to offer less substantial guarantees.

The Commission had essentially to concern itself with obtaining more economical service of equal quality; such is the specific purpose of the measure.

Pellegrini's antecedents offered every guarantee of a fully satisfactory performance of the services; no actual comment was made as to the inadequacy of that undertaking's industrial size,

taking into account of course the service to be carried out, or as to its capacity for training specialist staff to perform cleaning work.

Consequently, the stated grounds are not relevant or at least they relate to purposes which are completely secondary in relation to the specific objective of the measure, since the Commission had in the first place to concern itself with concluding a contract enabling the cleaning services to be adequately provided. The grounds distort the facts in that they conflict with a point of fact, namely the commendable performance of the previous services, from which it emerges that Pellegrini also devoted attention to the training of its staff, for otherwise it could not have provided its services properly; the grounds appear totally wrong, both because Pellegrini showed that it is of appropriate industrial size to perform the services, and because it is not clear why it was necessary to inquire into the commercial size of an undertaking which has to carry out a cleaning service only in the Euratom establishment in Italy. It is the applicant's submission that these arguments completely refute the line of argument embodied in the compulsory opinion, in which the Commission concurred. The least that was required was to show, by means of appropriate, detailed and comparative examination, why Pellegrini did not possess the qualifications which the company from Venice was found to have.

The total lack of such examination shows that the procedure followed gave no more than an appearance of legality, and that it ended in a defective measure.

In its rejoinder the *Commission* asserts that the party relying upon a misuse of powers must show, at least by means of objective, relevant and concordant evidence, that the measure was taken for an exclusive or at least determining purpose, other than the purpose for which the power of decision had been conferred, or that, as a result of a serious lack of foresight or care, the administrative authority objectively failed to have regard to the legal purpose of the measure.

Pellegrini has failed to prove either.

The legal purpose of the Commission's decision was not to obtain services equal in quality at a lower price. On the contrary the Commission had to aim at obtaining on appropriate economic terms such services as was deemed best suited to the requirements of the Centre. The contract was not awarded as the result of an adjudication procedure, but as the result of a request for tenders. The decision on the expediency of using one of these procedures rather than the other comes within the discretion of the authorizing officer who, in this instance, had previously sought the optional opinion of the Purchases and Contracts Advisory Committee.

The examination of the various tenders pursuant to Article 59 (2) of the Financial Regulation of 25 April 1973 (OJ L 116, p. 1) is based upon a threefold technical and economic assessment.

This is from the point of view of the service tendered which is best suited to meet the needs of the administrative authority, taking account of technical merit and the other features of the service; from the point of view of the commensurability of the relationship between the price asked and the services offered; and from the point of view of the guarantees which each tenderer offers that he is capable of carrying out the obligation which he undertakes to discharge.

The compulsory opinion of the Purchases and Contracts Advisory Committee carries out a more thorough examination and a more considered assessment of each of these technical and economic aspects; finally, the prior supervision by the financial controller of

the choice of a contractor is designed to ensure that the criteria of good financial management are followed.

Formal compliance with these rules of procedure in itself raises a presumption of lawfulness in respect of the decision adopted. This presumption appears to be all the stronger when, not only has the procedure been formally followed, but also the three processes of decision, consultation and supervision have come to identical conclusions regarding the merits, and concur in acknowledging the aptness of the measure in question.

Not only did the services offered by the company from Venice meet the needs of the Ispra Centre in all particulars, but also, by reason of its industrial and commercial size, that company was the only one which was capable of fulfilling the management criteria which the Commission proposes to implement.

There is no doubt that the chosen undertaking is capable of ensuring particularly thorough performance of the cleaning services. The larger size of the undertaking, from the commercial and industrial point of view and the retraining of its staff for their part guarantee in particular, in the relationship between the Commission and the holder of the contract, more flexible management than that which could be obtained in the case of the other tenderers, and less dependent on external factors than had been the case with the relationship with Pellegrini. Management and mobility of staff in a climate of social tranquillity constitute a primary requirement for the Ispra Centre, which is perpetually subject to the hazards of decisions on programmes. Precisely by virtue of its capacity for increasing its work-force without difficulty with trained staff and for utilizing surplus staff elsewhere without problems, a large-scale undertaking concerned about the retraining of its staff shows, even from the purely economic point of view, that it meets the requirements of the Centre, a fact which cannot be overlooked.

Continued employment for the staff of the undertaking holding the contract is in fact a problem with economic as well as social implications which the Commission must take into account in order to avoid the direct repercussions on the establishment which conflicts on this subject could have. Therefore when choosing a contractor, the defendant was within its rights and was taking care of its own economic interests in taking care to avoid incurring once more, during the implementation or on the expiry of the contract, the problem of guaranteeing employment for the staff of the contract-holder.

The applicant is unable to offer a single piece of relevant evidence of the alleged misuse of powers to which the request for tenders at issue gave rise. At all events, its arguments are, moreover, not supported by the many objective and concordant pieces of evidence which, according to the case-law of the Court, are necessary to establish that the application is well founded.

IV — Oral procedure

The parties were heard at the hearing on 5 October 1976. The advocate representing Flexon-Italia, to which the contract for the cleaning of the establishment of the JNRC at Ispra for 1976 was awarded, appeared before the Court to support the conclusions of the Commission.

The Advocate-General delivered his opinion at the hearing on 27 October 1976.

Law

1 By an application registered at the Court Registry on 9 March 1976, the Luigi Pellegrini & C. S.a.s. undertaking, responsible since 1960 for the cleaning work at the Nuclear Research Centre at Ispra, requests, first, that the Commission should be ordered to pay it damages for breach of contractual commitments and, secondly, the annulment of the Commission's decision conferring the performance of the cleaning work on a rival firm.

2 Having decided in 1971 to bring the previous contractual commitments to an end, the Commission issued a request for tenders with a view to awarding a new contract for the cleaning of the said establishment for a period of 36 months from 1 January 1972, on the basis of a draft agreement drawn up by it.

3 The applicant duly took part in the request for tenders, but its tender was not accepted.

4 When a competing firm, whose offer had been accepted, repudiated the contract before beginning performance of it, the Commission orally requested the applicant to carry out the cleaning of the establishment for the months of January and February 1972 under the terms and conditions set out in the 'draft agreement'.

5 The applicant accepted, and the agreement thus established was confirmed by a letter of 20 December 1971 from the Commission which expressly referred to the 'services defined in the draft agreement'.

6 This agreement was renewed on successive occasions, each time for periods of one, two or three months, until December 1975.

7 Following a fresh request for tenders in which the applicant once again took part, the Commission orally informed the applicant, in December 1975, that a competing firm had won the contract and asked the applicant to continue to carry out the cleaning of the establishment during January 1976 in order to facilitate the transition.

The action on the contract

Jurisdiction

8 The applicant takes the view that the Court has jurisdiction to give a ruling on the first head of its conclusions by virtue of an arbitration clause contained in Article 15 of the 'draft agreement'.

It is expressly provided in Article 15 of the 'draft agreement' that the Court shall have jurisdiction, pursuant to Article 153 of the EAEC Treaty, to decide any disputes between the Commission and the contractor relating to the said agreement, the agreement being moreover governed by Italian law.

9 Both parties agree that the agreement reached between them in December 1971 involved conferring jurisdiction on the Court.

However, while declaring itself prepared to accept this jurisdiction, the Commission expressed a doubt as to the formal validity of the clause conferring jurisdiction.

10 Article 38 (6) of the Rules of Procedure stipulates that any application submitted under Article 153 of the Euratom Treaty shall be accompanied by a copy of the arbitration clause.

Since these requirements have been fulfilled in this instance by the production of the contractual documents, consisting in the 'draft agreement' and the correspondence referring thereto, the bringing of the matter before the Court of Justice under Article 153 is valid.

Substance of the case

11 Since the letter of 20 December 1971 expressly referred to the services laid down in the 'draft agreement', the terms and conditions of that draft were to govern the contractual relationship in so far as they were not excluded or amended by the express terms of the letters.

Thus the clause in Article 2 which fixed the term of the contract at 36 months was excluded.

12 First, the applicant invoked Article 3 of the 'draft agreement' which reserves to the Commission a right of unilateral repudiation subject to three months' notice, in order to maintain that the Commission was obliged to give it such notice before putting an end to the contractual relationship at issue.

13 Even if this clause applies, under certain circumstances, in cases of anticipatory repudiation of the contract, it cannot come into play in this instance.

14 In fact the letter of 18 September 1975 specifies that the applicant remained responsible for the cleaning work only until 31 December 1975.

15 Furthermore, the applicant was notified, by a letter of 18 September 1975, of the issue of a request for tenders, in which it took part by submitting an offer to the Directorate of the Centre.

16 Under these circumstances, the contractual relationship was to come to an end on 31 December 1975.

17 Secondly, on the basis of Italian law, which applies to the contract by virtue of Article 15 (1) of the 'draft agreement', the applicant seeks to rely upon the provisions of Article 1563 (2) of the Italian Civil Code.

18 Under that provision, which relates to contracts of 'somministrazione' (supply), if the party entitled to receive the supply has the right to fix the dates of each occasion on which services are to be provided, he must give reasonable advance notice informing the party providing the services of such dates.

19 Even if this provision were applicable to the contract in question, the applicant must have known, from the moment when the Commission had informed it in September 1975 that its services would no longer be required after 31 December 1975 and that a request for tenders had been issued with a view to a new contract, that the contractual relationship would expire on 31 December 1975, that is in three months' time.

20 As that period corresponds to the period fixed in the 'draft agreement' in the event of anticipatory repudiation, it must be considered as reasonable notice.

21 When in December 1975 the applicant was approached by the Commission with a view to carrying out provisionally the cleaning of the establishment at Ispra during January 1976 in order to enable the tasks to be transferred to the new company, the Commission was not acting in the exercise of a right conferred upon it by the 'draft agreement'.

By that means, it was proposing, for a short period, a new fixed-term contract which Pellegrini accepted.

22 Accordingly, in so far as the application is based upon the alleged breach of the contract, it must be dismissed as unfounded.

The application for annulment

23 The applicant seeks the annulment of the measure by which the Commission decided to conclude the new cleaning contract for the establishment at Ispra with Flexon-Italia.

It alleges that the act is vitiated by misuse of powers or at least by negligence.

24 In this connexion, it bases itself upon the fact that the tender accepted was 50 % higher than all the others, and that the only reasons which the Commission gave for its decision and which appear in the compulsory opinion of the Purchases and Contracts Advisory Committee were irrelevant with regard to the choice of an undertaking carrying out the cleaning of the establishment at Ispra alone.

25 As the applicant had carried out the cleaning service for many years in a perfectly satisfactory manner, as emerges from the assessments made by the Directorate of the establishment at Ispra, the true purpose of the procedure of request for tenders was to remove the applicant and to obtain for Flexon an undue advantage.

26 Under Article 59 (2) of the Financial Regulation of 1973 (OJ L 116, 1973, p. 15) the administrative authority may freely choose the offer 'thought to be the most attractive', which leaves it a certain margin of discretion.

27 This provision does not stipulate that the price must constitute the only decisive factor in the evaluation of the financial and technical aspects of the offers.

28 In a procedure for request for tenders, the fact that the Commission chose an undertaking whose offer was higher in price than the others does not of itself constitute a misuse of powers.

29 The reasons stated by the Commission to justify its choice, in particular the stability of employment which the chosen undertaking was capable of offering to its workers through its ability to transfer them to other tasks, came within the considerations of a technical nature which it could take into account under Article 59 of the Financial Regulation for the purpose of making its choice.

30 In order to find that there has been a misuse of powers, it would have to be shown that the reasons for the Commission's choice were extraneous to the interests of the service.

Although the applicant's statements may give rise to doubts in this connexion, it has nonetheless not proved this fact sufficiently in law.

The admissibility of the conclusions directed against Flexon-Italia

31 The applicant brought an action against Flexon-Italia SpA at the same time as against the Commission.

Since the said company is not a party to the arbitration clause which governs the first head of the application, the Court has no jurisdiction with regard to it.

32 As regards the submissions for annulment based on Article 146 of the EAEC Treaty, the only possible defendant is the institution from which the contested measure emanates.

33 Therefore, in so far as the action is directed against the company Flexon-Italia, it is not admissible.

Costs

34 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading.

Since Flexon did not submit any pleadings in this connexion, it must bear its own costs.

35 As regards the costs of the Commission, the successful party, Article 69 (3) of the said Rules provides that, where the circumstances are exceptional, the Court may order that the parties bear their own costs.

In this instance, since it had been informed by the Commission that its work in the past had been entirely satisfactory and had learned that the prices of Flexon were markedly higher than its own, the applicant had good reason to consider itself justified in asking the Commission to explain before the Court the grounds for its choice.

In these circumstances, instead of ordering the applicant to bear all the costs, it should be ordered only to bear its own costs.

On these grounds,

THE COURT

hereby:

1. Dismisses the action;

2. Orders each party to bear its own costs.

Kutscher Donner Pescatore

Mertens de Wilmars Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 7 December 1976.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 27 OCTOBER 1976 [1]

Mr President,
Members of the Court,

This case involves, first, a contractual dispute which has arisen between the limited partnership (société en commandite simple) Luigi Pellegrini and the Commission over the implementation of a contract concluded for the carrying out of cleaning work at the Nuclear Research Centre at Ispra; secondly, an application by the said undertaking for the annulment of the decision by which, on the basis of a request for tenders organized at the end of 1975, the Commission named a competing firm, the Flexon company, to carry out the same work from 1 February 1976.

It is clear from this that the jurisdiction of the Court will have to be examined from two different legal aspects:

— First, as regards the contractual dispute, the Pellegrini undertaking asks you to decide the issue on the basis of an arbitration clause included in the agreement between the Commission and the applicant pursuant to Article 153 of the Treaty on the European Atomic Energy Community.
— Secondly the claim for annulment is based on Article 146 of the same Treaty.

But, before I come to this examination, I consider it essential to take note of the facts underlying the application, particularly since the file submitted to this Court is incomplete in certain respects and some of the documents produced may be misleading.

I shall therefore endeavour first to clarify the factual situation before pursuing the legal discussion.

It is not disputed that from 1960 onwards the cleaning services in respect

1 — Translated from the French.