JUDGMENT OF THE COURT (Fifth Chamber)
25 April 1996 *

In Case C-87/94,

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by Jan Devadder, Director at the Ministry of Foreign Affairs, Foreign Trade and Cooperation for Development, acting as Agent, and by Michel Waelbroeck and Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

APPLICATION for a declaration that, by taking into account, in the procedure for the award of a public contract by the Société Régionale Wallonne du Transport, amendments made to one of the tenders after the opening of those tenders, by admitting to the procedure for the award of the contract a tenderer who did not meet the selection criteria laid down in the contract documents and by accepting a tender which did not meet the criteria for the award of the contract laid down in the contract documents, the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 90/531/EEC of 17 September 1990 on the procurement

* Language of the case: French.

procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1) and to comply with the principle of equal treatment, which underlies all the rules on procedures for the award of public contracts,

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward (Rapporteur), President of the Chamber, J. C. Moitinho de Almeida, C. Gulmann, P. Jann and L. Sevón, Judges,

Advocate General: C. O. Lenz,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 13 July 1995,

after hearing the Opinion of the Advocate General at the sitting on 12 September 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 11 March 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by taking into account, in the procedure for the award of a public contract by the Société Régionale Wallonne du Transport (SRWT), amendments made to one of the tenders after the opening of those tenders, by admitting

to the procedure for the award of the contract a tenderer who did not meet the selection criteria laid down in the contract documents and by accepting a tender which did not meet the criteria for the award of the contract laid down in the contract documents, the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1, hereinafter 'the Directive') and to comply with the principle of equal treatment, which underlies all the rules on procedures for the award of public contracts.

The Directive

2 The 32nd and 33rd recitals in the preamble to the Directive state that the rules to be applied by the entities concerned should establish a framework for sound commercial practice and leave a maximum of flexibility and that, as a counterpart for such flexibility and in the interest of mutual confidence, a minimum level of transparency must be ensured.

3 Article 2 of the Directive mentions, as one of the contracting entities to which the Directive applies, public undertakings operating a network providing a public bus service. Under the second subparagraph of Article 2(2)(c) such a network exists where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

4 Article 4(1) provides that, when awarding supply contracts, the contracting entities are to apply procedures which are adapted to the provisions of the Directive.

5 Article 4(2) states that contracting entities are to ensure that there is no discrimination between different suppliers or contractors.

6 Article 27(2) provides that where the contract is to be awarded to the most economically advantageous tender '... contracting entities shall state in the contract documents or in the tender notice all the criteria they intend to apply to the award, where possible in descending order of importance'.

7 Finally, Article 27(3) states:

'Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting entities may take account of variants which are submitted by a tenderer and meet the minimum specifications required by the contracting entities. Contracting entities shall state in the contract documents the minimum specifications to be respected by the variants and any specific requirements for their presentation. Where variants are not permitted, they shall so indicate in the contract documents.'

8 A joint statement by the Council and the Commission concerning Article 15 of the Directive (OJ 1990 L 297, p. 48) provides:

'*The Council and the Commission* state that in open and restricted procedures all negotiation with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting entities and provided this does not involve discrimination.'

The facts

9 By a tender notice published in the supplement to the *Official Journal of the European Communities* of 22 April 1993 (OJ 1993 S 78, p. 76), the SRWT, which is based in Namur (Belgium), issued an invitation to tender for the award, under an open procedure, of a public contract for the supply of 307 standard vehicles. That contract, for an estimated sum of over BFR 2 000 000 000 (excluding VAT) and divided into eight lots, was to be performed over a period of three years.

10 The contract documents consisted of the *Cahier des Charges Type No 1* (hereinafter 'the general conditions') and the *Cahier Spécial des Charges No 545* (hereinafter 'the special conditions'), which amended the general conditions in certain respects.

11 Point 20.2 of the special conditions provided that the contract was to be awarded to the most economically advantageous tender. That tender would be selected on the basis of an evaluation of the tenders by reference to the award criteria under headings which are set out in point 59 of the Advocate General's Opinion. An evaluation was to be made, in particular, of the basic price of the bus, increased by the price of variants taken into account and then adjusted in accordance with the advantages and disadvantages resulting from the application of ten technical assessment criteria (hereinafter 'the technical criteria').

12 The SRWT expressly requested potential tenderers to propose certain variants concerning the financial structure of the contract, such as staggered payment terms, lease or hire of the vehicles.

13 As regards the technical criteria, the special conditions laid down, under each heading, a formula enabling the SRWT to allocate for certain features of the buses

offered a notional bonus or penalty in 'francs fictifs', the amount of which depended on the variables of the formula and was to be added to or deducted from the basic price.

14 After sending the contract documents to the interested parties, the SRWT issued three notices of amendment, dated 30 April, 5 May and 28 May 1993, rectifying and clarifying the contract documents in certain respects. In the second notice the SRWT clarified certain aspects of the contract documents relating to the minimum number of seated places, the desired total number of places, the maximum height of the floor and the formula for calculating one of the notional penalties. Each notice stated that tenderers had to indicate clearly in their tenders that they had received the notices of amendment and that they had taken them into account.

15 By 7 June 1993, the date fixed by the tender notice for both the receipt and the public opening of tenders, the following five companies had submitted tenders: EMI (Aubange), Van Hool (Koningshooikt), Mercedes-Belgium (Brussels), Berkhof (Roeselaere) and Jonckheere (Roeselaere).

16 The SRWT examined those tenders during June and July 1993. A memorandum dated 24 August 1993, drawn up for the meeting of the *conseil d'administration* on 2 September 1993, recommended the award of Lot No 1 to Jonckheere and Lots Nos 2 to 6 to Van Hool.

17 In the meantime, on 3, 23 and 24 August 1993 EMI had sent to the contracting entity three 'supplementary' notes commenting on certain points of its initial tenders, in particular fuel consumption, the frequency of engine and gearbox replacements, and certain aspects of the technical quality of the material offered.

18 After examining those three notes, the technical department of the contracting entity drew up a memorandum on 31 August 1993 stating that EMI's supplementary notes contained changes to its initial tenders and could not therefore be taken into account. The proposals for the award of contracts in the memorandum drawn up for the meeting on 2 September 1993 should therefore still stand.

19 At the meeting on 2 September 1993 the *conseil d'administration* took the view that it had insufficient information to adopt a final decision. In particular it was unsure whether it could take EMI's three supplementary notes into account and decided to ask for a legal opinion on that question from the Walloon Minister of Transport.

20 By letter of 14 September 1993 the Walloon Minister of Transport replied that, as regards most of the points mentioned, no legal problem would be raised by taking into account EMI's three supplementary notes. He therefore suggested that the file be re-examined in the light of his observations.

21 On 28 September 1993 the SRWT requested EMI to confirm the fuel consumption figures indicated in its supplementary note of 24 August 1993 and also the frequency of the engine and gear box replacements referred to in the supplementary note of 23 August 1993. By letter of 29 September 1993 EMI confirmed that the information it had supplied was correct.

22 Following that confirmation, the SRWT undertook a fresh comparison of the tenders, taking into account the content of the three supplementary notes. A memorandum prepared for the meeting of the *conseil d'administation* on 6 October 1993 proposed awarding Lot No 1 to Jonckheere and Lots Nos 2 to 6 to EMI.

23 At its meeting on 6 October 1993 the *conseil d'administration* decided, first, to adopt those proposals and thus award Lot No 1 to Jonckheere and Lots Nos 2 to 6 to EMI and, secondly, to postpone until 1996 an order for 30 vehicles.

24 On the same day, Van Hool applied to the Belgian Conseil d'État for an order suspending the operation of that decision under the emergency procedure. That application was dismissed by judgment of 17 November 1993.

25 On 30 November 1993 the Commission, with which Van Hool had lodged a complaint, gave the Kingdom of Belgium formal notice to submit its observations pursuant to Article 169 of the Treaty. By letter of 15 December 1993 the Belgian Government stated that the allegation that it had failed to fulfil its obligations was unfounded. The Commission was not satisfied by that reply and delivered a reasoned opinion to the Belgian Government, requesting it to intervene with the competent authorities to suspend the legal effects of the contract concluded between the SRWT and EMI. In its reply to that opinion, the Belgian Government claimed that the Commission had not proved any failure to fulfil obligations.

26 On 11 March 1994 the Commission brought the present action and applied for interim measures to suspend both SRWT's decision to award the contract and the measures implementing that decision. That application was dismissed by order of 22 April 1994.

27 By letter of 9 June 1995 the Commission abandoned its second plea, which alleged that the Kingdom of Belgium had accepted tenders from EMI which did not meet the selection criteria laid down in the special conditions.

28 The application, as so amended, seeks a declaration that the Kingdom of Belgium has failed to fulfil its obligations under the Directive and to comply with the principle of equal treatment of tenderers which underlies all the rules on procedures for the award of public contracts, in that, in the procedure for the award of a public contract by the SRWT,

— it took into account amendments made to one of the tenders after the opening of tenders, and

— it accepted a tender which did not meet the criteria for the award of the contract laid down in the contract documents.

29 Before examining those heads of complaint it is necessary to consider the Belgian Government's claim that the Directive does not apply in the present case.

The applicability of Community law

30 It is not disputed that the SRWT is a public undertaking operating a network providing a public bus service within the meaning of Article 2 of the Directive and that it therefore had to comply with the rules of the Directive, in conformity with Article 4, when it awarded the contract for the supply of the eight lots of buses at the origin of this action.

31 However, since all the tenderers are Belgian companies, the Belgian Government claims that the case concerned a purely internal situation to which Community law did not apply.

32 That argument cannot be accepted.

33 The obligation imposed on contracting entities by Article 4(1) of the Directive is not subject to any condition concerning the nationality or seat of tenderers. Moreover, as the Advocate General has pointed out in point 24 of his Opinion, it is always possible that undertakings established in other Member States may be concerned directly or indirectly by the award of a contract. The procedure laid down by the Directive must therefore be observed irrespective of the nationality or seat of the tenderers.

34 In the course of the procedure the Belgian Government also claimed that the contracting entity was not obliged to award the contract through an open procedure. It could have chosen a negotiated procedure and its conduct would have been in conformity with such a procedure.

35 Suffice it to state that, although under Article 15(1) of the Directive contracting entities obliged to apply the procedures in the Directive do indeed have a degree of choice regarding the procedure to be applied to a contract, once they have issued an invitation to tender under one particular procedure, they are required to observe the rules applicable to it, until the contract has been finally awarded.

The heads of complaint

36 The Commission considers that, by taking into account information submitted to it in EMI's three supplementary notes concerning, in particular, fuel consumption, the frequency of engine and gear box replacements, and certain aspects of the

technical quality of the material offered, EMI breached the principle of the equal treatment of tenderers.

37 As regards fuel consumption, the Commission complains that, when evaluating the tenders, the Kingdom of Belgium took into account the new consumption indicated by EMI to the SRWT after the opening of the tenders, which had been changed from the figure in its initial tenders.

38 As regards the frequency of engine and gear box replacements, the Commission complains that the Kingdom of Belgium took into account information supplied by EMI after the opening of tenders, which amended its initial tenders and also failed to comply with the prescriptive requirements of the contract documents.

39 As regards the technical quality of the material offered, the Commission considers that, when evaluating EMI's tenders, the SRWT wrongly took into account matters not included amongst the award criteria.

Fuel consumption

40 Point 20.2.2.1 of the special conditions provides:

'20.2.2.1 Fuel consumption

When comparing tenders, a notional advantage equivalent to the value of 6 000 litres of diesel for a standard bus (official price at the date of the opening of tenders) will be awarded for each whole litre per 100 km difference between the fuel consumption guaranteed in the tender (including tolerance) under the test cycle laid down in Annex 10 to these contract documents and the fuel consumption of the vehicle with the highest consumption.'

41 Under the conditions laid down in that annex, the test was to be performed with a vehicle loaded with a weight corresponding to the minimum number of passengers.

42 In its original tenders, EMI indicated a fuel consumption of 54 litres per 100 km in respect of Lots Nos 2 to 6. However, in Note No 1 (hereinafter 'Note 1') annexed to its tenders EMI claimed that, since consumption of 54 litres per 100 km had been obtained in tests on a vehicle which had not been run in and was not particularly well-tuned, the consumption which would be recorded with a vehicle which was both run in and optimally tuned could be reduced by 5 to 8% in relation to the consumption indicated in its tenders.

43 EMI also confirmed in its initial tenders that it had received the three notices of amendment and that it had taken them into account.

44 The SRWT carried out a first evaluation of the tenders on the basis of the fuel consumption indicated by EMI in its initial tenders, namely 54 litres per 100 km. Since it had the highest fuel consumption of all the tenders submitted for those lots, that consumption was, according to the method of calculation stipulated in the special conditions, to be used as the basis for evaluating the notional advantages of the other tenders. It is clear from Annexes 5 and 6 to the memorandum drawn up for the meeting of 2 September 1993 that in the course of that evaluation EMI's tenders were not accorded any notional advantage in respect of fuel consumption, whereas all the other tenderers were accorded such advantages, calculated by reference to the consumption indicated by EMI.

45 In its first supplementary note of 3 August 1993, EMI informed the SRWT of its interpretation of the purport of notice of amendment No 2. EMI claimed that, as a consequence of that notice, the total number of places stipulated in the special conditions as an absolute contractual requirement had been waived. That waiver affected the calculation of fuel consumption, since the equal treatment of tenderers logically required that the calculation be made on the basis of maximum authorized weight. It concluded that, for its data to be compared with those of the other tenderers, it was necessary to take into account the consumption indicated in its initial tenders, reduced by 8%.

46 Thereafter, in its supplementary note of 24 August 1993, EMI informed the SRWT, after referring to the contents of Note 1, that it had carried out further tests, this time under optimal conditions, and that these had shown a fuel consumption for its tenders relating to Lots Nos 2 to 6 of 45 litres per 100 km, representing a reduction of 16.7% on the consumption of 54 litres per 100 km. EMI requested the SRWT to take that new consumption into account when evaluating its tenders.

47 The Belgian Government has confirmed that SRWT did take that new consumption into account when awarding the contract to EMI.

48 Since EMI's new fuel consumption was no longer the highest, the SRWT re-evaluated the notional advantages awarded to all the tenderers. Annexes 1 and 2 to the memorandum drafted for the meeting of 6 October 1993 show that in the second evaluation the notional advantages of tenderers other than EMI were reduced in relation to those awarded on the first evaluation, so that Jonckheere no longer had any notional advantages, whereas EMI's tenders were awarded an advantage.

49 The Commission considers that SRWT breached the principle of the equal treatment of tenderers by taking into account, when allocating the contract, the data

supplied by EMI in its supplementary note of 24 August 1993 which amended, after the opening of tenders, the consumption initially indicated by EMI.

50 The Belgian Government submits, first, that the principle of equality of treatment actually required EMI's correction of its fuel consumption to be taken into account in the award of the contract, since the other tenderers had indicated already optimized results in their initial tenders. Secondly, it points out that fuel consumption is objective and verifiable; the amendment was therefore not a matter of choice, nor was it made after negotiations with the contracting entity. Finally, the change had no effect on the technical characteristics of the vehicle or its engine and EMI's initial tenders were not therefore amended.

51 It is to be noted at the outset that in Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353 (the 'Storebaelt case'), at paragraph 33, the Court held that the duty to observe the principle of equal treatment of tenderers lies at the heart of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

52 As is shown by Article 4(2) the position is the same in the case of the Directive in question here.

53 Furthermore, the 33rd recital in the preamble shows that the Directive aims to ensure a minimum level of transparency in the award of the contracts to which it applies.

54 The procedure for comparing tenders therefore had to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders.

55 When, as in the present case, a contracting entity opts for an open procedure, such equality of opportunity is ensured by the requirement under Article 16(1)(a) of the Directive for the contracting entity to act in accordance with Annex XII A of the Directive. It must therefore both set a final date for receipt of tenders, so that all tenderers have the same period after publication of the tender notice within which to prepare their tenders, and set the date, hour and place of opening tenders, which also reinforces the transparency of the procedure, since the terms of all the tenders submitted are revealed at the same time.

56 When a contracting entity takes into account an amendment to the initial tenders of only one tenderer, it is clear that that tenderer enjoys an advantage over his competitors, which breaches the principle of the equal treatment of tenderers and impairs the transparency of the procedure.

57 In the present case it is not disputed that, first, the reduction in fuel consumption indicated by EMI in its supplementary note of 24 August 1993 considerably exceeded the limit of 8% referred to by EMI in Note 1 annexed to its initial tenders and, secondly, that in its final comparison of the tenders the SRWT took into account that last figure of consumption.

58 Without it even being necessary to decide whether the SRWT could have taken into account the new consumption indicated by EMI in its supplementary note of 3 August 1993, which was within the 8% limit stipulated in its tender, the fact that that limit was exceeded shows that the new consumption of 45 litres per 100 km constituted an amendment of EMI's initial tenders. Indeed, in its supplementary notes EMI referred to points in the notices of amendment, which it claimed to

have taken into account in its initial tender, and did not explain why its new tests could not have been carried out before the final date for receipt of tenders. It follows that the consumption of 45 litres per 100 km should not on any view have been taken into account.

59 Moreover, the taking into account of those figures placed the other tenderers at a disadvantage by changing the amount of notional advantages resulting from the first comparison of tenders, thus affecting their ranking.

60 It must therefore be held that, by taking into account information on fuel consumption submitted by EMI in its supplementary note of 24 August 1993 and, therefore, after the opening of tenders, the Kingdom of Belgium failed to fulfil its obligations under the Directive.

The frequency of engine and gear box replacements

61 Point 20.2.2.2 of the special conditions provides:

'20.2.2.2 Assembly and dismantling times, price of spare parts

The tenderer shall set out the prices of spare parts and the assembly and dismantling times of the items listed in Annex 23.

In conformity with the table in Annex 23, a notional penalty will be applied automatically to all tenders to take account of maintenance costs.'

62 According to the table in Annex 23 a notional penalty was to be imposed in regard to the maintenance costs of only 45 components of the bus. For each component mentioned, that penalty was calculated by reference to a formula in which the variables were the number of identical items of that component in the bus, the dismantling time, the assembly time, the price and the foreseeable number of replacements of the component.

63 However, for the purposes of calculating the notional penalty, Annex 23 of the special conditions asked tenderers to indicate figures for only the first three variables. As regards the foreseeable number of replacements, Annex 23 set out, on the basis of SRWT's experience, a fixed number for each component, the figures for engine and gear box replacement being two and three respectively. Potential tenderers were therefore not asked to state the foreseeable number of replacements for those two components.

64 In conformity with the terms of Annex 23, EMI did not, when completing the table provided, indicate any proposal regarding the foreseeable number of replacements for the components mentioned. However, in its supplementary note of 23 August 1993 it stressed to the SRWT that provision should be made for only one engine and 1.25 gear boxes when using its buses and that the figures fixed by the SRWT in Annex 23 should not, therefore, be applied to its tenders.

65 The Belgian Government accepts that, when the SRWT calculated the notional penalty for EMI's tenders, the SRWT used those new figures instead of the figures appearing in the table in Annex 23, whereas when calculating the notional penalties for all other tenders it applied the latter figures.

66 The Commission considers that such conduct infringes the principle of equal treatment of tenderers in two respects. First, by taking the figures in question into account when awarding the contract, the SRWT allowed one of the tenderers to amend the terms of its initial tenders after they had been opened. Secondly, since those new figures did not comply with the prescriptive requirements of the table in Annex 23, the SRWT awarded the contract to a tenderer in disregard of the award criteria it had itself laid down in the special conditions.

67 As regards the first of those complaints, the Commission considers that if, following the observations submitted by EMI, the SRWT believed that, in the light of the tenders lodged, the prescriptive requirements it had laid down were wrong, it could have amended them by offering the other tenderers the same opportunity to depart from them. However, since it gave such an opportunity only to EMI, it breached the principle of equal treatment of tenderers.

68 The Belgian Government considers that EMI did not amend its initial tenders, since the material offered remained precisely the same. All the other tenderers could also have informed the SRWT that the performance of their buses exceeded the requirements of Annex 23. It concludes that, if the SRWT could not take the figures in question into account, it would be precluded from taking into consideration the advantages of vehicles of more recent design.

69 It should be recalled that Annex 23 of the special conditions did not ask tenderers to indicate the frequency of spare part replacements for their buses. On the contrary, the SRWT had fixed a figure for that element in respect of each component in the table. Moreover, in point 20.2.2.2 of the special conditions the SRWT had stated that a notional penalty would be applied to all tenders 'in accordance with the table in Annex 23'. The figures in that table must therefore be considered to be prescriptive requirements of the special conditions.

70 The Court held in the *Storebaelt* case, at paragraph 37, that when a contracting entity had laid down prescriptive requirements in the contract documents, observance of the principle of equal treatment of tenderers required that all the tenders must comply with them so as to ensure objective comparison of the tenders.

71 Accordingly, the requirements of Annex 23 continued to be applicable to all the tenders and those tenders had to comply with them. It must therefore be held that EMI was not entitled to 'amend' the terms of its initial tenders regarding those requirements and that the SRWT was not entitled to calculate EMI's notional penalties by reference to its new figures, which did not correspond to the prescriptive requirements of the special conditions.

72 The fact that EMI's new figures were taken into account necessarily gave it a real advantage when the tenders were compared. According to Annex 23, the figure relating to the frequency of spare part replacements acts, for the purposes of calculating the notional penalty, as a multiplier of the other figures provided by the tenderers relating to costs. As regards EMI's notional penalty, the SRWT used a figure for the number of replacements which was lower than that laid down in Annex 23 and, therefore, lower than those used in the calculation for the other tenders. The notional penalty for the maintenance of the components in question in EMI's buses was therefore obtained by using a lower multiplier.

73 Since the SRWT permitted only EMI to disregard the requirements in question, it is not necessary to decide whether the Commission is correct in considering that the SRWT could after opening the tenders have altered the prescriptive requirements fixed by the contract documents, giving all tenderers the same opportunity to disregard those requirements.

74 It must therefore be held with regard to this part of the complaint that, by awarding the contract to EMI on the basis of figures which did not correspond to the prescriptive requirements of Annex 23 of the special conditions for calculating its

notional penalty for maintenance costs for engine and gear box replacement, the SRWT infringed the award criteria laid down in the special conditions and also the principle of equal treatment of tenderers. The Kingdom of Belgium therefore failed to fulfil the obligations which the directive imposes on it in that regard.

The technical quality of the material offered

75 In its supplementary note of 3 August 1993 EMI claimed that 'the day-to-day running' of the buses it offered 'enables significant savings' to be made by the operator. EMI drew up two lists of features of the bus which enabled those savings to be made (hereinafter 'the cost-saving features').

76 The first list, entitled 'Quantifiable features', concerned the cantilever seats offered, a mechanism for demisting the side windows, and a special modular assembly system. EMI indicated, for each of those features, the financial advantage which would result during the lifetime of each bus, namely BFR 480 000, BFR 240 000 and BFR 100 000 respectively.

77 The second list, entitled 'Non-quantifiable features', included eight features which contributed to 'cost-savings', although EMI did not evaluate them in its initial tenders or in its supplementary note of 3 August 1993.

78 The Commission contends that the SRWT took those cost-saving features into account when deciding to award the contract to EMI, although they did not appear in the award criteria listed in the tender notice or in the contract documents. Under Article 27(2) of the Directive, which applies in the present case, only the criteria stated in the tender notice or in the contract documents should have

been taken into account by the SRWT when awarding the contract. Furthermore, the SRWT took account of those features solely when assessing EMI's tenders, while for the other tenders it applied strictly the award criteria set out in point 20.2 of the special conditions. That conduct breached, once again, the principle of equal treatment.

79 In the memorandum drawn up for the meeting of 6 October 1993 SRWT's management referred to all those cost-saving features when recommending the award of Lots Nos 2 to 6 to EMI. It stated, in the reasons for its recommendation in respect of Lot No 2, that the cost-saving features had 'a not inconsiderable financial impact', so that they were 'likely to have a favourable influence on the vehicle's operating costs, to an extent greatly exceeding the financial difference resulting solely from the valuation criteria adopted'.

80 According to the file, as regards Lots Nos 4, 5 and 6, the comparison of tenders solely on the basis of the award criteria laid down in point 20.2 of the special conditions had led to one of Van Hool's tenders being placed first, whereas one of EMI's tenders, even taking into account the figures supplied by it in its supplementary notes regarding fuel consumption and engine and gear box replacements, was placed second. The differences between the best tenders of Van Hool and the second-placed tenders of EMI amounted to BFR 294 799, BFR 471 513 and BFR 185 897 respectively for the three lots. However, after the cost-saving features had been taken into account, that initial ranking was reversed, so that, despite those differences, an EMI tender replaced the Van Hool tender as the tender recommended for those lots.

81 The Belgian Government has formally accepted that all the cost-saving features were taken into account in the decision to award the contract and that this had a decisive influence on the choice of EMI as supplier for Lots Nos 2 to 6.

82 The Belgian Government observes that point 20.2.1 of the special conditions expressly permitted the SRWT to take account of any suggestions, such as the cost-saving features. Moreover, Article 27(3) of the Directive also authorized the SRWT to take account of such suggestions, provided that they met the minimum specifications required.

83 It adds that the cost-saving features, which were in conformity with the minimum specifications in the contract documents, were not evaluated when the tenders were compared, but were taken into account as un-quantified comfort and quality features, leading to the conclusion that, taken as a whole, EMI's offer was economically the most advantageous. Furthermore, both the tender notice and the special conditions referred to the technical qualities of the material offered as being a criterion of award. It concludes that the SRWT was therefore entitled to take account of the cost-saving features at issue.

84 The Commission accepts that tenderers have the right to submit variants and that those variants may be taken into account by a contracting entity, provided, however, that the principle of equal treatment is observed. It contends that it was not observed in the present case, since the derogation from the criteria laid down in the special conditions resulted in an advantage being granted only to EMI.

85 The Court finds that the cost-saving features were not amongst the award criteria adopted by the SRWT for the award of the contract.

86 Admittedly the headings for the award criteria set out in point 20.2 of the special conditions could be interpreted — if no regard is had to the subsequent definitions — as having a wide scope (see, for example, in point 20.2.2.4 of the special conditions, the heading for the seven technical criteria, namely 'the technical qualities of the material offered'), so that, as the Belgian Government submits, all the characteristics relating to the technical qualities of the material offered would be relevant when comparing the tenders.

87 However, the SRWT itself defined all the technical criteria using a precise formula set out under each heading (see paragraph 13 of this judgment). Accordingly, the scope of the technical criteria, whatever the wording of the headings, was restricted by the formulas used by the SRWT to define them.

88 The requirement under Article 27(2) of the Directive for the contracting entities to state 'in the contract documents or in the tender notice all the criteria they intend to apply to the award, where possible in descending order of importance' is intended precisely to inform potential tenderers of the features to be taken into account in identifying the economically most advantageous offer. All the tenderers are thus aware of the award criteria to be satisfied by their tenders and the relative importance of those criteria. Moreover, that requirement ensures the observance of the principles of equal treatment of tenderers and of transparency.

89 Furthermore, although Article 27(3) of the Directive does indeed enable contracting entities to take account of variants, that provision must be interpreted in the light both of the principles underlying the Directive and of Article 27(2). Accordingly, in order to ensure that a contract is awarded on the basis of criteria known to all the tenderers before the preparation of their tender, a contracting entity can take account of variants as award criteria only in so far as it expressly mentioned them as such in the contract documents or in the tender notice.

90 As regards the Belgian Government's submissions concerning the taking into account of 'suggestions', suffice it to note that Article 27(3) of the Directive recognizes only the taking into account of variants, not suggestions. Moreover, the Directive makes no reference to them as award criteria and, consequently, such suggestions cannot be taken into account by a contracting entity when awarding the contract either.

91 In the present case it is sufficient to find that the principles of equal treatment of tenderers and of transparency of the procedure have not been observed and it is not therefore necessary to decide whether the rule laid down in Article 27(2) of the Directive precludes a contracting entity from changing its award criteria during the course of the procedure, provided that it observes those principles.

92 It is clear that, for Lots Nos 4, 5 and 6, the SRWT applied, in the case of EMI alone, the cost-saving features suggested by EMI to offset the financial differences, amounting to BFR 294 799, BFR 471 513 and BFR 185 897, between the tenders of Van Hool in first place and those of EMI placed second. Even if, as the Belgian Government submits, the SRWT did not allocate a precise value to the cost-saving features, EMI provided it with a list of 'Quantifiable features' (see paragraph 76 of this judgment), the total amount of which for each lot (BFR 820 000) more than sufficed to offset those differences.

93 On the other hand, as regards Lots Nos 2 and 3, it is evident from the memorandum drawn up for the meeting of 6 October 1993 that the tenders of EMI at issue were in first place even before the SRWT had taken the cost-saving features into account. The SRWT could not therefore have attached decisive importance to the cost-saving features relating to those lots, since EMI's tenders were already regarded as the most economically advantageous. This part of the complaint has not therefore been established.

94 It must be concluded that, by taking into account, in its comparison of tenders for Lots Nos 4, 5 and 6, the cost-saving features suggested by EMI without having referred to them in the contract documents or in the tender notice, by using them to offset the financial differences between the tenders in first place and those of EMI placed second and by accepting some of EMI's tenders as a result of taking those features into account, the Kingdom of Belgium failed to fulfil its obligations under the Directive.

95 Accordingly, the Court finds that

— by taking into account information on fuel consumption submitted by EMI in its supplementary note of 24 August 1993 and, therefore, after the opening of tenders,

— by awarding the contract to EMI on the basis of figures which did not correspond to the prescriptive requirements of Annex 23 of the special conditions for calculating the notional penalty of EMI for maintenance costs in respect of engine and gear box replacement,

— by taking into account, when comparing the tenders for Lots Nos 4, 5 and 6, the cost-saving features suggested by EMI without having referred to them in the contract documents or in the tender notice, by using them to offset the financial differences between the tenders in first place and those of EMI placed second, and by accepting some of EMI's tenders as a result of taking those features into account,

the Kingdom of Belgium has failed to fulfil its obligations under the Directive.

Costs

96 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Belgium has been unsuccessful and the Commission has applied for costs, the former must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by taking into account, in the procedure for the award of a public contract by the Société Régionale Wallonne du Transport, information on fuel consumption submitted by EMI in its supplementary note of 24 August 1993 and, therefore, after the opening of tenders, by awarding the contract to EMI on the basis of figures which did not correspond to the prescriptive requirements of Annex 23 of the special conditions for calculating the notional penalty of EMI for maintenance costs in respect of engine and gear box replacement, by taking into account, when comparing the tenders for Lots Nos 4, 5 and 6, the cost-saving features suggested by EMI without having referred to them in the contract documents or in the tender notice, by using them to offset the financial differences between the tenders in first place and those of EMI placed second, and by accepting some of EMI's tenders as a result of taking those features into account, the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;**

2. **Orders the Kingdom of Belgium to pay the costs.**

Edward Moitinho de Almeida Gulmann

Jann Sevón

Delivered in open court in Luxembourg on 25 April 1996.

R. Grass D. A. O. Edward

Registrar President of the Fifth Chamber