JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

6 July 2005 *

In Case T-148/04,

TQ3 Travel Solutions Belgium SA, established in Mechelen (Belgium), represented initially by R. Ergec and K. Möric and subsequently by B. Lissoir, lawyers,

applicant,

v

Commission of the European Communities, represented by L. Parpala and E. Manhaeve, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

supported by

Wagon-Lits Travel SA, established in Brussels (Belgium), represented by F. Herbert, H. Van Peer, lawyers, and D. Harrison, Solicitor, with an address for service in Luxembourg,

intervener,

APPLICATION, first, for annulment of the Commission's decisions not to award the applicant lot 1 of the contract which was the subject of Notice 2003/S 143 129409 for the provision of travel agency services, but to award that lot to another undertaking and, secondly, for damages to compensate for the loss suffered by the applicant following the rejection of its tender,

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

composed of J. Pirrung, President, N.J. Forwood and S. S. Papasavvas, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 March 2005,

gives the following

Judgment

Law

1 The award of service contracts by the Commission is subject to the provisions of Title V of Part One of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1; 'the Financial Regulation') and to the provisions of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1; 'the detailed implementing rules'). Those provisions are based on the relevant Community directives and, in particular, as regards service contracts, on Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1).

2 Article 100(1) of the Financial Regulation provides that '[t]he authorising officer shall decide to whom the contract is to be awarded, in compliance with the selection and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules'. Article 97(2) of the Financial Regulation and Article 138(1)(b) and (2) of the detailed implementing rules state that a contract may be awarded to the tender offering the best value for money, that is, the one with the *best price-quality ratio.*

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

'The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken ... However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.'

4 Article 139(1) of the detailed implementing rules provides that, '[i]f, for a given contract, tenders appear to be abnormally low, the contracting authority shall, before rejecting such tenders on that ground alone, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements, after due hearing of the parties, taking account of the explanations received'.

5 Article 146(4) of the detailed implementing rules provides that, '[i]n the case of abnormally low tenders as referred to in Article 139 of this regulation, the evaluation committee shall request any relevant information concerning the composition of the tender'.

Facts

6 By framework contract 98/16/IX.D.1/1 dated 13 January 1999, the company Belgium International Travel was entrusted by the Commission with the management of the travel agency services for its Brussels staff. That contract was concluded for an initial

two-year period, with the possibility of renewal for three one-year periods, that is, for the period from 1 April 1999 to 31 March 2004. By addendum dated 27 February 2001, that contract was transferred to the applicant.

7 By a contract notice of 30 May 2003, published in the *Supplement to the Official Journal of the European Union* (OJ 2003 S 103), the Commission issued an invitation to tender, in accordance with the restricted procedure, under the reference ADMIN/D1/PR/2003/051, for the provision of travel agency services for travel undertaken by officials and other staff carrying out missions and by any other persons travelling on behalf of or at the request of the Community institutions, agencies and bodies.

8 The file shows that that invitation to tender was cancelled by the Commission following the withdrawal of certain Community institutions.

9 On 29 July 2003, acting pursuant to the Financial Regulation and the detailed implementing rules, the Commission published in the *Supplement to the Official Journal of the European Union* (OJ 2003 S 143), under the reference 2003/S 143-129409, a new invitation to tender, in accordance with the restricted procedure, for the provision of travel agency services for travel undertaken by officials and other staff carrying out missions and by any other persons travelling on behalf of or at the request of certain Community institutions, agencies and bodies (section II.1.6 of the contract notice). The contract consisted of a number of lots, each corresponding to a site where the services were to be provided, including Brussels (lot 1), Luxembourg (lot 2), Grange (lot 3), Ispra (lot 4), Geel (lot 5), Petten (lot 6) and Seville (lot 7).

10 By registered letter of 28 November 2003, the applicant submitted to the Commission a tender for lots 1, 2, 3, 5, 6 and 7 of that contract.

11 By letter of 24 February 2004, the Commission informed the applicant that its tender for lot 1 of the contract ('lot 1' or 'the contract at issue') had not been accepted, since the *price-quality ratio* of its tender was lower than that of the selected tender. That letter of 24 February 2004 states:

'After examining the tenders received in response to our invitation to tender, we regret to inform you that your tender could not be accepted in respect of lots 1, 2, 3 and 7 of the above contract. The grounds justifying the rejection of your tender are the following:

Lot 1 (Brussels)

It was established that the *price-quality ratio* of your tender (51.55) is lower than that of the firm proposed as the successful tenderer (87.62) ...'

12 By letter of 8 March 2004, the applicant sought from the Commission disclosure of more detailed information regarding the choice of the tender selected for the contract at issue. The applicant also requested that the Commission suspend the procedure for the award of that contract and refrain from concluding a contract with the undertaking selected for that contract.

13 By letter of 16 March 2004, the Commission provided the applicant with information on the grounds of its decision of 24 February 2004 not to award it the contract at issue and of its decision to award it to another undertaking ('the refusal decision' and 'the award decision' respectively). The Commission pointed out inter alia that the applicant's tender had obtained 51.55 points, whereas the selected tender, from the company Wagon-Lits Travel ('WT' or 'the intervener'), had

received 87.62 points after a qualitative and financial analysis, and that, as a consequence, WT's tender offered the best value for money and justified the award of the contract at issue to that undertaking. The Commission also stated that WT's tender, although appreciably lower in terms of price than the applicant's (index 100 for WT and index 165.56 for the applicant), 'did not appear abnormally low and it was therefore unnecessary to apply the provisions of Article 139 [of the detailed implementing rules]'.

14 By fax of 17 March 2004, the Commission proposed to the applicant that framework contract 98/16/IX.D.1/1 on travel agency services, which was due to expire on 31 March 2004, be extended until 27 June 2004.

15 By letter of 19 March 2004, the Commission justified its request for an extension of the abovementioned framework contract, stating that the communication of instructions to the new contractor, namely WT, and the entry into force of the new contract could not take place by the expiry date provided for in that framework contract. That letter specified that, owing to 'time-limits which cannot be shortened and which are beyond the control of the Commission and the other contracting party, the passing of instructions to the new contractor and the entry into force of the new contract cannot take place by the natural expiry date [of the applicant's] contract'.

16 By fax of 22 March 2004, the applicant informed the Commission that it did not wish to extend the framework contract and that, consequently, that contract would expire on 1 April 2004.

17 By letters of 23 and 26 March 2004, the Commission asked the applicant to intermediate by forwarding to WT the files of 'traveller profiles' which it had drawn up, so as to 'ensure the continuity of the missions sector service'. By letters of 25 and 31 March 2004, the applicant informed the Commission that it refused to forward those profiles to WT.

18 On 31 March 2004, the Commission concluded a contract with WT for the provision of travel agency services in Brussels. That contract entered into force on 1 April 2004 with an addendum allowing the new contractor to perform the service 'ex-plant' (in its own offices) for a transitional period from 1 April to 19 May 2004.

Procedure and forms of order sought by the parties

19 By application lodged at the Registry of the Court of First Instance on 26 April 2004, the applicant brought the present action seeking, firstly, annulment of the refusal decision and the award decision and, secondly, compensation for the loss suffered by it as a result of both those decisions.

20 On 26 April 2004, the applicant lodged an application for the case to be decided under an expedited procedure in accordance with Article 76a of the Rules of Procedure of the Court of First Instance. That application was dismissed by decision of the Court of First Instance of 10 June 2004.

21 By separate document lodged at the Registry of the Court of First Instance on 26 April 2004, the applicant made an application for interim relief, seeking, firstly, suspension of operation of the refusal decision and the award decision and, secondly, an order that the Commission take the measures necessary to suspend the effects of the award decision or of the contract concluded following that decision. That application was dismissed by order of the President of the Court of First Instance of 27 July 2004, the costs relating to those proceedings having been reserved.

22 By document lodged at the Registry of the Court of First Instance on 9 June 2004, WT sought leave to intervene in the present proceedings in support of the forms of order sought by the Commission. By order of 14 July 2004, the President of the Second Chamber of the Court of First Instance granted that leave to intervene. WT lodged its statement in intervention and the other parties lodged their observations on that statement within the prescribed periods.

23 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure and, by way of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, asked the Commission to reply to a number of questions and WT, firstly, to reply to a question and, secondly, to produce a non-confidential copy of the financial and technical tender submitted in connection with the tendering procedure in question. By letter of 9 February 2005, the Commission submitted its replies to the Court's questions and, by letter of 14 February 2005, WT produced the requested document and submitted its reply to the Court's question.

24 The applicant claims that the Court of First Instance should:

— annul the refusal decision;

— annul the award decision;

— declare that the unlawful act committed by the Commission constitutes a fault capable of rendering it liable;

— order, pursuant to Article 64 of the Rules of Procedure, the production by the Commission of all the documents in its possession relating to the award of lot 1;

— refer the applicant back to the Commission for the loss suffered to be assessed;

— order the Commission to pay the costs.

25 The Commission contends that the Court should:

— dismiss the application in its entirety;

— order the applicant to pay the costs.

26 The intervener contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

The claims for annulment

27 In support of its claims for annulment, the applicant puts forward, in essence, two pleas. The first alleges infringement of Article 146 of the detailed implementing rules and a manifest error of assessment of the financial tenders. The second alleges a manifest error of assessment of the quality of the tenders.

1. *The first plea, alleging infringement of Article 146 of the detailed implementing rules and a manifest error of assessment of the financial tenders*

Arguments of the parties

28 The applicant submits that, by considering that WT's tender was not abnormally low and, therefore, by failing to comply with its obligation to request from WT any relevant information concerning the composition of the tender, the Commission infringed Article 146 of the detailed implementing rules since, in the applicant's view, Article 139 of the detailed implementing rules is not applicable to the present case.

29 According to the applicant, the price of WT's tender was 42% lower than the mean value between the tender submitted by the applicant and the tender of a third bidder which had submitted a tender which was even higher in price, the applicant's tender being assigned an index for its price of 165.56 and the most expensive tender an index of 181.13. That major difference should have prompted the Commission to consider WT's tender abnormally low, particularly since, by letter of 8 March 2004, the applicant had informed the Commission of its doubts as to the reliability of the terms of WT's tender.

30 The applicant points out that, even though the Commission enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, the Community judicature nevertheless checks compliance with the applicable procedural rules and the duty to state reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (Case T-211/02 *Tideland Signal* v *Commission* [2002] ECR II-3781, paragraph 33).

31 In that regard, the applicant recalls that the Court held in Case T-4/01 *Renco* v *Council* [2003] ECR II-171, paragraph 76, that 'the Council ... must examine the reliability and seriousness of the tenders which it considers to be generally suspect, which necessarily means that it must ask, if appropriate, for details of the individual prices which seem suspect to it, a fortiori when there are many of them' and that, in addition, 'the fact that the applicant's tender was considered to conform to the contract documents did not relieve the Council of its obligation, under the same article, to check the prices of a tender if doubts arose as to their reliability during the examination of the tenders and after the initial assessment of their conformity'.

32 In this case, the applicant points out that, for each of the lots, the price of the travel agency services is made up, on the one hand, of the 'management fee', which is the charge payable to the travel agency to cover the management costs relating to travel undertaken by staff of the Community institutions and agencies, and, on the other, the 'transaction fee', which is the charge payable to the travel agency to cover the administrative costs relating to travel undertaken by persons other than the staff of Community institutions and agencies but travelling at the request of Community institutions and agencies.

33 The applicant notes that the 'management fee' is made up of wage costs, operating expenses and general expenses. According to the applicant, wage costs make up the bulk of the 'management fee' and, therefore, of the price of the travel agency services relating to lot 1. The applicant thus estimated in its financial tender that wage costs

represented 79.5% of the 'management fee'. Since the price of travel agency services consists mainly of wage costs, the Commission should, in its view, have considered the price tendered by WT to be abnormally low.

34 In those circumstances, the applicant submits that the only possible way to reduce wage costs and therefore the price tendered, would have been to reduce significantly the number of persons assigned to the performance of the contract or the amount of their pay compared with that proposed by the applicant. Such reductions would then have been bound to have an effect on the quality of the services provided.

35 First, as regards pay, the applicant points out that the contract document provided that the travel agency services were to be provided on the premises of the Community institutions and agencies. The employment contracts of the employees are therefore subject to Belgian law, which imposes a minimum level of remuneration for employment contracts.

36 Second, as regards the number of employees, the applicant submits that the employment of 39 persons is necessary in order to ensure the quality of the services provided. Since the staff costs are irreducible, the substantial difference in price between the tender submitted by WT and those of two other tenderers suggests an abnormally low tender. It points out that, although it is possible to submit a more competitive tender than its own, a difference of 42% is, on any view, difficult to justify.

37 The applicant further submits that the Commission was wrong to pay attention to the ratio between the volume of transactions and the 'management fee', since that criterion is not included in the contract document. In that regard, the applicant

points out that no proportionality can exist between the volumes of transactions for lots 1 and 2 and the budgets estimated for those lots. The budget estimated for lot 2 represents only 12.58% of the budget estimated for lot 1. In addition, the volume estimated for lot 2 represents only 22.8% of that expected for lot 1.

38 Finally, the applicant notes that the Commission used criteria other than those set out in the contract document, firstly, in regard to the 'management fee' and, secondly, by taking into account both the profit-sharing scheme proposed by WT and its technical and logistical resources.

39 In the Commission's view, the tender submitted by WT was not abnormally low and the application of Article 139 of the detailed implementing rules was therefore not necessary. The use of the verb 'appear' in Article 139(1) of the detailed implementing rules makes clear the intention of the Community legislature to confer on the contracting authority a wide discretion during tendering procedures. The Commission further points out that it is clear from the same article that an abnormally low tender is not unlawful per se, since explanations for the abnormally low tender in question may be taken into account.

40 The Commission points out that there was no significant difference between the average cost of the 'transaction fees' tendered by the applicant and that of the 'transaction fees' tendered by WT, whereas there was a significant variation between the levels of the 'management fees' quoted by the two tenderers.

41 With regard to wage costs, WT properly estimated the number of persons necessary, basing its estimate inter alia on an 'annual average volume of transactions per manager' ratio. The Commission further points out that another tender also proposed a lower number of advisers than that proposed by the applicant. In terms of the cost per person, the Commission points out that WT quoted the second lowest price, the applicant for its part having submitted the highest price.

42 As regards general expenses, those quoted in WT's tender were far lower than those of the applicant.

43 The evaluation committee also took into account various parameters in evaluating the consistency of the tenders in respect of the 'management fee'. Firstly, it analysed the average cost of a 'missions' transaction paid for by the 'management fee' as compared with the average cost of an 'other travel' transaction paid for by the 'transaction fee'. That average cost was EUR 32.94 as against EUR 14.37 in the case of the applicant, and EUR 16 as against EUR 15.66 in the case of WT. Secondly, it compared the cost of the 'management fee' relating to lot 1 (Brussels) with that relating to lot 2 (Luxembourg) on the basis of the proportional volume of each lot. It was apparent from that analysis that WT's 'management fee' for lot 1 was 3.64 times higher than that quoted for lot 2, for a volume of missions 3.56 times higher. As for the applicant's 'management fee', it appeared to be higher for lot 1, since it was 7.89 times higher than that quoted for lot 2, likewise for a volume 3.56 higher.

44 In the light of that analysis, the Commission considered that WT's tender was realistic, balanced and proportional. It points out that it based its view on parameters which were objective and comparable as between the tenders, thus making it possible to assess the consistency between the technical content and the price level of the tender.

45 The Commission also draws attention to the fact that it took into account WT's profit-sharing scheme (sharing between the agency and the Commission of any discounts negotiated by the agency on the purchase price of tickets as compared with International Air Transport Association ('IATA') prices). It submits that the profit-sharing scheme is a relevant factor, firstly, for the purpose of assessing the potential income that a tenderer can expect in addition to payment for the service and, secondly, for the purpose of assessing the economic balance of a tender as regards the 'management fee'.

46 WT, for its part, submits that the Commission has demonstrated that it carried out a detailed and precise comparative examination, and that its tender cannot, therefore, appear abnormally low.

Findings of the Court

47 As a preliminary point, it should be recalled that the Commission enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and that review by the Court is limited to checking compliance with the procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 147, and Case T-169/00 *Esedra* v *Commission* [2002] ECR II-609, paragraph 95).

48 It should also be noted that, under Article 97 of the Financial Regulation, '[c]ontracts may be awarded by the automatic award procedure or by the best-value-for-money procedure'. In addition, under Article 138 of the detailed implementing rules, '[t]he tender offering the best value for money shall be the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract'.

49 Moreover, under Article 139 of the detailed implementing rules, the contracting authority is obliged to allow the tenderer to clarify, or even explain, the characteristics of its tender before rejecting it, if it considers that a tender is abnormally low. The obligation to check the seriousness of a tender also arises where there are doubts beforehand as to its reliability, also bearing in mind that the main purpose of that article is to enable a tenderer not to be excluded from the procedure without having had an opportunity to explain the terms of its tender which appears abnormally low.

50 The application of Article 146 of the detailed implementing rules is therefore inherently connected with that of Article 139 of those rules, since only when a tender is considered abnormally low, within the meaning of the latter article, is the evaluation committee required to request details of the constituent elements of the tender which it considers relevant before, where appropriate, rejecting it. Moreover, contrary to what the applicant claims, where a tender does not appear to be abnormally low for the purposes of Article 139 of the detailed implementing rules, Article 146 of those rules is not relevant. Consequently, given that the evaluation committee had no intention, in this case, of rejecting WT's tender, since that tender did not appear to it to be abnormally low, Article 139 of the detailed implementing rules proves to be irrelevant.

51 So far as the award of the contract at issue is concerned, under Article 6 of the contract document, 'for each lot, the contract will be awarded to the economically most advantageous tender, taking account of the quality of the services proposed and the prices tendered'. According to settled case-law, for the purpose of identifying the economically most advantageous tender, each of the award criteria used by the contracting authority does not necessarily have to be of a purely economic nature, since it cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority (Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 55, and *Renco* v *Council*, paragraph 67).

52 In this case, the price of the travel agency services is made up of two main elements: (I) the 'management fee', which represents the total monthly amount covering wage costs, operating expenses and general expenses and (II) the 'transaction fee', which represents the charge payable to the travel agency for administrative expenses relating to travel undertaken by persons travelling at the request of the Community institutions and agencies.

53 The Court notes that the applicant does not call in question the 'transaction fee' proposed by WT, but challenges only the amount of the 'management fee' tendered

by the latter. Consequently, it must be determined whether the Commission made a manifest error of assessment in regard to the financial terms of the 'management fee' taken in its various elements, since the 'management fee' tendered by WT was the least expensive, that of the applicant the most expensive and two other tenders were between the two.

Wage costs

54 It must be observed that the wage costs are established on the basis, first, of the number of persons employed and, secondly, of the cost generated by each employee.

55 As regards, firstly, the number of employees, this may be a useful indicator from the point of view of a possible under-estimate of the requirements essential for a satisfactory performance of the services covered by the invitation to tender. However, such statistical data cannot be considered a decisive guide, since the efficiency of a tenderer's structural organisation may justify a smaller number of employees.

56 In this case, the Court notes that, in estimating the number of employees necessary, WT took as its basis the 'annual average volume of transactions per manager', that calculation being based on an objective and realistic criterion. WT stated, in reply to a written question from the Court, that the number of employees which it considered necessary for lot 1 was 29, even though it knew that another tender was proposing a still lower number.

57 The applicant's estimate, according to which 39 persons are needed to perform the services, is not relevant, since the possibility remains that other tenderers may tender a lower number of employees by virtue, inter alia, of a more efficient modus operandi and greater technical competitiveness.

58 Consequently, the Court takes the view that the applicant has not proved to the requisite legal standard that WT's estimate, having regard to the number of employees, was inappropriate or that WT under-estimated that number.

59 As regards, secondly, the cost per person, it is to be observed that WT proposed the second lowest price per employee, the applicant, for its part, having proposed the highest price.

60 In the light of that fact, it is apparent that WT was not the only economic operator to estimate the requirements for lot 1 at a cost below that estimated by the applicant. Moreover, the fact that another tenderer proposed a cost per person which was lower than that proposed by the selected tenderer may have confirmed the contracting authority's assessment that the prices proposed by WT were not abnormally low.

61 The Court notes that the applicant merely relies on the fact that WT proposed either an insufficient number of employees or an abnormally low level of pay allocated to them. However, the applicant has not adduced any evidence that the Commission made a manifest error of assessment. Consequently, the contracting authority was able to show that the number of employees proposed by WT was consistent and that the selected tender was not abnormally low.

Operating expenses

62 So far as the operating expenses are concerned, it is apparent from Annex 2 to the contract document that those expenses are made up, firstly, of the expenses relating to the allocation by the agency of the period between the date of payment by the agency of its suppliers' invoices and the date of payment by the Commission of the agency's invoices and, secondly, of the other all management expenses and changes relating to capital goods, consumable goods, maintenance and operation of the computer and communication equipment used for the purposes of performing the contract.

63 In that regard, the applicant has adduced no proof that the operating expenses estimated by WT were abnormally low, but merely, in its pleadings, defined the components of those expenses without clarifying in what respect WT's estimate of them was abnormally low.

General expenses

64 So far as general expenses are concerned, it must be observed that the Commission found that WT's tender showed a far lower proportion of general expenses than the applicant's tender. With regard to this item, it must be pointed out that tenderers make estimates on the basis of their practice and experience. The applicant's estimates cannot therefore be regarded as a standard, since the specific organisational structure of each tenderer may be a reason for lower expenses.

65 Furthermore, in the Commission's submission, WT was concerned 'to minimise costs whilst ensuring a high level of quality through reliance on highly efficient infrastructures and technologies, thanks to advanced productivity techniques'. It is apparent from a written reply to a question put by the Court that the Commission took into account inter alia the fact that WT was able to propose not only solutions deemed optimal for the provision of the services from the point of view of reducing costs, but also innovative information technology solutions. In addition, the exhaustive description of the technical and logistic resources in WT's tender enabled the Commission to satisfy itself that the infrastructures used and tools developed were geared to productivity and cost reduction whilst ensuring the effectiveness of the services. The technical tender also placed to the fore a concern to provide the best possible service at the lowest possible cost.

66 Consequently, in the light of that information, the Court considers that the Commission took pains to satisfy itself that the general expenses ensured correct performance of the expected services and that the selected tender was reliable and serious.

67 It should also be noted that the evaluation committee checked the consistency of the 'management fee' by comparing, in the first place, the average cost of a 'missions' transaction paid for by the 'management fee' with the average cost of an 'other travel' transaction paid for by the 'transaction fee'. That analysis showed that, in the case of the applicant's tender, that cost was nearly twice as high as the average cost of a transaction paid for by the 'transaction fee' (EUR 32.94 as compared with EUR 14.37), unlike WT's tender, which proposed very slightly differing costs (EUR 16 as compared with EUR 15.66).

68 In the second place, the evaluation committee compared the cost of the 'management fee' for lots 1 (Brussels) and 2 (Luxembourg) on the basis of the proportional volume of each lot. The tender submitted by WT appeared reliable to the contracting authority since the 'management fee' for lot 1 was 3.64 times higher

than that tendered for lot 2, for a volume of missions 3.56 times higher, that is, a justified proportion which did not reveal any inconsistency in the prices tendered. Conversely, the applicant's 'management fee' appeared much higher for lot 1 since it was 7.89 times higher than that tendered for lot 2, likewise for a volume 3.56 times higher.

69 The Court notes that the applicant disputes the foregoing comparison based on ratios, but does not prove that it is incorrect, bearing in mind, moreover, contrary to what the applicant claims, that the Commission used that comparative method only in order to satisfy itself as to the consistency of the selected tender and not in any way for the purpose of allocating lot 1. Consequently, the Commission was reasonably entitled to consider that the 'management fee' in WT's tender was serious and reliable.

The profit-sharing scheme

70 It must be held that, as is maintained by the Commission, the profit-sharing scheme was taken into account in the qualitative assessment of the tender, in order to show that the Commission was fully entitled to consider that the tender was not abnormally low. That element was used in order to check the reliability and seriousness of the financial tender as a whole, and not as an award criterion. Since any discount received by the service provider gives rise to a proportional payment to the Commission and since, in this case, WT's tender envisaged a substantial proportion of additional income in the profit-sharing part, the Commission was able to satisfy itself that the 'management fee' was economically in balance.

71 In the light of the foregoing, it does not appear that the Commission made a manifest error of assessment in considering that WT's financial tender offered best value for money, yet without being abnormally low. Accordingly, the first plea must be rejected.

2. *The second plea, alleging manifest error in the assessment of the quality of the technical tenders*

Arguments of the parties

72 The applicant submits that the Commission made a manifest error of assessment by awarding WT's tender the highest mark (87.62 out of 100) for the quality of the proposed services. In its view, in order to explain the award of a higher mark, WT's tender was required to include not only substantial guarantees of quality with regard to the travel agency services, but also guarantees of quality superior to those offered by the applicant. In its view, WT's tender could provide no assurance whatsoever of a sufficient level of quality for those services.

73 The applicant submits that WT, by recruiting 14 of its 35 former employees, did not have the necessary staff to guarantee good quality of service provision.

74 The applicant raises the point that it was not accused, in the course of providing the services during the performance of the framework contract, that is, in the period from 1 April 1999 to 31 March 2004, of any breach of its obligations. In that regard, it recalls that, in an internal note of 6 December 2001, the head of unit in charge of missions at the Commission acknowledged the good performance of the travel agency services provided by it, emphasising the 'generally positive' character of those services. Consequently, the applicant submits that its tender fully satisfied the requirements laid down by the contract document.

75 The applicant points out that the Commission knew, even before the start of performance of the contract, that WT would be unable to guarantee a correct performance of the services for a three-month period, that is, a period

corresponding to one eighth of the initial term of the contract. However, the applicant points out that Annex 1 to the contract document makes provision of the travel agency services at the premises of the institutions a mandatory condition of performance of the service, bearing in mind also that the contract may be terminated 'if performance of the contract has not actually started within three months following the date laid down for that purpose'. The applicant also expresses surprise that WT, even though it was expected, at the time of the evaluation of tenders, not to be able to perform the contract for three months, was awarded the highest qualitative mark.

76 The applicant submits that the award of lot 1 to WT was made in disregard of the requirements of the contract document, which lays down, in Annex 1, as a condition of the admissibility of tenders, that tenderers must lodge proof that they have the necessary authorisations to issue tickets and states that an IATA licence number will be required before the start of performance of the contract. However, performance of the contract concluded with WT on 31 March 2004 began as from 1 April 2004, even though WT was unable to produce the abovementioned licence number. Consequently, the applicant submits that it was the only tenderer in a position to comply with the contract document so far as obtaining the IATA licence was concerned.

77 The Commission, on the other hand, submits that it evaluated the quality of the technical tenders in accordance with the contract document and with the evaluation methodology established prior to the opening of the tenders, and that it did so without making any manifest errors of assessment.

78 With regard to the inability to perform the contract between 1 April and 27 June 2004, the Commission notes that none of the contracting parties, apart from the applicant, would have been in a position to comply with the administrative and technical formalities necessary for performance of the services at the Commission's offices within six weeks following the award decision and less than one month from the first appropriate date for signing the contract. That is why the Commission asked the applicant to continue providing that service, although in the end the applicant refused to respond favourably to that request.

79 The Commission therefore points out that, faced with a situation of extreme urgency brought about by unforeseeable events not attributable to the contracting authority and likely to jeopardise the Community's interests, it had to resort to Article 126(1)(c) of the detailed implementing rules. Accordingly, it signed the contract in question with an addendum allowing the new contractor to perform the service 'ex-plant', that is to say, on its own premises, for a transitional period from 1 April to 19 May 2004 and not for a three-month period as the applicant claims.

80 In that regard, the Commission reiterates that it was faced with the unforeseen withdrawal of several institutions, including the European Parliament and the Court of Justice. In this case, the contract document did not lay down a precise date for the commencement of performance of the services, except that the contract had to be signed before 30 June 2004 and that tenders were valid for nine months from 2 December 2003. Moreover, WT would still have been in a position to perform the contract at issue, which was not due to start until 1 July 2004 at the latest.

81 In addition, it disputes the allegation that it was aware, at the time of the inter-institutional invitation to tender, of the exact nature of the difficulties which would arise as a result of the withdrawals of the institutions. It was only on 8 March 2004, at the meeting with WT, that the technical and administrative problems, which precluded performance of the contract 'in-plant' from 1 April 2004, manifested themselves. The Commission therefore submits that the problems were known about only after the closure of the invitation to tender, obliging the Commission to find an appropriate solution.

82 The Commission points out that, according to the contract document, the IATA licence is required only before commencement of the services, that is, after the tendering procedure is closed. Moreover, that licence is not a qualitative evaluation criterion.

83 WT, on the other hand, disputes the fact that an existing contractor should automatically be awarded the highest mark.

84 Regarding IATA licences, WT points out that it did have a general licence covering its operations in Belgium and IATA licences for each of its agencies. WT submits that none of the tenderers except the applicant could be in possession of a licence covering premises located inside the Commission. WT also points out that it is clear from Annex 1 to the contract document (clause 2.2) that holding an IATA licence number specific to the performance of the contract did not in any way constitute a condition of admissibility of tenders.

85 Finally, so far as the number of employees is concerned, WT reiterates that it satisfied the condition set out in the contract notice. It had at least 70 employees in Belgium and submits that, for the most part, its employees held the professional qualifications referred to in Article 5.2 of Annex 1 to the contract document.

Findings of the Court

86 It must be recalled, as a preliminary point, that it is settled case-law that the quality of tenders must be evaluated on the basis of the tenders themselves and not on that of the experience acquired by the tenderers with the contracting authority in connection with previous contracts or on the basis of the selection criteria (such as the technical standing of candidates) which were checked at the stage of selecting applications and which cannot be taken into account again for the purpose of comparing the tenders (Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 15, and *Esedra* v *Commission*, paragraph 158).

87 In this case, under Article 6 of the contract document, the criteria for awarding the contract are two in number, namely, the quality of the services proposed and the prices tendered. As regards the quality of the tender, this must be evaluated on the basis of four criteria: (i) staff, (ii) technical and logistical resources, (iii) management and communication of information and (iv) capacity to negotiate the lowest possible fares.

88 Consequently, the applicant's past experience cannot preclude the existence of a tender from another tenderer capable of offering a higher quality of services than its own and complying appropriately with the four criteria establishing the expected quality.

89 Regarding the number of employees, WT proposed 29 employees for lot 1, whereas the applicant tendered 39. WT's estimate was found reliable by the Commission since WT's productivity and efficiency, as explained by it in one of its written replies to the Court mentioned in paragraph 65 above, may justify a smaller number of employees than that used by the applicant, without impairing the expected quality of the services.

90 Moreover, neither the Financial Regulation nor the detailed implementing rules requires a tenderer actually to have available to it, at the time it submits its tender, the staff to perform a future contract which might be awarded to it. Any selected tenderer must be able to start providing the services on the date set by the contract resulting from the tendering procedure, and not before the contract is finally awarded to it. To require the tenderer to have the requisite number of employees at the time it lodges its tender would be tantamount to favouring the tenderer holding the existing contract and thus nullify the very essence of the call for tenders. In this case, the contract document required only that the tenderer, at the time of lodging its tender, have at least 70 employees in Belgium, a condition met by WT.

91 It should be noted that the performance difficulties encountered by WT, which was unable to obtain the required IATA licence and therefore to provide the services in-house from 1 April 2004, were connected with the withdrawal of certain institutions, which necessitated the issue of a second invitation to tender, and emerged only after the contract had been awarded. It was not until 8 March 2004, at the meeting between the Commission and WT, that those difficulties emerged. Consequently, the applicant's argument, that WT's performance difficulties during the first three months of the contract could not justify the award of a high mark and should have prompted the Commission to terminate the contract eventually signed with WT, is irrelevant.

92 According to the draft contract annexed to the contract document, the possibility of termination is only an option available to the institution, contrary to what the applicant claims. However, in this case, the Commission considered that the services in question had not been provided excessively late, and that their performance had not given rise to an unacceptable delay, given also that WT started to provide its services as from 1 April 2004, and did so under the conditions laid down and adapted by the addendum.

93 Moreover, according to the contract document, the capacity to perform the services immediately did not constitute a qualitative evaluation criterion, since the contract document provided only for a deadline for the commencement of performance of the services, in this case 1 July 2004. Consequently, the fact that WT was unable to provide its services in-house from 1 April 2004 cannot constitute an infringement of the contract document, since the latter mentioned only a time-limit for the start of the services. WT actually provided the services 'in-plant' from 24 May 2004 onwards, that is, more than a month before the deadline set by the contract document.

94 So far as the licence specific to the performance of the contract is concerned, the contract document states that 'an IATA licence number specific to the performance of the contract and an attestation from the local authorities administering the travel agency sector ... will be required before the start of operations ...' (Annex 1 to the contract document (Clause 2.2)). WT stated at the hearing that it had received, on

10 May 2004, licence 'A', which is required in order to be able to obtain an IATA licence subsequently. In this case, WT obtained that IATA licence on 18 May 2004. Accordingly, WT complied with the requirements of the contract document, since it was in possession of that licence before 1 July 2004.

95 With regard to use of the negotiated procedure, Article 126(1)(c) of the detailed implementing rules states that '[c]ontracting authorities may use the negotiated procedure without prior publication of a contract notice ... in so far as is strictly necessary where, for reasons of extreme urgency brought about by unforeseeable events not attributable to the contracting authorities and likely to jeopardise the Communities' interests, it is impossible to comply with the time-limits set for the other procedures'.

96 As regards the unforeseeable nature of the event and whether or not it was attributable to the contracting authority, it should be noted that it was following the withdrawal of other institutions that the Commission published the contract again on 29 July 2003, resulting in the timetable being put back. The Commission explained, in its reply to a written question put by the Court, that, after giving its agreement to the publication of the contract notice, the Parliament expressed reluctance, at a meeting held on 3 June 2003, to participate in the invitation to tender. It had reservations inter alia about awarding the contract on the basis of one lot per city. By note of 11 June 2003, the Parliament's Director-General of Personnel stated that it would be impossible for the Parliament to finalise the contract document before 30 October 2003. Compliance with the time-limit proposed by the Parliament would have jeopardised the progress of the invitation to tender in relation to the maximum duration of the current contract, namely, expiring on 31 March 2004. On 8 July 2003, the Parliament announced its withdrawal, also resulting in that of other institutions. The Commission also explained that it had been unable to specify a date of commencement of the services in the invitation to tender, but merely a deadline, since each lot had specific characteristics of its own, inter alia different expiry dates, which made it impossible to set a single start date for provision of the services for all the lots. Furthermore, it was only at the meeting on 8 March 2004 that the Commission became aware of the fact that the procedure for obtaining the IATA licence, which was required in order to provide the services 'in-plant', was time-consuming and could thus result in some delay in the performance of the services.

97 Consequently, in order to overcome that difficulty resulting from the original withdrawal of the institutions, the Commission asked the applicant to provide the service for a transitional period of six to eight weeks, which it refused to do.

98 The Court therefore takes the view that the timetable, disrupted by the unforeseeable withdrawal of certain institutions and the applicant's refusal to provide the services for a transitional period, did not enable the Commission to maintain the continuity of the travel agency services without resorting to the signing of an addendum allowing WT to provide the services 'ex-plant' from 1 April to 19 May 2004, in order to cope with the situation of extreme urgency with which it was faced.

99 Moreover, it is apparent that the Commission had no part in the withdrawals in question, given that they were not attributable to it and were unforeseeable, since the Parliament's reservations emerged only after the initial publication of the contract notice.

100 With regard to jeopardising the Community's interests, it must be held that the importance of the continuity of the services at issue in this case, involving nearly 57 000 missions per year, is such that the Commission was obliged to ensure their continuity, and to do so by using the negotiated procedure.

101 The Court notes that the negotiated procedure was not used at all in the invitation to tender. It was used only in order to sign an addendum to the main contract, which arises from the tendering procedure and was signed on 31 March 2004. Consequently, the sole purpose of that addendum was to allow the provision 'ex-plant' of the services in question during the period from 1 April to 19 May 2004, in the light of the applicant's refusal to provide the services for a transitional period.

102 The Court also considers, on the basis of the contract document, that the tenderer was required to be in a position to provide the services in-house not on the date of submission of the tender, but on 1 July 2004. Because of the applicant's refusal to extend the contract beyond the expiry of the framework contract on 31 March 2004, the Commission was forced to come to a contractual arrangement with WT in order to ensure the continuity of the services. It seems legitimate that early performance of the services on 1 April 2004 should require a contractual adjustment, allowing inter alia temporary provision of the services 'ex-plant'. In that regard, it must also be pointed out that WT was in a position to meet the requirements laid down by the contract document, since it was able to provide the services in-house from 24 May 2004, that is, more than a month before the deadline set by that document.

103 Accordingly, it must be held that the conditions set out in Article 126(1)(c) of the detailed implementing rules were met and use of the negotiated procedure was justified.

104 Finally, as regards the applicant's plea, put forward in its reply, alleging infringement of the principles of equal treatment and non-discrimination given effect by Article 89(1) of the Financial Regulation, it must be pointed out that, under Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. Since that plea was not mentioned in the application and is not a matter which has come to light in the course of the procedure, it must be declared inadmissible.

105 In the light of the foregoing, the Commission does not appear to have made a manifest error in the qualitative assessment of the selected tender. Accordingly, the second plea must be rejected.

3. *The request for production of documents relating to the award of lot 1*

106 In the context of the measures of organisation of procedure, the Court inter alia asked the intervener to produce data relating to its tender. The Court therefore considers that it has obtained sufficient information from the documents in the file to dispose of the case without ordering the Commission to produce all the documents relating to the award of lot 1, as requested by the applicant under Article 64 of the Rules of Procedure.

The claims for compensation

107 It follows from the foregoing that the Commission did not make a manifest error of assessment in the choice of the selected tenderer and did not in any way infringe the Financial Regulation. Moreover, the applicant alleges no other matter, apart from its two pleas, which could constitute an unlawful act capable of rendering the Community liable. Consequently, the claim for compensation must be held to be unfounded without there being any need for the Court to rule on its admissibility.

108 Accordingly, in the light of the foregoing, the application must be dismissed in its entirety.

Costs

109 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs of the Commission and of the intervener, including those incurred in the proceedings for interim relief.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs of the Commission and of the intervener, including those incurred in the proceedings for interim relief.

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 6 July 2005.

H. Jung J. Pirrung

Registrar President

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