

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

28 November 2002 *

In Case T-40/01,

Scan Office Design SA, established in Brussels (Belgium), represented by B. Mertens and C. Steyaert, lawyers,

applicant,

v

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

defendant,

APPLICATION for compensation for loss allegedly suffered by the applicant as a result of the Commission's decision to award to a third party a contract pursuant to tender No 96/31/IX.C1 for the supply of office furniture,

* Language of the case: French.

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

composed of: M. Jaeger, President, K. Lenaerts and J. Azizi, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 7 May 2002

gives the following

Judgment

Facts of the case and procedure

- 1 On 27 August 1996, acting pursuant to Article 56 of the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), last amended, at the material time, in connection with the special provisions applicable to research and technological development appropriations, by Council Regulation (EC, Euratom, ECSC) No 2335/95 of 18 September 1995 (OJ 1995 L 240, p. 12) and also pursuant to Article 6(4) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), the Commission

published invitation to tender No 96/31/IX.C1 in the *Official Journal of the European Communities* (OJ 1996 S 164, p. 25, and OJ 1996 C 249, p. 15) for the supply of 'hierarchical office furniture'. Three of the four lots under that invitation to tender were awarded, whilst the fourth, lot 2A, was not, because the goods proposed did not meet the tender specifications or were not of an acceptable quality.

- 2 In accordance with Article 6(3)(a) of Directive 93/36, on 1 July 1997 the Commission commenced a negotiated procedure (No 97/25/IX.C1) with a view to awarding lot 2A.

- 3 On 10 July 1997, an information meeting took place and the new specifications were sent out to 38 suppliers the next day. Those 38 suppliers included all those who had tendered for lot 2A under invitation to tender No 96/31/IX.C1. The deadline for tenders was initially set at 28 August 1997, but was postponed to 27 August 1997, the date of opening of tenders, which, according to the explanations provided by the Commission in its written pleadings, was due to confusion on its part concerning the address of the Frezza company, whose B offer was the one finally chosen (the specifications were erroneously sent to Frezza Italie instead of Frezza Belgium). Of the 38 suppliers, 17 submitted tenders.

- 4 The analysis of the documentation submitted by the tenderers led the Commission to reject the tenders of two suppliers, who had proposed goods which manifestly did not meet the specifications. A display of the furniture was held from 13 to 27 October 1997. One supplier withdrew, but 16 office sets were displayed by the other suppliers.

- 5 Around 100 suppliers were invited to take part in the assessment of the products proposed, of whom 34 accepted. Those assessors were divided into seven groups

(including a technical assessment group) and received assessment sheets adapted to their group and allowing for a mark of 0 to 5 to be given for each of the samples according to how they met the qualitative criteria set out in the specifications. The form used for the technical assessment (hereinafter 'the technical assessment sheet') stipulated that 'marks of 5 and 0 shall be supported by reasons'. The administrative file note concerning the methods for assessing tenders stated that 'the rejection of the product assessed shall be deemed valid if, without concertation, at least three assessors give a rejection mark of 0, supported by detailed reasons'. The analysis of the furniture displayed did not lead the Commission to reject tenders on the basis of non-compliance with the requirements of the specifications.

- 6 After examining the furniture displayed by the other tenderers, the manufacturer of the furniture proposed by the applicant wrote to the Commission on 23 and 24 February 1998 to draw its attention to the fact that the furniture proposed by the applicant met the tender specifications, whereas the furniture proposed by other competitors, including SA Frezza Belgium (hereinafter 'Frezza'), failed to do so in a number of respects.

- 7 On 23 April 1998, the applicant, not having received any reply, reminded the Commission of its tender.

- 8 On 20 May 1998, the Commission informed the applicant that its tender had not been successful, and that the contract had been awarded to Frezza.

- 9 On 24 July 1998, the applicant asked the Commission to provide it with a copy of the administrative file.

- 10 In a letter of 5 August 1998, Mr Taverne, Head of Unit 1 ‘Budget policy and management; tender procedures and contracts (Brussels)’ of the D ‘Resources’ Directorate, Directorate-General (DG) IX ‘Personnel and Administration’, acting on behalf of the Commission, sent the applicant certain documents, including the Commission’s report of 26 January 1998 to the Advisory Committee on Procurement and Contracts (ACPC) (except Annex 7, which was Frezza’s tender). The Commission refused to divulge the tender made by Frezza on the ground that it was a document from a third party which the code of conduct on public access to Commission documents did not allow it to divulge.
- 11 On 3 September 1998, in accordance with the procedure referred to by Mr Taverne in his letter, the applicant made the same request to the Secretary-General of the Commission, insisting on its wish to obtain *inter alia* the technical assessment sheets.
- 12 In a letter of 9 September 1998, Mr Taverne informed the applicant that those sheets had not been formally drawn up by the Commission.
- 13 In a letter of 25 September 1998, the Secretary-General of the Commission confirmed to the applicant the decision to deny access to the information or documents requested, on the ground that those assessment sheets did not exist.
- 14 On 9 December 1998, the applicant brought an action before the Court of First Instance seeking annulment of the decision taken by the Secretary-General on behalf of the Commission refusing to communicate to the applicant certain technical information in the Commission’s administrative file. That case was entered in the Registry of the Court of First Instance under case number T-194/98. As part of that procedure, the Commission acknowledged that it had

in its possession technical assessment sheets and undertook to supply the applicant with the sheets dealing with the furniture of all the tenderers. Thus the Commission supplied the applicant with two types of assessment sheets: those drawn up by officials from the technical department concerning whether the tender met the tender specifications (technical assessment sheets) and those drawn up by the other groups of assessors concerning the quality of the furniture proposed (aesthetic and ergonomic aspects, solidity, etc.). Under those circumstances, the Court of First Instance, after hearing the parties, ordered on 16 May 2000 that Case T-194/98 be removed from the register.

- 15 By application lodged with the Registry of the Court of First Instance on 21 February 2001, the applicant brought the present action pursuant to Article 235 EC and the second paragraph of Article 288 EC, for damages and interest against the Commission.

Forms of order sought

- 16 The applicant claims that the Court of First Instance should:

- declare the action admissible and well founded;

- declare that the Commission committed a fault for the purposes of Article 288 EC by awarding the contract to Frezza and that that fault occasioned loss to the applicant,

— order the Commission to pay to it the sum of EUR 1 023 895, together with the costs of the present proceedings.

17 The Commission contends that the Court of First Instance should:

— dismiss the action for damages as unfounded;

— order the applicant to pay the costs.

Law

18 It has been consistently held that, in order for the Community to incur non-contractual liability, the applicant must prove the unlawfulness of the conduct alleged against the institution concerned, actual damage and the existence of a causal link between that conduct and the damage pleaded (Case 26/81 *Oleifici Mediterranei v EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services v Commission* [1996] ECR II-729, paragraph 44; Case T-336/94 *Efisol v Commission* [1996] ECR II-1343, paragraph 30; Case T-267/94 *Oleifici Italiani v Commission* [1997] ECR II-1239, paragraph 20). If one of those conditions is not satisfied, the action must be dismissed in its entirety without its being necessary to examine the other conditions of non-contractual liability (Case C-146/91 *KYDEP v Council and Commission* [1994] ECR I-4199, paragraph 19; Case T-170/00 *Förde-Reederei v Council and Commission* [2002] ECR II-515, paragraph 37).

The unlawful conduct alleged against the Commission

- 19 The applicant maintains that the Commission committed faults which led to the applicant's losing the contract to Frezza. The irregularities relied on by the applicant relate to: communication of the assessment sheets and the tender submitted by Frezza; the date of Frezza's tender; the failure to eliminate bids at the stage of the initial assessment of the furniture; examination of the technical assessment sheets; compliance of Frezza's tender with the specifications; assessment of other criteria and the financial assessment of its tender as compared to Frezza's.

- 20 The applicant concludes that it should have been awarded the contract because it was the only company whose tender complied with the specifications.

- 21 The Commission takes the view that the applicant's action is unfounded. It argues that the applicant has not adduced any evidence of the Commission's allegedly unlawful conduct and maintains that it complied fully with the rules governing public contracts and the principle of sound administration.

Communication by the Commission of the assessment sheets and the technical assessment sheets submitted by Frezza

- 22 The applicant states that the Commission forwarded the technical assessment sheets only after an action had been brought before the Community Courts. In not communicating those sheets on the pretext that they did not exist, the

Commission failed to observe the principle of sound administration, a failure which could be deemed to be a serious breach and in respect of which it should assure liability for the injurious consequences suffered by the applicant.

- 23 The applicant further maintains that the systematic refusal by the Commission to communicate to it the tender submitted by Frezza and its production for the first time only at the stage of the present proceedings (without the slightest reservation concerning the confidential nature of those documents) also constitute a serious and manifest breach of the principle of sound administration.
- 24 The Court finds that the assessment sheets exist, despite the fact that the Commission has denied their existence on several occasions. Thus, in a letter of 9 September 1998, Mr Taverne stated that such sheets had not been formally drawn up. Moreover, in a letter of 25 September 1998, Mr Trojan, Secretary-General of the Commission, stated:

‘As regards the communication of the technical assessment sheets on compliance with the specifications required, such sheets do not exist....’

- 25 In paragraph 30 of its defence in Case T-194/98, the Commission stated:

‘The reason why the Commission has refused to communicate the technical assessment sheets is quite plain: they do not exist.’

- 26 It was only when the first action was brought before the Court of First Instance that the Commission communicated the technical assessment sheets. Likewise, on its own initiative and without the slightest reservation, the Commission attached by way of annexes to its defence extracts from Frezza's bid which it had previously refused to divulge on the grounds that they were documents from a third party which the code of conduct governing public access to Commission documents did not allow it to divulge.
- 27 It cannot but be concluded that the Commission, in repeatedly denying the existence of documents which in reality existed and by refusing to communicate documents on the ground that they were confidential, committed a serious fault.

The date of Frezza's tender

- 28 The applicant states that, after the information meeting on 10 July 1997, with the deadline for tenders set at 18 August 1997, it learned that the deadline had been postponed to 28 August 1997, according to the Commission, because the specifications had been erroneously sent to Frezza Italic instead of to Frezza. In those circumstances, the applicant expresses surprise that Frezza's tender is dated 18 August 1997. Likewise, the alleged confusion between the addresses of Frezza and Frezza Italic is surprising, since the companies are most likely in close contact with each other.
- 29 In that regard the Commission states that it was not for it to verify whether Frezza and Frezza Italic were in close contact with each other or not and that no loss could be caused to the other tenderers by the postponement of the deadline

for tenders, since the content of all the tenders remained unknown until the expiry of the extended deadline, namely, 28 August 1997, the date of opening of the tenders. It stresses that, in any event, the postponement of the deadline for the submission of tenders was of no practical consequence, since Frezza's tender is dated 18 August 1997.

30 The Court finds, first, that the invitation to the information meeting held on 10 July 1997, as well as all the correspondence concerning the initial invitation to tender, were sent to Frezza, but that the specifications were sent to Frezza Italie on 11 July 1997. In this connection, the Commission states merely that human error during the holiday period led to the confusion as to the addresses, but has refrained from particularising that claim.

31 Next it should be pointed out that the Commission, in its defence and rejoinder, has indicated that Frezza's tender was dated 18 August 1997. However, in response to written questions from the Court, it has been found that Frezza's tender arrived at the Commission on 22 August 1997, that is, four days after the expiry of the deadline set for the submission of tenders. The Commission maintains on this point that it allowed an extension of the deadline following a request to that effect by Frezza. However, the responses to the questions asked by the Court show that it was only by letter dated 21 August 1997 that Frezza asked for an extension of the deadline. That letter was posted on 22 August 1997 and received by the Commission on 25 August 1997. It follows that the request for an extension of the deadline set for the submission of tenders was made by Frezza only after expiry of that deadline.

32 It follows from the foregoing that both the submission of Frezza's tender as well as its request for an extension of the deadline and thus *a fortiori* the agreement of the Commission to an extension all occurred after expiry of the deadline set for the submission of tenders.

33 Accordingly, the Commission committed a fault in accepting Frezza's late tender.

The failure to eliminate tenders when the furniture was first assessed

34 The applicant observes that, in the report sent to the Advisory Committee on Procurement and Contracts, the Commission indicates that an initial examination of the furniture displayed did not lead it to reject any of the 16 office sets displayed. The applicant considers this statement to be a cause of some concern because, in its view, an examination of the technical assessment sheets shows that none of the tenders, apart from its own and Frezza's, met the requirements of the specifications. Thus, the Commission, it is submitted, committed a fault at this stage in the assessment of compliance by the tenders with the specifications.

35 In that regard the Commission confirms that examination of the furniture displayed did not lead it to reject tenders on the ground of non-compliance with specifications and also states that it allowed a certain degree of flexibility concerning compliance.

36 In that regard the Court notes that, according to the technical assessment sheets of three of the five assessors, namely, Messrs Ackermans, Reynen and Gasparini, none of the furniture other than that of Frezza and the applicant met the requirements of the specifications, since they awarded them 0 marks and added the remark 'non-compliant'.

37 However, the complaint that the Commission, on the initial examination of the furniture displayed, should have rejected some of the 16 sets displayed is devoid of relevance. The results of an initial examination are, by their nature, provisional and subject to revision at later stages of the procedure.

- 38 It is appropriate to examine whether the procedure for awarding the contract was, from an overall standpoint, carried out correctly and, more precisely, whether it ultimately enabled tenders which did not meet the requirements to be rejected and a tender which did meet the specifications to be accepted, if such were the case. Thus, it is immaterial in the present case that no tenders were rejected, rightly or wrongly, on an initial examination on the ground of non-compliance with the specifications, even if subsequently some assessors considered that none of the tenders, except Frezza's and the applicant's, met the tender specifications.
- 39 It follows that this plea cannot be accepted.

The examination of the technical assessment sheets

- 40 The applicant claims essentially that of the five technical assessments, only one of the assessment sheets (Mr Reynen's) can be considered to have been completed by a person who actually examined the furniture displayed by the tenderers.

— The sheets drawn up by Mr Wood

- 41 The applicant observes, first, that the technical assessment sheets drawn up by Mr Wood are not signed or dated. Next, the sheets contain no remarks. Thus, the mark of 5 given to Frezza concerning compliance with specifications is not elucidated by any supporting remarks, yet the tender in question manifestly does not meet the requirements of the tender specifications. The applicant also questions whether Mr Wood's opinion can be altogether objective, given that he is the person in charge of furniture and is in constant contact with suppliers of office furniture, such as Frezza.

- 42 The Commission argues that Mr Wood's assessment is handwritten and that, consequently, the absence of a signature does not prevent its author from being identified or, *a fortiori*, invalidate his analysis. The applicant has not adduced any evidence in support of its allegation of a manifestly erroneous assessment.
- 43 In that regard the Court points out, first, that the assessors had received forms enabling them to give a mark of 0 to 5 for each of the specimens according to how well they met the qualitative requirements laid down in the tender specifications. On each form, it was stipulated that 'marks of 5 and 0 shall be supported by reasons'.
- 44 Next, it should be recalled, as an examination of the technical assessment sheets shows, that Mr Wood did not sign or date them; nor did he make any remarks to justify the marks of 5 which he gave (including to Frezza's B and C tenders).
- 45 Moreover, Mr Wood omitted to fill out the specific section 'compliance with tender specifications' for each of the tenders. The Commission has offered no explanation for this.
- 46 As regards the absence of signature and date, the Commission's argument that Mr Wood's assessment is handwritten and that, consequently, the absence of a signature does not prevent its author from being identified or, *a fortiori*, invalidate his analysis, must be rejected.

- 47 In fact, even on the supposition that a signature is not absolutely necessary, mere handwritten notes on the technical assessment sheets in question, namely 'IXC3', 'WOOD' and 'A', are insufficient to identify their author and thus may not replace a signature, the principal function of which is to identify with certainty the author of the document.
- 48 In any event, it must further be stated that the Commission has not provided any explanation for the absence of detailed comments by Mr Wood to justify the marks of 5 awarded. The failure to give reasons for those marks, in breach of the instruction to the assessors, and the fact that Mr Wood also omitted to fill out the specific section 'compliance with tender specifications', are of such a nature in themselves as to invalidate the technical assessment sheets drawn up by him.
- 49 However, as regards the applicant's complaint that Mr Wood's opinion might not be entirely objective because he is the person in charge of furniture and thus has ongoing contact with suppliers of office furniture, including Frezza, suffice it to state that it is reasonable for the technical assessments to be made by officials who are experts in the area. Moreover, as pointed out by the Commission, the five technical assessors were all with the 'procurement, supplies' unit in Brussels or Luxembourg. Consequently, the objection raised against Mr Wood could also be raised concerning the five assessments. Finally, the assessors who were favourable to the applicant also work in the same unit as Mr Wood.
- 50 None the less it follows from the foregoing that the Commission committed a fault in taking account of Mr Wood's assessment sheets.

— The sheets drawn up by Mr Zastawnik

- 51 The applicant states that the sheets drawn up by Messrs Scholtes and Zastawnik were fictitious, contained no remarks and were not signed or dated. The applicant further observes that Mr Scholtes did not take the trouble to make the slightest remark on the marks awarded by him and notes that the marks varied only between 3 or 4 for all the tenders, whereas other assessors gave marks of 0. The applicant concludes that Mr Scholtes did not complete the technical assessment sheets with due professional care.
- 52 The Commission argues that the technical assessment sheet bearing the names of Messrs Scholtes and Zastawnik in fact amounts to a single assessment, carried out by Mr Zastawnik, who was replacing Mr Scholtes. Contrary to the applicant's assertion, Mr Zastawnik's sheets are correctly filled out, and are dated and signed on the first page. The Commission further stresses that the applicant's statement that the sheets were 'fictitious' is insulting and above all without foundation. In fact, that assessor's marks largely coincide with those given by other assessors and are strictly within the range of marks given by the other assessors.
- 53 The Commission maintains that the applicant's criticism of the manner in which Mr Zastawnik completed the technical assessment sheet is based solely on the fact that the marks given by him are not comparable to those given by other assessors more favourable to the applicant. According to the same line of reasoning, in the Commission's view, the opposite conclusion could be reached, namely, that the assessments of the three assessors favourable to the applicant must be rejected owing to a lack of objectivity.
- 54 The Court finds that, contrary to the applicant's assertion that Mr Zastawnik's sheets are not dated or signed, it appears that they are indeed dated and signed on

the first page (it being noted that the technical assessment sheet for each tender comprises three stapled pages). It must be observed that this rather unusual way of signing a document by putting the signature on the first page does not affect the validity of the technical sheets at issue here. The signature offers proof, in the absence of evidence to the contrary, that its author is indeed the person who completed the technical assessment sheets.

- 55 As for the argument that Mr Zastawnik did not take the trouble to add the slightest remark to the marks he gave, an examination of the sheets shows that he did not give marks of 0 or 5, with the result that no justificatory remark was necessary. Consequently, this argument is unfounded.
- 56 As regards the argument that the technical assessment sheets were not completed with due professional care, the marks given by Mr Zastawnik varying between 3 and 4 only, whereas other assessors gave marks of 0 supported by reasons, it is indeed surprising to observe that some assessors (Messrs Ackermans, Reynen and Gasparini) considered that all of the tenders (except the applicant's and Frezza's) did not comply with the specifications, whilst Mr Zastawnik gave all of the tenders marks of 3 or 4 (with one exception). None the less, this difference between assessments is not sufficient by itself, even together with the fact that the sheets are signed and dated on the front page only, for a finding that the sheets drawn up by Mr Zastawnik are invalid.
- 57 In fact, the purpose of the technical assessment sheets is to gather the assessments conducted by various assessors whose viewpoints may obviously differ.
- 58 It follows that the Commission was entitled to take Mr Zastawnik's technical assessment sheets into account and that, consequently, this plea must be rejected.

— The technical assessment sheets of Messrs Reynen, Ackermans and Gasparini

- 59 The applicant notes that Messrs Reynen, Ackermans and Gasparini completed identical technical assessment sheets and concludes from this that they conducted a joint assessment of the furniture displayed. It also alleges that Mr Reynen alone (or jointly with Messrs Ackermans and Gasparini) seems to have examined the furniture.
- 60 The Commission states that the sheets completed by Messrs Ackermans and Gasparini contain certain errors of detail, although these do not affect the result of the assessment. Thus, only the first page is signed and Mr Reynen's signature appears on pages 2 and 3 of the forms completed by Mr Ackermans; the 'functionality' criterion is not assessed at all on Mr Gasparini's form for Frezza's C furniture, which led him to give a mark of 0 for that criterion in the qualitative assessment.
- 61 It should be noted, first, that it was legitimate for Mr Reynen's technical assessment sheets to be taken into consideration by the Commission in the procedure at issue here. Moreover, the applicant does not argue that the Commission committed an irregularity by taking them into account.
- 62 Secondly, as regards Mr Ackermans's technical assessment sheets, it cannot but be noted that they simply reproduce the ones drawn up by Mr Reynen. As the Commission, moreover, acknowledges, the sheets drawn up by Mr Ackermans are photocopies of Mr Reynen's sheets, on which Mr Ackerman merely deleted Mr Reynen's name and added his own signature (without even deleting Mr Reynen's). On some pages, Mr Ackermans deleted Mr Reynen's name but did not add his own and did not sign it. On the sheet for the tender M from the

company Mercator, Mr Reynen, like Mr Ackermans, made no assessment of compliance. On one assessment sheet only, the one for Frezza's C tender, Mr Ackermans deleted two marks given by Mr Reynen and increased the assessment for functionality and compliance (from 2 to 3), whilst leaving Mr Reynen's remarks and signature.

- 63 In those circumstances, it appears that the Commission was not entitled to take account of Mr Ackermans's sheets.
- 64 Thirdly, as regards Mr Gasparini's assessment, an examination of the technical assessment sheets completed by him shows that the marks awarded by him match in all cases those given by Mr Reynen and also, consequently, those given by Mr Ackermans. Although this may be accounted for in cases where, owing to non-compliance of bids, the mark awarded is 0, it is more surprising in the other cases, in particular that of the applicant and Frezza. The similarity, not to say the identical nature, of the remarks made by Mr Gasparini and Mr Reynen tend to indicate that the sheets were copied without any actual individual assessment being conducted or, at the very least, that their content is the result of a joint assessment.
- 65 In that regard it should be recalled that the technical assessment sheets state that 'a mark of 0 for the criteria of solidity and finishing will result in elimination if it is awarded by at least three persons and is supported by reasons'. The technical assessment sheets completed by Messrs Reynen, Ackermans and Gasparini gave a mark of 0 for those two criteria for all of the tenders except for those of the applicant and Frezza. In response to written questions on this point from the Court, the Commission stated that the tenders in question had none the less not been eliminated. Recalling that the note in the administrative file concerning methods of assessing tenders stated that 'the rejection of the product assessed shall be considered valid if, without concertation, at least three assessors award a rejection mark of 0, supported by detailed reasons', the Commission argued that since these three assessments had manifestly been carried out in a concerted manner rejection could not take place on this basis.

- 66 It follows that the Commission itself acknowledges that the three assessors evidently assessed the bids in a concerted manner. It is true that Directive 93/36 does not expressly impose a specific number of assessments or provide that assessors must conduct their assessment completely independently and without any concertation. None the less, the principle of sound administration, which governs the conduct of negotiated procedures for the award of public contracts, requires assessors called upon to assess bids from tenderers to do so in an independent manner, at least initially, by awarding marks on the basis of their own personal expertise.
- 67 It follows that, in the present case, the Commission was not entitled to take Mr Gasparini's assessments into account.
- 68 In conclusion, it follows from the foregoing that the assessments by Messrs Wood, Ackermans and Gasparini should have been rejected and that the Commission committed an error in taking them into account.

Compliance by Frezza's tender with the tender specifications

- 69 Before examining the alleged irregularities committed by the Commission in the assessment of compliance by Frezza's tender with the tender specifications, it is appropriate to determine the margin of discretion available to the Commission in the context of the negotiated procedure for the award of the contract.
- 70 In that regard the applicant considers that the flexibility available to the Commission in the context of the negotiated procedure must be examined in the

light of the criteria set by the Commission itself for award of the contract. The applicant refers to the Vade-mecum on public procurement and contracts drawn up by the Advisory Committee on Procurement and Contracts and concludes that certain of the conditions governing the contract at issue are deemed to have mandatory effect and leave no margin of discretion to the Commission.

- 71 The applicant maintains that the Commission's assertion that it is not required to adhere strictly to the technical specifications of the terms and conditions of a tender in the context of a negotiated procedure is contrary to Article 16(1) of Directive 93/96, which provides that the contracting authority may take account only of tenders which meet the minimum specifications required. Whatever margin of discretion the Commission may have in negotiations, it cannot be that it would not be obliged to apply criteria which it itself has set. Moreover, the Commission must abide by the principle that all tenderers are to be treated equally.
- 72 The Commission observes that strict adherence to the tender specifications in the present case would have led to the elimination of all the tenders, including the applicant's. It maintains that it follows from Article 6(3)(a) of Directive 93/36 that, in the context of the negotiated procedure, the contracting authority has a right to negotiate. It may accept bids which do not entirely comply with the technical specifications but offer a solution acceptable to it, in conformity with the principle that all tenderers are to be treated equally.
- 73 The Commission stresses that it adhered to the principle that tenderers are to be treated equally, particularly as regards the applicant. It states that, first, following an unsuccessful invitation to tender, it invited a large number of suppliers to display their furniture. It then allowed for a certain amount of flexibility in relation to the technical specifications, particularly as regards the applicant, in order to choose the furniture best suited to those specifications and its needs. Finally, it made its choice on the basis of the same criteria and ancillary criteria for the award as those used during the unsuccessful invitation to tender which preceded the negotiated procedure, in opting for the 'most economically advantageous tender'.

- 74 With regard to the Commission's argument based on Article 6(3)(a) of Directive 93/36 concerning its claim to a right to negotiate, the Court notes that that provision sets out the circumstances in which a negotiated procedure may be initiated but does not indicate the manner in which it must be commenced. Accordingly, the Commission's plea based on that provision is unfounded.
- 75 It is true that Article 1(e) of Directive 93/36 provides that "negotiated procedures" are those national procedures whereby contracting authorities consult suppliers of their choice and negotiate the terms of the contract with one or more of them'.
- 76 However, even if the contracting authority has a certain margin of discretion in the context of a negotiated procedure, it is always bound to ensure observance of the terms and conditions of the tender specifications, which they have freely chosen to make mandatory.
- 77 This is confirmed by Article 16(1) of Directive 93/36, which provides that where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may take account of variants which are submitted by a tenderer when they meet the minimum specifications required by the contracting authorities.
- 78 In the present case, appended to the terms and conditions of the tender are the various data sheets describing the technical features, some of which are regarded as mandatory requirements: 'Failure to meet these requirements will result in the tender being rejected' (part XII of the data sheets).

79 It should also be noted that the letter of 1 July 1997 addressed by Mr Rosin (Head of Unit 3, 'Procurement, supply' of Directorate C 'Administration' of DG IX) to the tenderers in the course of the tender procedure, stated: 'In this regard, I wish to stress the importance of observing the terms and conditions of the tender specifications, including the mandatory requirements listed therein. Non-observance of those requirements will unfortunately result in the elimination of your bid altogether.' That letter shows the importance attached by the Commission to observance of the terms and conditions of the tender specifications, irrespective of the fact that, according to the Commission, it did not form part of the specifications sent to the tenderers but announced the opening of the negotiated procedure by inviting the addressees to submit a bid.

80 It follows from the foregoing that, although the Commission had a power to negotiate in the context of the negotiated procedure, it was none the less required to ensure observance of those terms and conditions of the tender specifications which were regarded as mandatory.

81 The applicant's arguments alleging non-compliance by Frezza's bid with the terms and conditions of the tender specifications must now be examined.

82 In that regard the applicant maintains that it is clear from the remarks of Messrs Reynen, Ackermans and Gasparini on the technical assessment sheets concerning Frezza's B and C tenders that those bids did not meet those requirements of the tender specifications regarded as mandatory. Thus, it notes that item VI-A did not have adjustable jacks; that the drawers of item VI-B did not open in such a way that the tray extended by 105% of its length; that no light colours were proposed; that the cut-away table for item V-F did not allow for versatile use to left and right of the desk; and that the dimensions of the furniture were non-compliant.

83 With regard to the dimensions of the furniture, the applicant maintains, in response to the Commission's argument concerning non-compliance of its bid on

the ground that the dimensions of the meeting tables and desk tables proposed by it did not comply with the terms and conditions of the specifications, that if the dimensions were mandatory requirements, as the Commission maintains, then the dimensions of the desk tables and meeting tables mentioned in Frezza's tender were also not in conformity with the terms and conditions of the specifications.

- 84 The Court considers it therefore appropriate to examine whether the table dimensions formed part of the mandatory requirements which had to be met by the bids, failing which the bids would be eliminated for non-compliance with the terms and conditions of the tender specifications. In that regard it may be observed that the data sheets appended to the specifications expressly provided as regards both desk tables and meeting tables as follows: 'XII. Mandatory conditions. Failure to meet these requirements will result in non-compliance by the tender.... Art. III: a minimum of 2 dimensions must be proposed'.
- 85 The Commission maintains that the dimensions defined within the parameters provided for in the terms and conditions of the specifications formed part of the mandatory conditions.
- 86 The applicant maintains that the data sheets concerning the tables did not mention that the dimensions were mandatory, unlike the data sheet for the item referenced 2.04, which provided for a 'mandatory height'.
- 87 In that regard the Court considers that the dimensions should be regarded as forming part of the mandatory conditions. The fact that a minimum of two dimensions were requested to be proposed implies that four tables, that is to say two meeting tables and two desk tables, having different dimensions but within the parameters referred to in the specifications, had to be included in the tender. Allowing tenderers to propose furniture having dimensions outside the parameters stipulated in the specifications would render nugatory the specification of dimensions in the invitation to tender.

- 88 The Court also notes that on other data sheets (for example, those for the casings or cupboards), the dimensions are not indicated in part XII concerning mandatory conditions and are preceded by the symbols '+-'. It would thus appear that if the table dimensions had not formed part of the mandatory conditions, they would also have been preceded by the symbols '+-' and the statement 'Art. III: a minimum of 2 dimensions must be proposed' would not have been included under the heading of mandatory conditions.
- 89 As for the applicant's comparison with the data sheet for the item referenced 2.04 indicating a 'mandatory height', it should be stated that the sheet in question defines the required dimensions in the following manner: '(+ L. 120 × W. 80) × H. 72/75 cm'. Unlike the data sheets for the tables, the length and width are preceded by the symbols '+-', which is why the wording 'mandatory height' was added.
- 90 Consequently, in regard to the tables, in order for the tenderers' bids to satisfy the mandatory conditions, they had to propose a minimum of two dimensions within the parameters indicated in the terms and conditions of the specifications.
- 91 As regards compliance by Frezza's tender, it should be noted, first, that for the desk tables the specifications required dimensions of between 160 and 200 cm for length, 80 and 100 cm for width and 72 and 75 cm for height. As to the dimensions of the meeting tables, the specifications required dimensions of between 180 and 240 cm for length, 90 and 120 cm for width and 75 cm for height.
- 92 The Court finds that, for the desk tables, Frezza's bid proposed two tables which were entirely in compliance with the requirements of the tender specifications, namely, the ZNS 160 table, which measured 166 cm long, 80 cm wide and 72 cm

high, and the ZNS 180 table, whose dimensions were 186 cm long, 80 cm wide and 74 cm high. Accordingly, the applicant's argument concerning non-compliance of the desk tables in Frezza's bid must be rejected.

93 As regards the meeting tables, the applicant points out that the dimensions proposed by Frezza were 186 cm long, 80 cm wide and 72 cm high, or 210 cm long, 110 cm wide and 72 cm high. In its replies to the written questions raised by the Court, the Commission acknowledged that the dimensions for the meeting tables were not entirely in conformity with the dimensions laid down in the terms and conditions of the specifications.

94 Without its being necessary to examine the other arguments raised by the applicant concerning compliance by Frezza's bid with the tender specifications, it is clear from the foregoing that the plea that Frezza's bid did not comply with the tender specifications is well founded in so far as the dimensions of the meeting tables are concerned. Consequently, the Commission committed a fault in accepting Frezza's bid.

The Commission's assessment of other criteria

95 In its reply, the applicant argues that there is nothing in the Commission's file concerning the manner in which the criteria relating to warranty and services were assessed by the technical group. It also argues that there was no assessment of compliance by the products with environmental criteria.

- 96 It should be pointed out that under Article 48(2) of the Rules of Procedure of the Court of First Instance 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 have come to light in the course of the procedure. In the present case, as the Commission has rightly pointed out, the arguments, first, that there is nothing in the Commission's file about the manner in which the criteria relating to warranty and services were assessed by the technical group and, secondly, that there was no assessment of compliance by the products with environmental criteria, cannot be regarded as amplifying, directly or by implication, pleas already put forward in the original application and closely connected therewith. Consequently, they must be declared inadmissible (see Case C-104/97 P *Atlanta v European Community* [1999] ECR I-6983, paragraphs 27 and 29; Case T-252/97 *Dürbeck v Commission* [2000] ECR II-3031, paragraph 43; and Case T-62/99 *Sodima v Commission* [2001] II-655, paragraphs 67 and 68).

The financial assessment of the applicant's and Frezza's tenders

- 97 The applicant submits that, as regards the assessment of the tenders, its own calculations of the points show that its tender gains more points than Frezza's. Accordingly, it challenges the Commission's conclusion that Frezza's tender was the better one from both a technical and financial viewpoint and submits that the Commission manifestly committed a fault in accepting the bid by Frezza.
- 98 In its reply, the applicant carries out a fresh calculation of points in which it excludes the technical assessment sheets drawn up by Messrs Wood and Scholtes, together with the points awarded for the warranty and services, and re-evaluates on a basis of equality the prices proposed for the drawer casings.

- 99 The Commission confirms the result of its financial and qualitative assessment of all the tenders. It takes the view that the table attached to the application lacks clarity and, more importantly, does not take into account the weighting of each qualitative assessment criterion.
- 100 As regards the applicant's re-evaluation in its reply of the financial value of the tenders, the Commission essentially observes that the applicant is taking a selective approach to the criteria for awarding the contract, opting for or rejecting certain criteria or assessors according to what is favourable to its bid, and even inventing other criteria, while losing sight of the fact that the contracting authority is bound to apply the selection criteria provided for in the terms and conditions of the tender specifications.
- 101 In that regard the Court considers that the table attached to the application, in which the applicant re-evaluates the points given by the different groups of assessors, is totally lacking in clarity.
- 102 Likewise, the applicant's fresh calculation in its reply cannot be considered sufficiently reliable. Thus it may be observed, first, that, in its fresh calculations, the applicant included the technical assessment sheets drawn up by Messrs Reynen, Ackermans and Gasparini. However, as has been noted above, only the sheets completed by Messrs Reynen and Zastawnik were able to be used. Secondly, the applicant did not include the points awarded for warranty and services. However, it follows from the above analysis that the applicant's arguments on this point are inadmissible. Finally, the applicant calculated, without supporting evidence, additional costs of 40% for technical solutions which would allow 105% opening of desk drawers, whereas the Commission states that this additional cost would be no more than 11%. The applicant stated in its application that the supply of 105% opening desk drawers would increase the supply price by 10 to 15%.

- 103 Accordingly, this argument cannot be accepted.
- 104 The Commission goes on to state in its rejoinder that even were the applicant's assertions accepted concerning exclusion of the technical assessments by Messrs Wood and Zastawnik and the 40% estimate for the additional cost of the drawers, its tender would still rank below Frezza's. In that regard it should be observed that the difference between the applicant's analysis and the Commission's stems from the fact that the latter does not exclude points awarded for the warranty and services. Since the pleas concerning warranty and services have been declared inadmissible, the Commission cannot be criticised for having failed to take those two criteria into account.
- 105 Likewise, the file shows that even if the assessments by Messrs Ackermans, Gasparini and Wood which, as has been established, were not able to be taken into account by the Commission had been excluded and an additional cost of 40% for the drawers as proposed by the applicant were accepted, its tender would still rank lower than Frezza's.
- 106 It follows that the applicant's argument concerning the financial assessment of the tenders cannot be accepted.
- 107 In the light of the foregoing, it must be concluded, in regard to the unlawful conduct imputed to the Commission, that it committed a number of serious faults which, individually or at the very least taken together, must be regarded as fulfilling the first of the three conditions necessary for the non-contractual

liability of the Community to be incurred under the terms of the case-law cited in paragraph 18 above.

Causal link

108 To prove the causal link between the faults committed by the Commission in awarding the contract and the alleged loss, the applicant essentially argues that, had it not been for those faults, it would have been awarded the contract and it would not have suffered any loss. It states that it can hardly be disputed that, if the Commission had not committed the faults established, its tender would have been found to be the only one which met the mandatory conditions of the tender specifications and would in any event have been considered to be the most economically advantageous tender with the result that the contract would have been awarded to it. It argues that the Commission did not have any margin of discretion.

109 In that regard it should be noted that, according to the case-law, in order to be successful the applicant must show that its tender met all of the tender specifications (see, by analogy, Case T-478/93 *Wafer Zoo v Commission* [1995] ECR II-1479, paragraph 49; and Case T-230/94 *Farrugia v Commission* [1996] ECR II-195, paragraph 46). Accordingly, it is appropriate to examine compliance by the applicant's tender with the terms and conditions of the tender specifications.

110 The Commission claims that non-compliance by the applicant's tender may be established in three respects. First, the dimensions of the meeting tables were not in accordance with the specifications; nor, secondly, were the dimensions of the desk tables; and thirdly, no desk-adjustment jack was installed. On this point the

Commission states that the documentation submitted with the applicant's tender did not provide any alternative solutions, and that even though inserts were present, that does not negate the absence of adjustment jacks, which were required for the tender specifications to be met.

- 111 The applicant maintains that only its tender was fully in compliance with the terms and conditions of the tender specifications and observes that Mr Reynen awarded its bid a mark of 4/5 for compliance with tender specifications, whereas Frezza's tender received a mark of only 2/5.
- 112 As regards the meeting tables and the desk tables, the applicant maintains that the data sheet does not state that the dimensions were mandatory, and that the specifications merely stated that two dimensions had to be proposed. As for the adjustment jacks, the applicant expresses surprise that the jacks were not located on the furniture displayed and adds that the furniture was equipped with metallic inserts intended for installation of jacks.
- 113 In that regard it should be stated that, for the reasons set out above, the Court considers that the table dimensions formed part of the mandatory conditions.
- 114 First, as regards the dimensions of the meeting tables, the specifications provided for dimensions of between 180 and 240 cm long, 90 and 120 cm wide and 75 cm high. The Court points out that it is not disputed that the table displayed by the applicant was 180 cm long, 80 cm wide and 72 cm high, and that the alternative

table proposed in the tender was 210 cm long, 120 cm wide and 72 cm high. Accordingly, as the Commission correctly points out, the Court finds that the two tables proposed did not meet the height specifications and that, in addition, the first table did not meet the width specifications.

115 Likewise, the Court finds, secondly, that the Commission correctly considered that the dimensions of the desk table did not comply with the terms and conditions of the tender specifications. The tender specifications required dimensions of between 160 and 200 cm long, 80 and 100 cm wide and 72 and 75 cm high, with a minimum of two different dimensions. The desk displayed by the applicant was 160 cm long, 80 cm wide and 72 cm high, whilst the alternative table proposed was 210 cm long, 120 cm wide and 72 cm high. Accordingly, as the Commission correctly observed, the alternative table proposed did not meet the length or width specifications, and the documentation submitted with the bid did not offer any alternative solution.

116 In these circumstances, it cannot be concluded that the tables proposed by the applicant did not comply with the mandatory conditions of the tender specifications.

117 Moreover, as regards the absence of adjustment jacks, the applicant merely expresses surprise that the jacks were not located on the furniture displayed and adds that the furniture was equipped with metallic inserts intended for installation of jacks. In response to a question from the Court, the applicant added that the presence of the metallic insert, to which only the jack may be fitted, confirms that the jacks indeed formed part of its bid.

- 118 It is none the less the case, however, that the applicant's furniture did not contain the adjustment jacks which were required to comply with specifications. Therefore, the furniture displayed did not comply with the terms and conditions of the tender specifications.
- 119 In those circumstances, the Court finds that the applicant has not established to the requisite legal standard that its tender satisfied all the conditions of tender specifications deemed to be mandatory.
- 120 Moreover, as paragraph 105 above makes clear, even when the sheets which could not be taken into account are eliminated and Frezza's tender price is increased by the additional cost connected with the desk drawers, the applicant's tender still appears less advantageous than Frezza's.
- 121 It follows that, although the Commission committed serious faults in the course of the tender procedure, the applicant has not, however, succeeded in showing that the Commission should have awarded it the contract and, therefore, has not established a causal link between the faults established and the loss alleged.
- 122 Consequently, and without its being necessary to examine whether the loss which the applicant claims to have suffered owing to the award of the contract to Frezza was actually sustained, the application must be dismissed.

Costs

- 123 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings.
- 124 However, under Article 87(3) of those Rules, the Court may order that the costs be shared or that each party bears its own costs, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional. The Court may order a party, even if successful, to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur.
- 125 In the present case, in light of the numerous faults committed by the Commission in the course of the tendering procedure, the Commission should be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby:

1. Dismisses the application;

2. Orders the Commission to pay the costs.

Jaeger

Lenaerts

Azizi

Delivered in open court in Luxembourg on 28 November 2002.

H. Jung

Registrar

K. Lenaerts

President