

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
8 May 1996 *

In Case T-19/95,

Adia Interim SA, a company incorporated under Belgian law, having its registered office in Brussels, represented by Vincent Thiry, of the Liège Bar, Christian Jacobs, Rechtsanwalt, Bremen, Hans Joachim Prieß and Klaus Heinemann, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Tom M. Gilliams, 47 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by Xénophon A. Yataganas and Hendrik van Lier, Legal Advisers, acting as Agents, with at address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission decision, communicated to the applicant on 5 December 1994, informing it that the tender which it submitted in

* Language of the case: French.

response to invitation to tender No 94/21/IX. C.1 on the supply of agency staff had been rejected, and for annulment of the Commission's decision, communicated to the applicant on 21 December 1994, awarding the contracts in question to the companies Ecco, Gregg and Manpower,

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

composed of: K. Lenaerts, President, P. Lindh and J. D. Cooke, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 February 1996,

gives the following

Judgment

Facts

In order to ensure the availability of agency staff, the Commission of the European Communities periodically concludes framework agreements with employment agencies, which it selects on the basis of invitations to tender. In view of the imminent expiry of the framework agreements in force in 1994, the Commission

published in the Supplement to the *Official Journal of the European Communities* of 13 July 1994 (OJ 1994 S 132, p. 129) an open invitation to tender for the supply of agency staff (open invitation to tender No 94/21/IX. C.1). It appears from point 2 of that invitation to tender that the Commission was proposing to conclude framework agreements with three employment agencies.

- 2 Point 15 of the invitation to tender specifies the criteria for the award of the contracts as follows:

‘— coverage of the different job and language profiles;

— organization, customer service, flexibility;

— price’.

- 3 The price was to be calculated in accordance with the instructions laid down in the specifications. On the basis of the reference pay scales set out by the Commission, tenderers had to establish for each type of service, first, net hourly wages; secondly, gross hourly wages; and thirdly, an hourly billing rate. The latter constituted the tender price.

- 4 Net and gross hourly wages were to be expressed in Belgian francs, whereas the billing rates had to be expressed in ecus. Gross hourly wages were calculated by applying to the net hourly wages the relevant Belgian social security and tax provisions. In order to convert the gross hourly wages into billing rates, the tenderers had to determine a coefficient reflecting all their costs, their profit margins and a Belgian franc/ecu conversion rate.

5 The applicant company is engaged exclusively in the business of supplying agency staff. It is undisputed that at the material time it was the main supplier of agency staff to the Commission and had always performed its contracts with the Commission to the latter's satisfaction.

6 On 30 August 1994, the applicant submitted a tender in response to invitation to tender No 94/21/IX. C.1. It is common ground that the tender contained a systematic calculation error.

7 The tenders were opened on 6 October 1994. In order to assess which of them satisfied the formal requirements and the selection criteria, the selection committee allocated 30 points to the criterion of job coverage and language profiles, 30 points to the criterion of organization, customer service and flexibility and 40 points to the criterion of price.

8 It appears from Annex 7(d) to the selection committee's minutes, which summarize the assessment of the three award criteria, that the applicant was in second place with 48 points out of a possible 60, following the evaluation of the criteria of coverage of job and language profiles, on the one hand, and organization, customer service and flexibility, on the other.

9 In order to evaluate the price criterion, the selection committee used the following formula: it granted maximum points (40) to the lowest tender and then deducted five points from the other tenders depending on the percentage by which they exceeded the lowest tender. Thus tenders up to 5% more expensive than the lowest tender were given 35 points; those between 5 and 10% more expensive 30 points; those between 10 and 15% more expensive 25 points and so on down to a minimum of 10 points. Since the prices proposed by the applicant exceeded the lowest tender by more than 50%, its tender was given only 10 points for the price criterion, and fell from second to tenth position.

- 10 The three tenders accepted by the Commission each obtained 73 or 74 points. The applicant's tender received 58 points (28 for the criterion of job coverage and language profiles, 20 for organization, customer service and flexibility and 10 for the price criterion).
- 11 It is undisputed that the selection committee was aware that there was a calculation error in the applicant's tender. Its minutes of 3 November 1994 state that 'the tender of Adia, although the present main contractor, has obtained a poor mark because the billing rates it gave diverge excessively from the average for the other tenders. The difference — of more than 50% — found in Adia's tender is due to a systematic error in the calculation of the billing rates on the basis of the gross hourly wages.'
- 12 By letter dated 5 December 1994, the Commission informed the applicant that its tender had been rejected in the following terms:
- 'Thank you for having taken part in the abovementioned tendering procedure. I regretfully inform you that, following an in-depth comparative study of the tenders and after obtaining the prior opinion of the Advisory Committee on Procurement and Contracts — CCAM —, the Commission considered that it was unable to accept your proposal.'
- 13 By letter dated 9 December 1994, the applicant asked to be informed of the reasons for which its tender had been rejected.

- 14 By letter dated 21 December 1994, the Commission answered that request in the following terms:

‘Thank you for your letter of 9 December 1994 asking for information as to the reasons for which your company’s tender was rejected.

The procedure applied by the tender selection committee was as follows:

1. The committee analysed each tender in the same non-discriminatory way. This means in particular that the fact that a particular company had already had a contract with the Commission did not place it at a *de facto* advantage over the other tenderers.

2. As stated in the specifications, only three tenders were to be accepted, and not six as had previously been the case.

3. 22 tenders were received by the deadline, of which the committee dealing with the opening of tenders found that two were not in order.

4. Two of the 20 remaining tenders did not satisfy the conditions for participating in the tender set out in point 6 of the specification.

5. Six of the 18 tenders satisfying the conditions for participating in the tender did not fulfil all the selection criteria set out in point 7 of the specifications.

6. The twelve tenders selected, which included that of your company, were then assessed on the basis of the three award criteria set out in point 8 of the specification, namely:

- coverage of the different job and language profiles;
- organization, customer service, flexibility;
- price.

7. On the basis of that assessment, the selection committee adopted the tenders which had obtained the most points as being the most economically advantageous ones. These were the tenders of the companies Ecco, Gregg and Manpower.

Accordingly, the outcome of the invitation to tender and the non-acceptance of the tender by your company resulted solely from a strict application of competitive criteria. However, this outcome does not detract from the satisfaction which the Commission has had in working with your company under the previous framework agreement.'

Procedure and forms of order sought by the parties

15 It was in those circumstances that the applicant brought these proceedings by application lodged at the Registry of the Court of First Instance on 7 February 1995.

16 The applicant claims that the Court should:

— annul the Commission's decision, communicated to it on 5 December 1994, not to accept the tender submitted by the applicant pursuant to invitation to tender No 94/21/IX. C.1;

— annul the Commission's decision, communicated to it on 21 December 1994, to award the public contract relating to invitation to tender No 94/21/IX. C.1 to the companies Ecco, Gregg and Manpower;

— order the Commission to pay the costs.

17 The Commission claims that the Court should:

— dismiss the first two pleas in the application as unfounded and the third as inadmissible;

— in the alternative, dismiss the application as unfounded in its three pleas;

— order the applicant to pay the costs.

The claim for annulment

- 18 The applicant raises three pleas in support of its application. The first two pleas, raised in the application, allege breach of the duty to state reasons, on the one hand, and infringement of the principle of equal treatment together with manifest error of assessment, on the other. The third plea, raised in the reply, alleges infringement of the principle of sound administration, of essential procedural requirements and of the second paragraph of Article 99(h) of Commission Regulation (Euratom, ECSC, EC) No 3418/93 of 9 December 1993 laying down detailed rules for the implementation of certain provisions of the Financial Regulation of 21 December 1977 (OJ 1993 L 315, p. 1).

Admissibility

Arguments of the parties

- 19 The Commission contests the admissibility of the third plea on the ground that it was not raised until the reply and is not based on matters which came to light in the course of the proceedings.
- 20 The applicant argues that the third plea is based on ‘matters contained in the defence and in the documents appended thereto’.

Findings of the Court

- 21 The Court points 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.

- 22 There are two limbs to the third plea. In the first limb, the applicant argues that the invitation to tender published in the Supplement to the Official Journal infringes Article 99 of Regulation No 3418/93 on the ground that it does not contain most of the particulars required by that provision. In the second limb, it argues that the second paragraph of Article 99(h) of Regulation No 3418/93, read in the light of the principle of sound administration, obliged the Commission to contact it in order to clarify the terms of its tender.
- 23 As far as the first limb of this plea is concerned, the Court finds that the applicant could have had cognizance, before it brought its action, both of the invitation to tender, to which it responded, and of Regulation No 3418/93, which was published in the Official Journal of 16 December 1993 (OJ 1993 L 315). It follows that the first limb of the plea is not based on matters which came to light in the course of the procedure within the meaning of Article 48(2) of the Rules of Procedure and so must be declared inadmissible.
- 24 As far as the second limb of the plea is concerned, the Court considers that it should be declared admissible inasmuch as it is based on a relevant matter of fact which came to light in the course of the procedure, namely the fact that the selection committee was aware of the existence of a systematic calculation error in the applicant's tender. Since, however, in this second limb of the third plea the applicant merely reiterates an argument set out in its second plea, the Court will consider it when it assesses the second plea.

Substance

The first plea, alleging infringement of the duty to state reasons

— Arguments of the parties

- 25 The applicant asserts in the first place that a tenderer participating in a procedure for the award of a public contract organized by a Community institution is entitled to be given, at the very time when it is informed that its tender has been rejected, an individual statement of the reasons for the rejection of its tender. It takes the view that that right flows directly from Article 190 of the EC Treaty such that the Court ought not to apply Article 12(1) of 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), in conjunction with Article 126 of Regulation No 3418/93, if those provisions have the effect of enabling the institutions to give the reasons for their decisions rejecting tenders *a posteriori*.
- 26 The applicant considers that it follows from this that, in order to determine whether the Commission complied with its duty to state the reasons on which its decision was based, the Court should take account only of the reasons set forth in the letter of 5 December 1994 and not of those contained in the letter of 21 December 1994, which was late. Since it is undisputed that the letter of 5 December 1994 contains no reasons whatsoever, the applicant considers that the Court must conclude that there has been an infringement of Article 190 of the Treaty.
- 27 Secondly, the applicant argues that, in any event, the reasons set out in the letter of 21 December 1994 must be regarded as inadequate, since they do not enable the precise grounds on which its tender was rejected to be identified. While the invitation to tender and the specifications set out three precise award criteria, the applicant considers that the letter of 21 December 1994 makes no reference to these and is based merely on a general reference to 'the more economically advantageous' tenders of the three successful companies.

28 The Commission states in response that it is clear from Article 12(1) of Directive 92/50 that it is entitled to give a reasoned decision only to eliminated tenderers who make an express request to that effect. It considers that that provision is applicable in this case by virtue of Article 126 of Regulation No 3418/93, which provides that the Council directives on contracts for public works, supplies and services are to be applicable to the award of contracts by the institutions whenever the amounts involved are greater than the amounts provided for in those directives.

29 Consequently, it considers that it was only the letter of 21 December 1994 which needed to furnish justification for the rejection of the applicant's tender and that that letter does in fact provide adequate grounds for the contested decision in that it describes the procedure followed, sets forth the criteria applied and mentions the names of the successful tenderers.

— Findings of the Court

30 It is necessary to determine first which duties to give reasons are applicable to the institutions vis-à-vis tenderers eliminated from Community procedures for the award of public contracts.

31 In this connection, the Court observes that Directive 92/50 is applicable in this case by virtue of Article 126 of Regulation No 3418/93, since the value of the contract in question exceeds the threshold laid down by Article 7(1) of that directive. However, it appears from Article 12(1) of Directive 92/50 that the institution concerned fulfils its obligation to state reasons if it first informs eliminated tenderers immediately of the fact that their tender has been rejected by a simple unreasoned communication provided it subsequently, if expressly requested to do so, furnishes them within 15 days with a reasoned explanation.

- 32 The Court considers that such a manner of proceeding satisfies the purpose of the duty to state reasons enshrined in Article 190 of the Treaty, according to which the reasoning followed by the authority which adopted the measure in question must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights; and, on the other, to enable the Court to exercise its supervisory jurisdiction (Case T-166/94 *Koyo Seiko v Council* [1995] ECR II-2129, paragraph 103).
- 33 In this context, it must be emphasized that the fact that interested tenderers receive a reasoned decision only if they make an express request to that effect does not restrict their ability to assert their rights before the Court. The period for bringing proceedings laid down in the fifth paragraph of Article 173 of the Treaty does not in effect begin to run until the reasoned decision is notified, subject to the tenderer having made his request for a reasoned decision within a reasonable time after he was apprised of the rejection of his tender (see Case T-465/93 *Consorzio Gruppo di Azione Locale 'Murgia Messapica' v Commission* [1994] ECR II-361, paragraph 29, and Joined Cases T-432/93, T-433/93 and T-434/93 *Socurte and Others v Commission* [1994] ECR II-503, paragraph 49).
- 34 Accordingly, in order to determine whether the Commission complied with its duty to state reasons, the Court takes the view that it is necessary to examine the letter dated 21 December 1994 sent to the applicant in response to its express request for an individual explanation.
- 35 In this regard, it is clear from that letter that the Commission did provide sufficiently detailed reasons for its rejection of the tender in question, because it confirmed that it satisfied all the formal requirements of the procedure but was considered to be less economically advantageous than the tenders of Ecco, Gregg and Manpower at the stage when the three award criteria were applied.

- 36 The sufficiency of that reasoning is borne out by the fact that — as the applicant confirmed at the hearing — when it was informed that its tender had been rejected in December 1994, it was able immediately to identify the precise reason for its rejection, to wit the presence of a systematic error in the calculation of the price.
- 37 It follows from the foregoing that the first plea alleging infringement of the obligation to state reasons must be rejected.

The second and third pleas considered together, alleging infringement of the principles of equal treatment and sound administration, the second paragraph of Article 99(h) of Regulation No 3418/93 and manifest error of assessment

— Arguments of the parties

- 38 The applicant puts forward two separate arguments in support of this plea. First, it argues that, in order to guarantee compliance with the principles of equal treatment and sound administration, the Commission was itself obliged either to correct the error which it had found or to contact the applicant in order to enable it to correct the error. In this context, the applicant avers that it is clear from the documents produced by the Commission during the proceedings that, if the formula ‘billed hourly rates = gross hourly wages x 2.16: 39.5’ had been correctly applied, it would have obtained at least sufficient points under the price criterion to be classed in joint third place. In addition, it draws the Court’s attention to the wording of Article 99(h) of Regulation No 3418/93, which in its view, confirms that a contracting institution may take it upon itself to contact a tenderer in order to correct obvious clerical errors. Lastly, at the hearing, the applicant based an argument on Article 37 of Directive 92/50, from which it appears that a contracting authority is not entitled to reject a tender which appears abnormally low without requesting particulars in writing on its make-up. It adds moreover that the Commission made a manifest error of assessment in awarding it points for its flexibility and customer service by comparison with the points which it awarded under those heads to Ecco.

39 The Commission responds by stating in the first place that if it had corrected the applicant's tender, that in itself would have constituted an infringement of the principle of equal treatment. It considers that corrections of clerical errors may be envisaged only in so far as they have no discriminatory effect. However, in view of the key importance played by the tender price in assessing the tender, any correction of the applicant's tender or any request made to it to submit a new tender would have been bound to infringe the principle of non-discrimination.

40 In so far as the applicant contests the assessment made by the selection committee of its flexibility and its customer service, the Commission contends that it is not for the applicant to substitute its assessment for that of the contracting authority in proceedings relating to legality.

— Findings of the Court

41 It is common ground that the existence of a 'systematic error in the calculation of the billing rates on the basis of the gross wages' was adverted to by the Commission at the meeting of its selection committee (see paragraph 11, above).

42 In view of that factor, the applicant claims that, by refraining from contacting it, the Commission infringed the principle of equal treatment in so far as it did not assess the real value of all the tenders submitted to it, but simply compared the value of the applicant's tender, which it knew to be distorted, with the apparent real value of the other tenders. The applicant adds that, at the same time, the Commission infringed the principle of sound administration and the second paragraph of Article 99(h) of Regulation No 3418/93.

43 In that regard, it should be noted that according to the second paragraph of Article 99(h) of Regulation No 3418/93 any contact between the institution and the

tenderer after the tenders have been opened is prohibited save, exceptionally, 'if some clarification is required in connection with a tender, or if obvious clerical errors contained in the tender must be corrected'. In those cases, the institution may take it upon itself to contact the tenderer.

- 44 The Court considers that it is clear from the precise terms of that provision that it empowers the institutions to contact tenderers in the exceptional, limited circumstances which it identifies. It follows that that provision cannot be interpreted as imposing a duty on the institutions to contact tenderers.
- 45 Next, it is necessary to enquire whether, in this case, that power might nevertheless have given rise to a duty on the part of the Commission by virtue of the superior principles of law invoked by the applicant (see paragraph 42, above) having regard to the fact that the calculation error in question was particularly obvious.
- 46 As to that, the Court considers it sufficient to observe that the systematic calculation error in question was not particularly obvious. Whilst the selection committee succeeded in attributing the error to the 'calculation of the billing rates on the basis of the gross hourly wages' (see paragraph 11, above), it was unable for all that to determine, on the basis solely of the applicant's tender, whether the error was a calculation error made in applying the formula presented by the applicant, as it has maintained before the Court; an error in determining the coefficient for converting the gross hourly wages into billing rates, which, according to the specifications, takes in all the tenderer's costs, its profit margin and the Belgian franc/ecu conversion rate (see paragraph 4, above); or simply a clerical error.
- 47 It follows that, even though the selection committee detected the presence of a systematic calculation error, it was unable to ascertain its exact nature or cause. In

those circumstances, any contact made by the Commission with the applicant in order to seek out jointly with it the exact nature and cause of the systematic calculation error would have involved a risk that other factors taken into account in order to establish its tender price — in particular those relating to the calculation of the coefficient encompassing its profit margin — might have been adjusted, and this would have entailed, contrary to the applicant's claims, an infringement of the principle of equal treatment to the detriment of the other tenderers, all of whom, in common with the applicant, are under an equal duty to take care in drawing up their tenders.

- 48 The Court further notes that the applicant has neither shown nor even alleged that the Commission contacted, in the course of the procedure at issue, other tenderers who were in a comparable situation to its own in order to correct any errors in their tenders or to provide additional information. In this connection, the Court observes that it appears from Annexes 7(d) and 9 to the report to the CCAM that the selection committee used, as an assessment criterion, the clarity and precision of the tenders and penalized some tenders because they were insufficiently precise about the quality of the service which the tenderers undertook to provide. Yet, whilst those tenderers were in a situation comparable to that of the applicant in so far as they could have increased the value of their tenders if the Commission had taken it upon itself to contract them in order to obtain explanations, the Court finds that the report to the CCAM and the documents appended thereto do not mention any contact made by the Commission with tenderers, but confirm that the Commission strictly applied the conditions of the tendering procedure.

- 49 Lastly, the Court considers that the Commission did not commit a manifest error in assessing the applicant's organizational ability. In this regard, the Court recalls that the Commission has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error (Case 56/77 *Agence Européenne d'Interims v Commission* [1978] ECR 2215, paragraph 20). In this case, the Court finds, with regard to the points awarded to the applicant for its customer service, that it is undisputed that the applicant's tender — unlike that of Ecco — made no reference to the quality of the customer service which it undertook to provide and hence the Commission made no manifest error of assessment in giving Ecco three points more than

the applicant for its customer service. As regards the points awarded to the applicant for flexibility, unlike Ecco's tender, that of the applicant did not undertake to provide a 'contact person' permanently at the Commission's offices, with the result that the Commission did not make any manifest error of assessment in awarding Ecco two points more than the applicant for flexibility.

50 In addition, the Court would point out that the first and second paragraphs of Article 37 of Directive 92/50, which place the contracting authority under a duty to verify that the terms of the tender are not the outcome of the economy of the method by which the service is provided, the technical solutions chosen, the exceptionally favourable conditions available to the tenderer for the provision of the service or the originality of the service; are concerned with a tender which appears to be abnormally low, whereas the tender at issue in this case is one which appears to be abnormally high.

51 For all of these reasons it follows that the Commission has not infringed the principles of equal treatment and sound administration or the second paragraph of Article 99(h) of Regulation No 3418/93, nor has it committed a manifest error of assessment, and therefore the second and third pleas must be rejected.

52 It follows that the application must be dismissed in its entirety.

Costs

53 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application;
2. Orders the applicant to pay the costs.

Lenaerts

Lindh

Cooke

Delivered in open court in Luxembourg on 8 May 1996.

H. Jung

K. Lenaerts

Registrar

President