JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
17 December 1998 *

In Case T-203/96,

Embassy Limousines & Services, a company incorporated under Belgian law, established in Diegem (Belgium), represented by Éric Boigelot, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Louis Schiltz, 2 Rue du Fort Rheinsheim,

applicant,

v

European Parliament, represented by François Vainker and Anders Neergaard, of its Legal Service, acting as Agents, assisted by Charles Price, of the Brussels Bar, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

defendant,

APPLICATION for compensation for the damage allegedly suffered by the applicant on account of the wrongful conduct of the Parliament in connection with

* Language of the case: French.

Invitation to Tender No 95/S 158-76321/FR relating to a contract for passenger transport using chauffeur-driven vehicles, brought pursuant to Article 181 of the EC Treaty, under the arbitration clause in the third paragraph of Article 6 of the specifications of that invitation to tender and Article VIII of framework contract PE-TRANS-BXL-95/6, and, in the alternative, pursuant to Article 178 and the second paragraph of Article 215 of that Treaty,

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

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

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 July 1998,

gives the following

Judgment

Background to the dispute

1 On 22 August 1995 the European Parliament, pursuant to 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, hereinafter 'Directive 92/50'), published in the *Official Journal of the European Communities* a tender notice (OJ 1995 S 158, p. 23, hereinafter 'the notice'), in accordance with the open procedure, in respect of a contract for passenger transport using chauffeur-driven vehicles, in this case for Members of the European Parliament (Invitation to Tender No 95/S 158-76321/FR, hereinafter 'the contested invitation to tender').

2 The notice indicated that the contract would take the form of a framework contract with a company providing the service and that it would be carried out on the basis of order forms specific to each operation. The contract would be concluded for a period of three years and renewable for two one-year periods. The place of delivery would be Brussels and the service providers would have to provide evidence to the effect that they had been active in the sector for five years. As contract award criteria, the notice stated that the economically most advantageous tender would be selected, taking account of the prices tendered and the technical merit of the tender.

3 On 13 September 1995 the General Secretariat of the Parliament, in the person of Mr Candidi, Head of the Human Resources and Administration Department, sent the applicant, Embassy Limousines & Services SA (hereinafter 'Embassy'), in response to its written request of the same date, all the documents relating to the contested invitation to tender, namely framework contract PE-TRANS-BXL-95/6 (hereinafter 'the framework contract'), the specifications relating to the invitation to tender and the technical specifications relating thereto.

4 The framework contract (Article VIII) and the specifications of the contested invitation to tender (third paragraph of Article 6) made the contracts awarded subject to Luxembourg law and provided for the exclusive jurisdiction of the Court of Justice of the European Communities. Any matters not governed by the specifications would be subject to the 'General Terms and Conditions Applicable to Contracts' drawn up by the Commission of the European Communities (hereinafter 'the General Terms and Conditions').

5 On 16 October 1995 the applicant submitted its tender.

6 On 4 December 1995 the Parliament, in the person of Mr Candidi, contacted Mr Hautot, the then Managing Director of Embassy, to tell him that the Advisory Committee on Procurements and Contracts (hereinafter 'the ACPC') had that day delivered an opinion in favour of the authorising officer's proposal to award the contract to his company.

7 On 12 December 1995 the applicant sent to the Parliament a letter in which it reported on the measures it had taken in order to respond to the urgency of the situation in which the Parliament found itself. It stated that it had entered into contracts for leasing cars and renting mobile telephones (GSM), engaged drivers and attended to their social security, health insurance and tax situation. In the same letter the applicant reacted to rumours and gossip referring to an alleged lack of good character on the part of its executives and/or shareholders and questioning the quality of the services it provided.

8 As a result of those rumours and articles in the press casting doubt on the probity of certain Embassy executives, two of the latter, Mr Hautot and Mr Heuzer, were asked to go to Strasbourg in order to produce any documents required to show the good repute of their company. That meeting took place on 13 December 1995.

9 After that meeting Mr Feidt, the Director-General of Administration, sent a memorandum to the Secretary-General of the Parliament, which reads as follows:

'Further to the request made by the Bureaux of the European Parliament, an inquiry has been conducted by my departments in order to check whether the accusations made against the Embassy company ... were well-founded.

The executives of that company were invited to travel to Strasbourg where they answered the questions put to them after supplying all the documents requested ...

Thorough examination of those documents has shown that the allegations are completely without foundation.

In those circumstances, and given the need for the new company to organise on a practical level the setting up of the services, a decision urgently needs to be taken: it is imperative that the administration guarantee transport for Members of Parliament as soon as they return in January 1996.

Consequently I request your agreement to the signing of that contract as soon as possible.'

10 Nevertheless, on 19 December 1995 Mr Feidt referred to the ACPC a proposal that a contract with the company then responsible for provision of the services at issue (hereinafter 'Company A') should be extended for one month. The minutes of the ACPC meeting of that date state *inter alia*:

'The ACPC,

...

— having regard to its opinion of 4 December 1995 in favour of concluding a contract with the Embassy company ..., the successful candidate in the above tendering procedure,

— taking formal note that the internal decisions of the Parliament authorising the signing of the contract with the Embassy company ... could not be finalised before the end of 1995,

— on the basis of Article 59(b) of the Financial Regulation and Article 11(3)(d) of Directive 92/50 ..., *delivers an opinion in favour* of a contract from 1 January 1996 to 31 January 1996 with Company [A ...] (the company which made the second lowest bid in the above tendering procedure) on the terms of the original contract and renewable for a maximum of one month (February 1996) after a further reference to the ACPC.

— *invites* the authorising officer to take all appropriate measures to ensure that the contract with the company which made the successful bid in the open tendering procedure is signed as soon as possible.'

11 A contract with Company A was concluded on 5 January 1996.

12 By letter of 25 January 1996 the applicant told the Parliament that it did not understand why that institution had not yet adopted the final decision on the contested invitation to tender.

13 At two meetings of 22 January 1996 and 26 February 1996 the ACPC delivered opinions in favour of two one-month extensions to the contract concluded with Company A. Finally, at a meeting of 1 April 1996, the ACPC gave an opinion in favour of a three-month extension to the contract concluded with that same company.

14 On 16 February 1996 the applicant sent a letter to Mr Ribeiro, a member of the College of Quaestors (the body responsible for making recommendations to the Bureau on questions concerning Members), in particular to clarify certain questions relating to the qualifications and experience of Embassy drivers.

15 By letters of 29 February and 4 March 1996 sent to the Parliament the applicant again expressed surprise at having not yet received the signed contract.

16 On 8 May 1996 the Bureau of the Parliament recommended to the authorising officer the initiation of a new tendering procedure.

17 On 28 May 1996 the applicant sent the Parliament a letter in which it asked it to indicate its reasons for deciding to reopen the procedure.

18 On 31 May 1996 the ACPC delivered an opinion in favour of annulling the contested invitation to tender. At the same time it also delivered an opinion, on a proposal from the authorising officer, in favour of signing a contract with Company A for the period from 1 July to 31 December 1996, while waiting for the results of the new invitation to tender. The minutes of that meeting show:

'The ACPC,

...

1. as to the annulment of Invitation to Tender No 95/S 158-76321/FR

...

— whereas the decision of the authorising officer to annul that invitation to tender is based on the opinion given by the Bureau at its meeting of 8 May 1996;

— whereas according to that opinion, which confirms the position taken by the College of Quaestors, "the present procedure is not likely to give Members a transport service of appropriate quality";

...

— delivers an opinion (eight votes for and one abstention) in favour of annulling the invitation to tender under discussion while pointing out that it is for the authorising officer to verify the economic basis of a new invitation to tender (its cost, difference in results compared with the first, etc.).

...'

19 By registered letter of 19 June 1996 the Parliament informed the applicant that the contested invitation to tender had been annulled and that the procedure had been reopened. That letter explained, in particular, that the Parliament had considered that none of the tenders received had been judged completely satisfactory and that the institution had been particularly concerned to give Members of Parliament a service of the highest technical quality, provided by very experienced professional drivers, all of which was not unarguably demonstrated in the documents presented by the tenderers. A new open invitation to tender would be launched, specifying the requirements of the Parliament more explicitly and more fully.

20 By letter dated 22 July 1996 the applicant formally requested the Parliament either not to annul the contested invitation to tender and to award it the contract, or to pay it satisfactory compensation.

21 After acknowledging that letter on 21 August 1996, Mr Feidt, by letter of 14 October 1996, rejected the applicant's requests. He stated:

'It is agreed that, in this case, no contract has been concluded between the Parliament ... and ... Embassy ... since:

— the ACPC has no competence other than to deliver an opinion to the competent authorising officer, in this case myself; the ACPC does not take any decisions;

— according to Article 1 of Council Directive 92/50/EEC, to which you refer in your letter, "'public service contracts' shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority (the European Parliament)";

— there is no written contract, since proposed framework contract PE-TRANS-BXL-95/6, which formed part of the specifications and was therefore received by Embassy, has not been signed.'

22 Mr Feidt continued:

'If Embassy believed, from 4 December 1995, that it had or would have a contract for passenger transport in Brussels as a result of the invitation to tender ..., any misunderstanding should have been very quickly cleared up at the meeting of 13 December 1995 .... According to the minutes of that meeting, which have been sent

to me, Mr Hautot and Mr Heuzer of Embassy "have been informed that the ACPC had indeed expressed an opinion in favour of the authorising officer's proposal to award them the contract but that that opinion had the status of advice only and that the authorities had the power of final decision".'

23 Mr Feidt concluded that the Parliament saw no reason justifying the withdrawal or annulment of its decision to reopen the tendering procedure which had been communicated to Embassy by letter of 19 June 1996. He added that the ground justifying the reopening of the tendering procedure was not incompatible with the need felt by Mr Hautot to give a thorough account, in his letter of 16 February 1996 to Mr Ribeiro, of the considerable professional training and experience of the Embassy drivers.

Procedure and forms of order sought by the parties

24 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 10 December 1996, the applicant brought these proceedings.

25 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure. In accordance with Article 64 of the Rules of Procedure, the parties were invited to reply to certain questions and to produce certain documents.

26 By order of 5 June 1998, the Court of First Instance, pursuant to Article 65(c) of its Rules of Procedure, ordered the hearing, as witnesses, of Mr Candidi and Ms Lahousse, officials of the Parliament, and of Mr Hautot and Mr Heuzer, representatives of the applicant company. The order provided that the witnesses would be heard on the content of the meeting which was held in Strasbourg on 13 December 1995. Mr Candidi and Mr Hautot would be heard on the subject and content of

their telephone conversation of 4 December 1995. Finally, Mr Candidi and Ms Lahousse would be heard on their reaction to the applicant's letter of 12 December 1995 on the subject of certain investments it had made.

27 The parties and the witnesses were heard at the public hearing of 2 July 1998.

28 Embassy, the applicant, claims that the Court should:

— declare the application admissible and well founded and consequently order the Parliament to pay it the sum of BEF 21 028 460, subject to an increase or reduction in that amount in the course of the proceedings, by way of compensation for the financial, commercial and non-material damage which it has suffered on account of the wrongful conduct of the Parliament;

— order the Parliament to bear all the costs.

29 The Parliament, the defendant, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

30 In its application and reply the applicant stated that its action was brought pursuant to the third paragraph of Article 6 of the specifications of the contested invitation to tender and Article VIII of the framework contract, and therefore on the basis of Article 181 of the EC Treaty, and in the alternative, on the basis of Article

178 and the second paragraph of Article 215 of the Treaty, and that it concerned a claim for damages to compensate for the damage caused to the applicant by the wrongful conduct of the Parliament in connection with the contested invitation to tender.

Contractual liability of the Community

Arguments of the parties

31 The applicant claims that, although a contract between the parties had been properly concluded, the Parliament withdrew from it unilaterally and refused to perform it on the terms and conditions agreed.

32 It maintains, first, that the award of the contract at issue results from valid, public and unequivocal *consensus ad idem*. It stresses in that regard that, during their telephone conversation of 4 December 1995, Mr Candidi informed Mr Hautot that the decision to award the contract to Embassy had been taken and consequently invited him to do everything to ensure that the company was in a position to provide the services at issue from the beginning of January 1996. The applicant insists that, by officially informing him of the decision taken by the ACPC, the Parliament expressed its intent and thereby made its offer irrevocable. The Parliament thus showed its intention to contract with the applicant, thereby conferring on the applicant a contractual right which meant that the Parliament could not go back on its decision.

33 The applicant adds that, in reality, it is the ACPC which takes the decision to award a contract to an undertaking, since the authorising officer's only function is to formalise what has, in fact, already been decided by the ACPC.

34 Secondly, the applicant maintains that, at the very least, it should be considered that there is an apparent contract. It claims that all the factors necessary for the formation of a contract are present. In that regard it underlines the validity of its tender, the information given by Mr Candidi and the fact that the Parliament required it to begin to implement, from December 1995, the measures necessary for the performance of the contract from the first working day in January 1996.

35 The Parliament considers that, since no contract between the parties has been signed, the applicant's action for damages in contract is inadmissible. It points out that both the General Terms and Conditions and Directive 92/50 require any contract between the contracting authority and the successful tenderer to be in writing. It also contends that the last document of the invitation to tender constitutes a draft framework contract which must be signed by the service provider and by the authorising officer. However, that framework contract has never been signed either by the applicant or by the authorising officer.

36 It refutes moreover the applicant's allegation that it is in reality the ACPC which takes the decision to award a contract to an undertaking, by referring in that regard to the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), from which it is clear that the ACPC constitutes only an advisory committee.

37 It considers, finally, that the doctrine of apparent contract which is invoked by the applicant does not correspond to any 'general principle common to the laws of the Member States' so that it cannot be usefully invoked in this case.

Assessment by the Court

38 In accordance with the combined provisions of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as subsequently amended, and Article 181 of the Treaty, the Court of First Instance has jurisdiction to hear, at first instance, actions in contract brought before it by natural or legal persons pursuant to an arbitration clause.

39 It is important to stress, however, that, in the words of Article 1 of Directive 92/50, applicable pursuant to Article 126 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), inasmuch as the value of the contract at issue exceeds the threshold laid down in Article 7(1) of that directive, 'public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority'.

40 In this case, it is not disputed that the value of the contract exceeds that threshold. The existence of contractual relations between the parties therefore presupposes that they have entered into a written contract. In that regard, it is appropriate to refer also to Article 3 of the General Terms and Conditions (applicable, in this case, pursuant to the first paragraph of Article 6 of the specifications). That article provides:

'3.1 The contracts shall be made binding by the agreement in writing of the parties thereto.

3.2 A contract shall be concluded by notification to the tenderer that his tender has been accepted.

Such notification shall be in the form of a purchase order or letter.

3.3 If the acceptance does not conform in all respects with the tender or if the Commission's decision is advised after the expiry of the period during which the tender was valid, the conclusion of the contract shall be subject to the tenderer's agreement in writing.

3.4 The contract may also take the form of a contract signed by both parties.'

41 It follows that the contract could not be finally awarded without the framework contract being signed by the two parties. However, since the framework contract has never been signed, it must be concluded that there is no valid contract in this case.

42 Moreover, the favourable opinion of the ACPC, as an *opinion* of an *advisory* body, cannot change that conclusion, notwithstanding the importance which is generally accorded to that opinion, in practice, in connection with an invitation to tender.

43 The applicant's allegation that there is an 'apparent' contract must also be refuted. Without there being any need to consider the foundation of the doctrine of apparent contract in Community law or the conditions governing its application in this case, it is clear that the evidence put forward by the applicant does not permit any derogation from the requirement of a written contract. The representatives of Embassy have, furthermore, recognised in their testimony that they were aware of the need for a written agreement for the contract to be validly awarded.

44 It follows that, since the applicant has failed to demonstrate the existence of a valid contract, in so far as its application is made on the basis of Article 181 of the Treaty it must be declared inadmissible.

Non-contractual liability of the Community

45 The non-contractual liability of the Community under the second paragraph of Article 215 of the Treaty and the general principles to which that provision refers depends on fulfilment of a set of conditions as regards the unlawfulness of the conduct alleged against the institution, the fact of damage and the existence of a causal link between the conduct in question and the damage complained of.

Unlawfulness of the conduct alleged

46 In support of its application for compensation under Article 178 and the second paragraph of Article 215 of the Treaty, the applicant alleges an infringement of Directive 92/50 and the wrongful conduct of the Parliament in connection with the tendering procedure.

Infringement of Directive 92/50

— Arguments of the parties

47 The applicant points out that its tender was perfectly proper in form and content, in that it met in every particular the criteria of the contested invitation to tender. However, according to the applicant, it is unarguably clear that, from the beginning of January 1996, the Parliament, first by monthly contracts, then by subsequent contracts, awarded the service contract for the transport of Members of Parliament in chauffeur-driven motor vehicles to another company, also a tenderer and the second lowest bidder.

48 Embassy considers that its bid, which had been judged to be the economically most advantageous, must have been set aside for improper reasons and given way to a contract negotiated with another service provider. In that regard it quotes Article 11(3) of Directive 92/50 which states:

'Contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice in the following cases:

(a) in the absence of tenders or of appropriate tenders in response to an open or restricted procedure provided that the original terms of the contract are not substantially altered and that a report is communicated to the Commission at its request;

...'.

49 The Parliament contends that the reason for which it annulled the contested invitation to tender was that the condition requiring providers to have at least five years' experience in the sector, mentioned in the notice, had not been reproduced in the documents constituting the contested invitation to tender. The fact that that requirement was included in the notice but not reproduced in the invitation to tender could have been criticised, with justification, by a potential tenderer in a position to satisfy the terms eventually included in the invitation to tender, but who had not submitted a tender because he could not show evidence of five years' experience. That would be a breach of the principle of equal treatment of tenderers, which is an essential principle for the application of Directive 92/50 (see Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraphs 33 and 39, and Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 51).

50 The Parliament contends moreover that it wanted to avoid any risk of unlawfulness connected with contacts that certain of its officials had had with tenderers before the opening of bids, *inter alia* the contacts between Mr Candidi and the applicant. Contrary to what is laid down in Article 100 of Regulation No 3418/93 of 9 December 1993, cited above, no note for the file was drawn up following those contacts.

51 The Parliament also points out that Article 12(2) of Directive 92/50 expressly provides for the contracting authority to be able to decide not to award a contract in respect of which a prior call for competition was made, or to recommence the procedure for the award of the contract. In addition, Article 4 of the General Terms and Conditions provides that fulfilment of an adjudication or invitation-to-tender procedure does not involve the institution in any obligation to award the contract.

52 The Parliament states finally that the contract was temporarily awarded to Company A in accordance with Article 11(3)(d) of Directive 92/50 which provides for such a solution in cases of extreme urgency brought about by unforeseeable events. The need to ensure continuity of service in this case allegedly constitutes appropriate justification.

53 The Parliament infers from the foregoing that its decisions to annul the contested invitation to tender and to award the contract on a provisional basis to Company A were perfectly legitimate and that the adoption of those decisions does not therefore constitute a fault giving rise to liability on the part of the Community.

— Assessment by the Court

54 It is necessary, first, to point out that the contracting authority is not bound to follow through to its end a procedure for awarding a contract. It is clear from Article

12(2) of Directive 92/50 that, if the procedure is annulled, the contracting authority is simply bound to inform candidates or tenderers who so request in writing of the grounds on which it decided not to award a contract in respect of which a prior call for competition was made, or to recommence the procedure.

55 Moreover, Article 4 of the General Terms and Conditions states, first, that fulfilment of an adjudication or invitation-to-tender procedure does not involve the institution in any obligation to award the contract and, secondly, that it is not liable for any compensation with respect to tenderers whose tenders have not been accepted.

56 In addition, it must be recalled that the Parliament 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 (see Case 56/77 *Agence Européenne d'Intérims* v *Commission* [1978] ECR 2215, paragraph 20, and Case T-19/95 *Adia Intérim* v *Commission* [1996] ECR II-321, paragraph 49).

57 In this case the contested procedure for awarding the contract was not completed. Therefore, having received from the applicant a request in writing dated 28 May 1996, the Parliament informed it, by letter of 19 June 1996, of the grounds justifying the annulment of the contested invitation to tender and the reopening of the procedure (see paragraph 19 above).

58 In response to the applicant's allegations, Mr Feidt then pointed out in his letter of 14 October 1996 (see paragraphs 21 to 23 above) that the Parliament '[saw] no reason to withdraw or annul its decision to reopen the tendering procedure which has been communicated to Embassy by letter of 19 June 1996. The grounds of that decision are not incompatible with the need felt by Mr Hautot, who was obviously anxious, to give a thorough account to Mr Ribeiro, a member of the College of Quaestors of the European Parliament, in his letter of 16 February 1996, of the

considerable professional training and experience of the Embassy drivers: Mr Hautot referred in his letter to the worries that Mr Ribeiro might have had about the quality of the drivers recruited by Embassy ...'.

59 It follows that, whatever the legal worth of the different explanations given by the Parliament concerning the risk of discriminatory treatment of tenderers, it is clear that it followed the procedure laid down in the legal provisions applicable when it annulled the contested invitation to tender.

60 Furthermore, the applicant has put forward no evidence to show that the Parliament, in considering that none of the tenders received was totally satisfactory, has committed a grave and manifest error. Although the doubts about the competence of the drivers recruited by Embassy constituted a decisive ground of the Parliament's decision not to accept its bid, the applicant has not shown that the Parliament went beyond the proper bounds given the broad discretion it enjoys in that regard.

61 Since the annulment of the contested invitation to tender was not unlawful, the non-contractual liability of the Community cannot consequently be incurred on that account.

62 It is also necessary to reject the applicant's argument that the Parliament unlawfully awarded the contract, on a provisional basis, to Company A. In these proceedings the applicant is seeking, in substance, to obtain compensation for the damage caused to it on account of the allegedly wrongful conduct of the Parliament in connection with the contested invitation to tender. However, the provisional award of the contract at issue to Company A was made at the end of a negotiated procedure without prior publication, which is different from the open procedure disputed in this case. It follows that, even if the applicant succeeded in proving the unlawfulness of the negotiated procedure followed by the Parliament

to compensate for the suspension of the contested invitation to tender, it could not be the cause of the damage allegedly suffered by the applicant in connection with the contested invitation to tender.

63 It follows from the foregoing that the liability of the Community cannot be incurred on account of an infringement of Directive 92/50 by the Parliament.

Unlawful conduct of the Parliament during the tendering procedure

— Arguments of the parties

64 The applicant claims that the conduct of the Parliament during the tendering procedure was wrongful and therefore gives rise to liability on the part of the Community, in so far as it could legitimately and reasonably lead the applicant to believe in the imminent conclusion of the agreement for the provision of services. Embassy states that the Parliament asked it on 4 December 1995 to engage in an important series of investments with a view to the immediate implementation of the agreement at the very beginning of January 1996. The applicant emphasises, in that regard, that, in reality, it is the ACPC which takes the decision to award a contract to an undertaking, so that the information given to the applicant concerning the favourable opinion of the ACPC constitutes *de facto* a decision.

65 It states, moreover, that the Parliament confirmed the imminent signing of the contract at issue, in particular during the visit of its representatives to Strasbourg on 13 December 1995, and that no-one has ever disputed that it had been decided to award it the contract. For seven and a half months from 4 December 1995 it was

never disputed by anyone within the Parliament that the contract had indeed been awarded to the applicant, who had even been called the 'successful candidate' by the ACPC.

66 The applicant therefore considers that the Parliament was at fault in requiring from it, in view of the urgency of the situation, preparations which were particularly demanding in terms of time, energy and resources, especially financial, for a contract which it eventually decided not to conclude and which it claims is non-existent. It considers that the Parliament's attitude constitutes an infringement of a general rule of conduct amounting to negligence. It adds that, in any event, the Parliament should have told it directly that the contract would not be performed at the beginning of January 1996, so that it could have immediately put an end to the steps it was taking and limited as far as possible the amount of damage it claims to have suffered.

67 Finally, the applicant claims that, in reality, the Parliament acted with the aim of favouring another company, namely the company which proved to be the second lowest bidder and which, in the course of 1996, provided the service at issue on a temporary basis. Embassy infers that the Parliament exceeded the powers conferred on it, in the more general context of a misuse of procedure designed to favour a third party. That unlawfulness constitutes a fault.

68 The Parliament contends that no fault giving rise to liability on the part of the Community can be imputed to it. First, it is clear from the papers in the file that the only communication from the Parliament which could possibly have constituted a wrongful act is the telephone conversation which Mr Candidi had with Mr Hautot on 4 December 1995 after the meeting of the ACPC on the same day. However, according to the Parliament, during that conversation Mr Candidi confined himself to confirming that the ACPC had given an opinion in favour of the proposal to award the contract to the applicant. He never told the applicant that a decision had been taken in its favour.

69 The Parliament adds that, if the applicant thought it wise, in those circumstances, to incur expenses and to make irreversible investments, it manifestly acted with a lack of judgment which cannot be expected on the part of a reasonably prudent trader. That is all the more true because Article 12(2) of Directive 92/50 provides for the possibility of annulling an invitation to tender and Article 4 of the General Terms and Conditions not only provides for the possibility of such an annulment but also excludes any compensation for tenderers in such a case. The telephone conversation of 4 December 1995 was not, moreover, followed by any written confirmation on the part of the Parliament.

70 The Parliament also contends that, even if Mr Candidi was imprudent and the applicant was misled, any possible misunderstanding was cleared up during the visit of the Embassy representatives to Strasbourg on 13 December 1995, on which occasion they were told that the opinion of the ACPC was purely advisory and that the authorities were responsible for the final decision.

71 The Parliament considers therefore that neither in the telephone conversation of 4 December 1995 nor during the visit of 13 December 1995 can a fault be identified on its part such as to give the applicant a right to damages. That conclusion may be drawn from the case-law of the Court of Justice and the Court of First Instance (see Joined Cases 19/69, 20/69, 25/69 and 30/69 *Richez-Parise and Others* v *Commission* [1970] ECR 325, paragraphs 36 to 41, Case 137/79 *Kohll* v *Commission* [1980] ECR 2601, paragraphs 12 to 15, and Case T-133/89 *Burban* v *Parliament* [1990] ECR II-245, paragraph 36, confirmed by Case C-255/90 P *Burban* v *Parliament* [1992] ECR I-2253, paragraphs 10 to 12).

72 Secondly, the Parliament states that the applicant must have known that Directive 92/50 and the General Terms and Conditions, both of which are applicable to the contract in question, provide that all contracts must be concluded in writing. Consequently, by inferring from Mr Candidi's statements that the contract had already been awarded, or that its award was imminent or that some decision had been

taken by the Parliament which could justify incurring the expenses necessary to perform the contract, the applicant itself acted imprudently irrespective of any fault on the part of the Parliament (see Case C-330/88 *Grifoni* v *EAEC* [1991] ECR I-1045, and Case T-133/89 *Burban* v *Parliament* [1990] ECR II-245, paragraph 36).

— Assessment by the Court

73 The applicant claims, in substance, that, by fuelling its expectations of winning the contract and by encouraging it to take all the necessary steps in order to be operational from the beginning of January 1996, the Parliament caused it damage. It is necessary, consequently, to determine, in particular, whether the conduct of the Parliament during the contested tendering procedure constitutes a breach of the principle of the protection of legitimate expectations such as to give rise to liability on the part of the Community.

74 It is apparent from the case-law that the right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain justified expectations (see, to this effect, Case 265/85 *Van den Bergh en Jurgens and Lopik* v *Commission* [1987] ECR 1155, paragraph 44, Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 26, Case T-489/93 *Unifruit Hellas* v *Commission* [1994] ECR II-1201, paragraph 51, Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 148, and Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 31).

75 In that regard, it is important to determine whether a prudent trader could have guarded against the risks run in this case by the applicant. Generally, it must be remembered that traders must bear the economic risks inherent in their activities, taking account of the circumstances of each case (see, *inter alia*, Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraph 7, and Case 267/82 *Développement and Clemessy* v

Commission [1986] ECR 1907, paragraph 33). In connection with a tendering procedure, those economic risks include, *inter alia*, the costs connected with the preparation of the bid. The expenses thus incurred must therefore be borne by the undertaking which has chosen to participate in the procedure, since it in no way follows from the mere fact that an undertaking has the right to take part in a tendering procedure that its tender will be accepted (see paragraphs 54 and 55 above, and the Opinion of Advocate General Mancini in *Développement and Clemessy* v *Commission*, p. 1908, 1912).

76 On the other hand, if, before the contract in question is awarded to the successful tenderer, a tenderer is encouraged by the contracting institution to make irreversible investments in advance and thereby to go beyond the risks inherent in the business under consideration, consisting in making a bid, non-contractual liability may be incurred on the part of the Community (see, to that effect, *Sofrimport* v *Commission*, paragraphs 28 and 29).

77 In this case, it is common ground that the Parliament, in the person of Mr Candidi, took the initiative of telephoning the applicant on 4 December 1995 to tell it that the ACPC had delivered that day an opinion in favour of the authorising officer's proposal to award it the contract. It is clear from Mr Candidi's testimony that that initiative was not part of the normal procedure which provided, on the contrary, for the finalisation of the contract by the Parliament before any contact with the successful undertaking. However, in this case, the new company had to be in a position to provide its services from the beginning of January 1996 and it was therefore a matter of urgency that all necessary preparations be made in order to avoid an interruption in the service. Mr Candidi confirmed moreover that, at the time when he contacted the applicant, there was nothing to indicate to him that a final decision against the applicant would be taken.

78 That version of the facts is corroborated, moreover, by the testimony of Ms Lahousse. She confirmed that the successful undertaking had to be operational from 1 January 1996. Consequently the applicant, as the successful tenderer in the contested invitation to tender, had to make preparations in order to be in a position to perform the contract with effect from 1 January 1996. However, according to Ms Lahousse, the Bureau had raised, at a meeting of 11 December 1995, the

problem of the integrity of the executives of the applicant company, and this was discussed during the meeting of 13 December 1995. As a consequence, a huge information campaign regarding the ability of the applicant to manage the contract in question was undertaken by a large number of drivers. That led to the suspension of the procedure between December 1995 and May 1996. For that reason, the administration did not receive precise instructions from the authorities on what to do about the contested invitation to tender until May 1996.

79 It follows that, at the beginning of December 1995, both the Parliament and the applicant believed that Embassy would perform the contract with effect from 1 January 1996. Consequently, although the applicant was not expressly invited to make the investments needed in order to have an infrastructure capable of providing the service required with effect from 1 January 1996, it is clear, given the circumstances of the case, that, in so doing, it acted in a reasonable and realistic way in order to satisfy the requirements expressed by the Parliament. It is not disputed that Embassy, in order to be able to provide those services with effect from 1 January 1996, was bound to take the measures necessary for the performance of the contract immediately after receiving the information from Mr Candidi on 4 December 1995. That argument is, moreover, supported by the lack of reaction from the officials of the Parliament to the applicant's letter of 12 December 1995. That letter referred, in particular, to the making of certain investments by reason of the urgency of the situation in which the Parliament found itself (see paragraph 7 above).

80 In those circumstances, the Parliament cannot rely on the case-law according to which an incorrect interpretation of a provision does not constitute in itself a wrongful act (see *Richez-Parise and Others* v *Commission*, *Kohll* v *Commission* and Case T-133/89 *Burban* v *Parliament* [1990] ECR II-245). That case-law, concerning actions by officials who had received erroneous information as to their rights under the Staff Regulations, cannot be applied to the circumstances of this case. A simple error of information about the interpretation of certain provisions of the Staff Regulations is not comparable to a situation in which the Parliament induced in its intended co-contracting party the certainty of winning a contract and, in addition, encouraged that party to make irreversible investments.

81 The Parliament cannot argue either that the applicant, as a tenderer in the tendering procedure, should have remained in a state of readiness in all circumstances and hence that it was Embassy's responsibility to have the infrastructure needed to perform the contract. In that regard, attention should be given to the statements of the Embassy representatives at the witness hearing, according to which the contract at issue, involving about 40 chauffeur-driven cars, was of some magnitude and extremely important for the applicant's business. It should have been clear to the Parliament that Embassy, as a new provider of the services requested, could not be ready without considerable investments.

82 Furthermore, contrary to the Parliament's contention, Embassy's certainty of winning the contract was not removed at the visit of its representatives to Strasbourg on 13 December 1995. At that meeting, the discussion centred on the truthfulness of certain rumours and articles in the press relating to the probity of the Embassy executives and not on the question of whether the company would win the contract at issue. However, that problem of probity was apparently resolved on the very day of the meeting. It is apparent from the testimony of Mr Heuzer, the applicant's representative, that Mr Candidi told him and Mr Hautot, by telephone, on their way back from Strasbourg, that that problem had been resolved. That information, which is not disputed by the Parliament, is moreover confirmed by Mr Feidt's internal memorandum written on the same day (see paragraph 9 above), explaining that the allegations concerning the probity of the Embassy executives were without any foundation and requesting the agreement of the Secretary-General to the signing of the contract with Embassy as soon as possible.

83 It is therefore clear from the file that it was not until several days after the meeting of 13 December 1995 that the Parliament decided not to award the contract to Embassy with effect from 1 January 1996, but to award it, on a provisional basis, to Company A which was a party to the preceding contract.

84 On 19 December 1995 Mr Feidt referred to the ACPC a proposal that the contract with Company A should be extended for one month. It is clear from the minutes of the ACPC meeting (see paragraph 10 above) that the internal Parliament decisions allowing the signing of the contract with the applicant could not be finalised before the end of 1995 and that a contract running from 1 to 31 January 1996 would be concluded with Company A (as it was on 5 January 1996). On that occasion, moreover, the ACPC invited the authorising officer to make all necessary preparations for Embassy to sign the contract as soon as possible.

85 In that regard, without being contradicted on that point by the Parliament, Mr Hautot testified that nobody within the Parliament had contacted him in order to inform him that the contract had been provisionally awarded to another company for the period from 1 to 31 January 1996. It is therefore confirmed that it was as a result of steps he took himself that Mr Hautot discovered, shortly before Christmas, that the Parliament had, provisionally, awarded the contract to Company A. On that subject, it should be noted that the contracting body must comply, at each stage of a tendering procedure, not only with the principle of the equal treatment of tenderers, but also with the principle of transparency (see *Commission* v *Belgium*, cited above, paragraph 54). Therefore, a company which is closely involved in a tendering procedure and which has even been judged to be the successful tenderer, must receive, without any delay, precise information concerning the conduct of the entire procedure. Consequently, the Parliament ought to have informed the applicant before Christmas 1995 of the precise reasons for which it would not be awarded the contract with effect from 1 January 1996 as had been previously envisaged.

86 It follows from the foregoing that the Parliament, first, induced on the part of the applicant a legitimate expectation by encouraging it to take a risk which went beyond that normally run by tenderers in a tendering procedure and, secondly, failed to inform the applicant of an important change in the conduct of the tendering procedure.

87 In that regard it is not necessary to determine whether the officials of the Parliament acted in a way that was excusable. As the contracting body in the procedure for the award of contracts, the Parliament is obliged to show a coherent and consistent attitude towards its tenderers. The interventions of various administrative and political bodies within the Parliament cannot therefore justify the failure to comply with its obligations to the applicant.

88 It follows that the Parliament has committed a fault which gives rise to non-contractual liability on the part of the Community.

Damage and causal link

Arguments of the parties

89 The applicant considers that it has suffered the following damage:

(a) expenses and charges incurred by reason of its certainty of winning the contract, which can be broken down, according to invoices lodged with the reply, as follows:

— cost of active fleet reserved for the Parliament from 1 January 1996 until 31 March 1996 and insurance, namely 36 cars in total: BEF 3 272 545 (incl. VAT (including Value-Added Tax));

— parking expenses for the period from 1 January 1996 to 31 March 1996 for 36 vehicles: BEF 635 105 (incl. VAT);

— expenses of breaking off the contract for the fleet of 25 vehicles: BEF 1 146 980 (incl. VAT);

— telephone costs (GSM): BEF 424 480;

(b) expenses of organising the contract, consultants and other: BEF 886 600, split as follows:

— preparation of the contract, feasibility study and statistical analysis: BEF 131 325;

— assistance and preparation of data, tender and organisational advice: BEF 181 500 (incl. VAT);

— preparation, negotiation for fleet of vehicles, telephone contract and parking: BEF 124 963;

— travel and representation expenses (flat-rate basis): BEF 150 000;

— secretarial expenses (flat-rate basis): BEF 52 000;

— fax, telephones, administration, copying and printing (flat-rate basis): BEF 100 000;

— expenses in connection with recruitment, medical examinations, training (drafting of contracts, hiring of a meeting room) and familiarisation expenses for the drivers: BEF 200 000;

— fees of Mr Hautot, working exclusively on the tender and subsequently on the setting up of the Parliament contract from October 1995 until 30 June 1996: BEF 540 000;

(c) loss of profit estimated over five years on the basis of a three-year contract renewable for two twelve-month periods: BEF 10 000 000.

90 In addition, the applicant claims that the wrongful attitude of the Parliament caused it non-material damage. It explains that, in the certainty that it would be awarded the contract, it made promises not only to its shareholders, but also to third parties, with a view to expansion and commercial success. The particularly unclear circumstances in which the contract was not awarded (rumours about its solvency, capital base, the quality of its services and the reliability of its shareholders and/or administrators) were circulated in Belgian society, and particularly in Brussels society, which is particularly closed and narrow.

91 The applicant estimates that, subject to an increase or reduction in that amount, the non-material damage must be assessed at a flat rate of BEF 5 000 000.

92 The applicant states, moreover, that, had it not, in one way or another, been certain of winning the contract, it would never have invested the sums spent on setting up the services promised, so that the existence of the causal link between the fault alleged and the damage claimed, as required by the case-law, is proven. Furthermore, the particularly negative rumours which, at one time, circulated about it would not have been repeated or had any effect at all in terms of image and commercial reputation if, at the end of the day, the contract had been performed and/or concluded normally.

93 The Parliament considers that the applicant limits itself to pleading various heads of damage without adducing the slightest evidence to show that it really suffered the harm alleged. It adds that the applicant has adduced no proof that the invoices which it has produced corresponded to expenses incurred in connection with their supposed relations.

94 Furthermore, the Parliament disputes owing the applicant anything in respect of supposed non-material damage. First, the applicant adduces no evidence to show that its reputation was damaged and, secondly, it has no evidence showing that the Parliament was the cause of, or participated in, the spreading of the rumours which it pleads in support of its application.

95 The Parliament contends, finally, that the causal link between the fault alleged and the damage claimed is completely lacking, by reason of the circumstance that, as early as 13 December 1995, at the meeting in Strasbourg, the applicant had been told that the opinion of the ACPC was purely advisory and that the Parliament took the final decision about the granting of the contract. It adds that the expenses which the applicant incurred in the preparation and performance of the contract, and its loss of profit, are not, in any event, compensable, since Embassy has not shown that the first contract had been effectively awarded to it.

Assessment of the Court

96 In this case, it has been established that the fault committed by the Parliament gives rise to non-contractual liability on the part of the Community. On the other hand, no contractual liability has been incurred. In the circumstances the applicant is not justified in claiming compensation for its loss of profit, since that would result in giving effect to a contract which never existed.

97 Next, it is clear from Article 4 of the General Terms and Conditions that the contracting institution is not liable for any compensation with respect to tenderers whose tenders have not been accepted. It follows that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute damage which is capable of being remedied by an award of damages (see Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraph 71). In this case the applicant has provided no evidence that would permit a derogation from that principle. The applicant is therefore not justified in claiming reimbursement of the expenses relating to the preparation of the tender.

98 It remains, therefore, to determine the damage which is connected with the investments made by Embassy by reason of the information received on 4 December 1995 showing that the ACPC had delivered an opinion in its favour.

99 On that subject, it is clear from the file that, after receiving that information, the applicant immediately took the measures necessary for the performance of the contract. In a letter dated 5 December 1995 Mr Hautot expresses himself in these terms: 'I will take responsibility for all recruitment ... and all the working meetings with [the Parliament]. ... bringing together the necessary fleet is the responsibility of [Mr Heuzer] and his assistants. ... I would ask everyone to make the effort required to put in place a flawless organisation for 1.1.96 ...' Next, a letter of 6 December 1995 from Budget Rent a Car reads: '... further to your express request, we confirm that we are proceeding with the official order and, thereafter, with the registration of the vehicles requested for 1996. ... to avoid duplication of effort we would remind you again that we are currently proceeding with the acquisition of the telecommunications infrastructure (GSM) needed for the proper conduct of your business.'

100 In addition the applicant, in its letter of 12 December 1995, reported on the measures it had taken in order to be capable of dealing with the urgency of the situation announced by the Parliament. In that letter the applicant therefore mentioned the contracts for leasing cars and GSM rental, the recruitment of drivers and attending to the latters' social security, health insurance and tax situation (see paragraph 7 above).

101 It follows that the aforementioned investments show a direct causal link with the telephone conversation of 4 December 1995.

102 In addition, by making those investments, Embassy did not exhibit a lack of prudence. First, it has already been established that its certainty of winning the contract had not been removed at the meeting in Strasbourg on 13 December 1995 (see paragraph 82 above). Secondly, the Parliament has put forward no argument which casts doubt on the truthfulness of the version of the facts given by the Embassy representatives, under oath, according to which the investments mentioned in the letter of 12 December 1995 had all been made in December 1995. Thirdly, it is clear from the testimony of the Parliament officials that Embassy did not receive any information to indicate that it might not eventually win the contract (see paragraphs 82 to 85 above).

103 It goes without saying that, in the absence of a clear refusal to award it the contract, the applicant had no reason to annul, during the first months of 1996, the contracts already concluded. It is useful to recall, in that regard, the minutes of 19 December 1995 in which the ACPC, while giving an opinion in favour of a contract from 1 January 1996 to 31 January 1996 with Company A, invites the authorising officer to do everything necessary in order for the contract with Embassy to be signed as soon as possible. That confirms that the Parliament itself intended, at that juncture, to award the contract to Embassy.

104 In view of the foregoing, the compensable damage can be considered to be made up of the damage pleaded by the applicant and mentioned above at paragraph 89(a), 'expenses and charges incurred by reason of its certainty of winning the contract', and those mentioned under (b), 'expenses of recruitment, medical examinations, training and familiarisation expenses for the drivers' and 'preparation, negotiation for fleet of vehicles, telephone contract and parking'.

105 In that regard the Court rejects the argument of the Parliament according to which the applicant's invoices do not show that the expenses were incurred in connection with their relations. No document in the file goes to disprove the fact that those invoices correspond to the measures which Embassy took in order to respond to the urgency of the situation in which the Parliament found itself, measures on which Embassy had already reported in its letter of 12 December 1995.

106 However, it is clear from the file produced by the applicant that the GSM rental costs (BEF 424 450) cover the period from 19 January 1996 to 18 October 1996. The fact that the rental began to run only on 19 January 1996 is said to be due to a special offer of a rent-free period. However, the Court finds it reasonable to limit the recoverable costs to those relating to the period from 19 January 1996 to 31 March 1996. Inasmuch as the applicant did not relinquish that contract at the end of March 1996, at which point it should have realised that it was very likely that the Parliament contract would not be awarded to it, it must itself bear the costs incurred thereafter. The sum recoverable for GSM rental, including the estimated cost for breaking off the contract, can therefore be assessed at BEF 200 000.

107 Since the Parliament has not disputed the correctness of the sums claimed by the applicant, it is appropriate to assess Embassy's loss on the basis of the figures it has supplied (see paragraph 89 above). Compensation for the damage suffered by the applicant therefore amounts to the total sum of BEF 5 579 593 (incl. VAT). However, since the VAT paid by the undertaking can be reclaimed and is not, consequently, borne by Embassy, it cannot be taken into account in calculating the damages. It is therefore necessary to take into consideration the sums claimed exclusive of VAT, namely, according to Embassy's invoices, BEF 1 875 000 + BEF 829 583 for car rental, BEF 947 917 for breaking off the contract, BEF 524 880 for the parking of cars, and BEF 103 275 for the file relating to cars and telephone costs. To that must be added the sum for GSM rental, earlier calculated at BEF 200 000, and the flat-rate sum relating to the recruitment of drivers, amounting to BEF 200 000. The sum of the material damage suffered by the applicant amounts therefore to BEF 4 680 655.

108 Given the circumstances of this case it is also necessary to compensate the applicant for the non-material damage it has suffered. It has certainly neither shown that its reputation has been damaged nor proved that the Parliament was responsible for causing such damage. However, it is clear from the file that, although, from December 1995, Embassy took preparatory measures in order to respond to the urgency of the situation outlined by the Parliament officials, it did not know until 19 June 1996 that the contract would not be awarded to it (see paragraph 19 above). In those circumstances, by sending it no information — which had however been requested on many occasions — concerning the outcome of the tendering procedure, the Parliament placed Embassy in a position of uncertainty and forced it to make useless efforts with a view to responding to the urgency of the situation.

109 Consequently, the Court considers it equitable to quantify the damage, both material and non-material, suffered by the applicant at a total sum of BEF 5 000 000.

Costs

110 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 Parliament has been unsuccessful and the applicant has applied for costs, the Parliament must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Orders the European Parliament to pay to the applicant a sum of BEF 5 000 000;

2. **Declares that that sum will bear interest at an annual rate of 8% with effect from the date of this judgment and until due payment;**

3. **Orders the Parliament to pay its own costs and the costs of the applicant.**

Lindh Lenaerts Cooke

Delivered in open court in Luxembourg on 17 December 1998.

H. Jung P. Lindh

Registrar President