OPINION OF ADVOCATE GENERAL LENZ

delivered on 12 September 1995 *

A — Facts

1. This action for failure to fulfil obligations concerns the lawfulness of the award of a contract for the supply of buses for public transport falling within the scope of Directive 90/531/EEC. [1]

2. The facts of the case are as follows. The Société Régionale Wallone des Transports (Walloon Regional Transport Company, hereinafter 'the SRWT') initiated a public tendering procedure for the award of a contract for the supply of a total of 307 standard buses by publishing an invitation to tender in the Supplement to the Official Journal of the European Communities of 22 April 1993. [2] The supply contract, for the estimated sum of BFR 2 022 918 000 (excluding VAT), was to be performed in eight lots over a period of three years.

3. On 7 June 1993, which was the final date for the receipt of tenders and also the date for opening them, tenders had been received from five companies: EMI (Aubange), Van Hool (Koningshooikt), Mercedes-Belgium (Brussels), Berkhof (Roeselaere) and Jonckheere (Roeselaere).

4. The tenders were examined by the SRWT during June and July 1993. In a memorandum dated 24 August 1993, drawn up for a meeting of the *conseil d'administration* on 2 September 1993, it was recommended that Lot No 1 be awarded to Jonckheere and Lots Nos 2 to 6 to Van Hool.

5. On 3, 23 and 24 August 1993 EMI submitted three supplementary notes to the SRWT, in which it commented on certain items in its tender, particularly with regard to fuel consumption and the frequency with which engines and gear boxes would have to be replaced.

6. After examining those three notes, the SRWT's technical service drew up an unsigned memorandum dated 31 August 1993, which stated that the additional memoranda were amendments to the original tender and could not therefore be taken into

* Original language: German.

1 — Council Directive of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1).

2 — Supplement to the Official Journal of the European Communities No S 78 of 22 April 1993, p. 76.

consideration. The proposal for adoption at the meeting of the *conseil d'administration* on 2 September 1993 should therefore still stand.

7. On 2 September 1993 the *conseil d'administration* took the view that they did not have sufficient information to take a final decision. In particular, it was unclear how far it was legally permissible to have regard to the content of the three supplementary notes. A decision was therefore taken to ask the Walloon Minister for Transport for a legal opinion, it being known that a recognized specialist in public tendering procedures was working in his cabinet.

8. The Walloon Minister for Transport set out his opinion in a letter of 14 September 1993. It stated that the taking into account of the supplementary notes was mostly unproblematical in legal terms. The letter concluded by requesting the *conseil d'administration* to undertake a further review in the light of the minister's observations.

9. On 28 September 1993 the SRWT asked EMI to confirm the fuel consumption figures quoted in the note of 24 August and their claims in the note of 23 August regarding the frequency of engine and gear-box replacement. EMI confirmed those matters by letter of 29 September 1993.

10. A new memorandum comparing the tenders, drawn up for the meeting of the *conseil d'administration* on 6 October 1993, took into account the additional information from EMI. It proposed that Lot No 1 should be awarded to Jonckheere and Lots Nos 2 to 6 to EMI.

11. On 6 October 1993 the *conseil d'administration* decided to adopt that proposal. A contract for Lot No 1 (37 vehicles) was to be awarded to Jonckheere, while Lots Nos 2 to 6 (278 vehicles) were to be awarded to EMI. An order for an additional 30 buses was postponed until 1996.

12. On the same day, Van Hool made an emergency application to the Belgian Conseil d'État for an order suspending the operation of the decision. The application was rejected by judgment of 17 November 1993.

13. Van Hool also lodged a complaint with the Commission of the European Communities, which, on 30 November 1993, requested the Belgian Government to submit its observations under Article 169 of the Treaty. In its observations of 15 December 1993 the Belgian Government claimed that it had not failed to fulfil its obligations. On 8 February

1994 the Commission then delivered a reasoned opinion to the Belgian Government, requesting it to intervene with the competent authorities to suspend the legal effects of the contract between the SRWT and EMI. The Commission considered that the Belgian Government's reply was not of such a nature as to dispose of the allegation that it had failed to fulfil its obligations. On 11 March 1994 it therefore brought an action before the Court of Justice. On the same day the Commission applied for interim measures to suspend the SRWT's decision of 6 October 1993 awarding the contract and the contract concluded between the SRWT and EMI, until the Court had given a final ruling in the main proceedings. The application for interim measures was dismissed by order of 22 April 1994.

14. In the present proceedings before the Court of Justice, an informal meeting took place on 17 May 1995 between the Judge-Rapporteur, the Advocate General and the parties in order to discuss the extent to which the facts were disputed and whether measures of inquiry were necessary.

15. In its application the Commission claims that the Court should:

1. declare that:

— by taking into account, in the procedure for the award of a public contract by the Société Régionale Wallone des Transports, amendments made to one of the tenders after the opening of tenders,

— by admitting to the procedure for the award of the contract a tenderer who did not meet the selection criteria laid down in the contract documents,

— and by accepting a tender which did not meet the criteria for the award of the contract laid down in the contract documents,

the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, and to comply with the principle of equal treatment, which underlies all the rules on procedures for the award of public contracts;

2. order the Kingdom of Belgium to pay the costs of the proceedings.

16. The Kingdom of Belgium contends that the Court should:

1. dismiss the application;

2. order the Commission to bear the costs, including the costs of the proceedings for the adoption of interim measures.

17. Following the informal meeting of 17 May 1995, the Commission abandoned its first plea in law, namely that the public authority had admitted a tenderer who did not meet the selection criteria laid down in the contract documents. The Commission announced the abandonment of that plea in its letter of 9 June 1995 and confirmed it again in the oral procedure. Two pleas in law therefore continue to be in issue, first, that the SRWT took into account amendments to a tender which were made after the opening of tenders, and, second, that it accepted a tender while taking into account criteria other than those laid down in the contract documents. Each plea can be split into two parts, which is the approach which I will adopt.

18. The form of order sought by the Commission must be amended so as to reflect the changes to the original situation. The position is therefore as follows:

The Commission claims that the Court should declare that:

— by taking into account, in the procedure for the award of a public contract by the SRWT, amendments made to one of the tenders after the opening of tenders,

— and by accepting a tender which did not meet the criteria for the award of the contract laid down in the contract documents,

the Kingdom of Belgium has failed to fulfil its obligations under Directive 90/531, and to comply with the principle of equal treatment, which underlies all the rules on procedures for the award of public contracts.

B — Analysis

I. *Preliminary issues*

(a) The scope of the Directive

19. As regards the scope *ratione personae* of the Directive, Article 2(1) of Directive 90/531 states as follows:

'This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

(b) or, when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.'

Article 2(2) defines the scope of the Directive *ratione materiae*; the passage relevant to the present dispute states as follows:

'Relevant activities for the purposes of this Directive shall be:

(a) ...

(b) ...

(c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;

(d) ...'.

20. It is not disputed that the SRWT is a public undertaking providing a public bus service. Since it is a public contracting entity, the SRWT therefore falls within the scope of the Directive. Doubts in that regard could stem only from the fact that the SRWT is not listed in Annex VII to the Directive, which contains a list of 'contracting entities in the field of urban railway, tramway, trolley bus or bus services'.

21. The Commission has argued convincingly that the list is only declaratory. Factual alterations always give rise to the danger that the content of the list will fail to correspond to the real position. Consequently, in the final analysis only Article 2 of the Directive is authoritative.

22. That view is supported by the Directive's rules concerning the drawing up of Annexes I to X. For example, Article 2(6) states:

'The contracting entities listed in Annexes I to X shall fulfil the criteria set out above. In order to ensure that the lists are *as exhaustive as possible*, Member States shall notify the Commission of amendments to their lists. The Commission shall revise Annexes I to X in accordance with the procedure in Article 32.' [3]

Article 32 then states:

'Annexes I to X shall be revised in accordance with the procedure laid down in paragraphs 3 to 7 *with a view to ensuring that they fulfil the criteria of Article 2.*' [4]

It must therefore be assumed that the Directive's sphere of application is open.

3 — My emphasis.
4 — My emphasis.

(b) Internal situation

23. In the course of the proceedings the Belgian Government has objected that this case involves a purely internal situation, to which Community law does not apply. Only Belgian companies were in competition for the award of a contract from a Belgian public undertaking.

24. That objection can be countered, first of all, by pointing out that once Community rules have entered into force they are of general application. Secondly, it is wholly possible that, as a result of the award of a contract, undertakings from other Member States may be involved as suppliers. Even if only EMI and Van Hool, the undertakings involved in the proceedings, are taken into consideration, it is clear that the award of the contract has specific, cross-border effects. The manufacturer and supplier of the engines for the EMI vehicles is, for example, Renault, a French undertaking.

(c) The choice of procedure for the award of the contract

25. In the course of these proceedings the Belgian Government has claimed that the SRWT was not obliged to award the contract through an open procedure and that it would have been in accordance with the Directive to choose a negotiated procedure. That

argument is intended to substantiate the lawfulness of any negotiations carried out with a tenderer.

26. In Title III of the Directive, 'Procedures for the award of contracts', Article 15(1) states:

'Contracting entities may choose any of the procedures described in Article 1(6), provided, ... a call for competition has been made ...'.

Article 1(6) states that for the purposes of the Directive '"open, restricted and negotiated procedures"' shall mean 'procedures applied by contracting entities whereby:

(a) in the case of open procedures, all interested suppliers or contractors may submit tenders;

(b) in the case of the restricted procedures, only candidates invited by the contracting entity may submit tenders;

(c) in the case of negotiated procedures, the contracting entity consults suppliers or contractors of its choice and negotiates the terms of the contract with one or more of them'.

27. The Belgian Government is correct in stating that the SRWT was able to choose which of the abovementioned procedures it wished to adopt. However, once it had opted for a particular procedure, it had to observe the rules applicable to that type of procedure until the contract was finally awarded. The aim of the Community rules as such is to establish Community-wide competition for each of the three types of procedure. That aim requires the unconditional observance of the prohibition of discrimination, a matter which I will return to below. The publication rules, which apply to each type of procedure, [5] are an example of the means used to pursue that aim. Consequently, once a procedure has been chosen, it is not permitted to derogate from the rules applicable to it.

II. *The plea that the offer was amended after the date for the opening of tenders*

28. This plea is in two parts. First, it concerns the fuel consumption figures and,

5 — See for example Articles 16 and 17 of the Directive.

secondly, the stated frequency of engine and gearbox replacement for the vehicles offered.

29. First of all, tenders may not be amended after the final date for receiving or opening them. That is a fundamental principle of the procedure for awarding public contracts. It follows from the principle of equal treatment, which basically applies to all procedures for the award of public contracts, [6] and is, moreover, expressly laid down in Directive 90/531. Article 4(2) states:

'Contracting entities shall ensure that there is no discrimination between different suppliers or contractors.'

30. The coordination of procurement procedures ultimately promotes the objective of Community-wide competition and the complete realization of the free movement of goods and services. [7] That goal presupposes the equal treatment of potential tenderers. The prohibition of discrimination is therefore expressed in several places. [8] The joint statement by the Council and the Commission concerning Article 15 also shows that subsequent amendments of tenders are forbidden in the interests of equal treatment. It states:

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

31. Against that background, it must be examined whether a tenderer subsequently made amendments to his tender, which the

6 — See judgment in Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 39.

7 — See Recitals Nos 3, 5, 6 and 11 to 13 in the preamble to Directive 90/531.

8 — See Article 4(2) of the Directive, Recital No 25 in the preamble to the Directive and the joint statement made by the Council and the Commission concerning Article 15 of the Directive.

SRWT then took into account in an unlawful manner.

(a) The fuel consumption of the vehicles offered

32. In its original tender for Lots Nos 2 to 6, EMI indicated fuel consumption of 54 litres per 100 km. In that tender, the figures given for each lot were accompanied by a note, in which EMI drew attention to a possible reduction in fuel consumption. It stated that the consumption indicated was based on test results carried out by an independent undertaking. The tests had been performed using a vehicle which had not yet been 'run in'. Under optimal conditions, and using a vehicle which had been run in, a fuel saving of between 5 to 8% could be expected.

33. In its note of 3 August 1993, the first of the three notes at issue, EMI again refers to the fact that, under the conditions indicated, the fuel consumption would be reduced by 8%. [9] In the note of 24 August 1993, the third of the notes at issue, which is headed 'Note explicative' (explanatory note), EMI refers to tests performed showing that fuel consumption of 45 litres per 100 km was now to be expected in urban traffic. [10]

34. The *Commission* considers that those matters constitute a subsequent amendment of the original offer. It claims that those figures should not have been taken into account.

35. On the other hand, the *Belgian Government* is of the opinion that the statements merely clarified the figures already provided in the tender. The possibility of a reduction in fuel consumption had been referred to from the very beginning and only the specific results sent in subsequently. Clarifying or supplementing the data contained in the tender was compatible with the joint statement by the Council and the Commission concerning Article 15 of the Directive.

36. It argues that if the subsequent statements are not accepted as a clarification, they were in any event admissible as a correction of a material mistake. Moreover, in another context, the Commission had approved the correction of incorrect statements, to the disadvantage of the tenderer. The same criteria should apply if a correction was to the advantage of the tenderer.

37. The dispute centres, both terminologically and factually, on the question whether the statements *clarify* or *amend* the tender. In my opinion, having regard to its lexical meaning, the concept of 'clarifying' used in the joint statement by the Council and the Commission must be understood as the communication of details which describe the object in question more clearly or more precisely. I understand 'supplementing', the second of the concepts used in the joint statement, to mean the addition of details previously not available. Common to both concepts is the fact that they are not intended to replace information previously

9 — EMI's note of 3 August 1993, p. 5.

10 — That figure is relevant with respect to Lots Nos 2 to 6.

given, but to render it more concrete in some way or other.

38. I believe that the view that neither 'clarifying' nor 'supplementing' involve the replacement of previous indications by new facts is confirmed by the factual consideration that the possibility of substituting data potentially puts other tenderers at a disadvantage.

39. Against that background, I understand 'clarifying' to mean that where, for example, a possible reduction in fuel consumption of up to 8% has been indicated, the undertaking commits itself to a figure falling within that range and, for example, communicates the number of litres resulting from that reduction.

40. In the note of 3 August 1993, EMI acted precisely in that manner by committing itself to a reduction of 8% in the indicated fuel consumption. In my opinion, that note represents a clarification of fuel consumption, and not a variation of the tender.

41. On the other hand, the fuel consumption figure of 45 litres per 100 km communicated in the note of 24 August 1993 signifies a reduction of 17.5% in the indicated fuel consumption. That reduction is more than twice the previously indicated margin. In my opinion, as a matter of pure terminology, that must be regarded not as a clarification, but as a variation.

42. According to the joint statement of the Council and Commission, the actual test of the admissibility of a clarification is whether or not the subsequent information has a discriminatory effect. I therefore consider it important to examine the effects on the other tenderers of the figures communicated at the end of August. In so doing, regard must be had to the fact that, under the criteria for the award of a contract listed in the contract documents, provision was made for evaluating the fuel consumption of the vehicles offered. As regards the evaluation of the technical assessment criteria, Point 20.2.2.1 adopts a comparative calculation as the basis for calculating operating costs. It provides that the vehicle with the highest fuel consumption from amongst the admitted tenders is to serve as a standard. The other vehicles are to be credited with a monetary allowance in 'francs fictifs' [11] for consumption below that standard.

43. EMI, with an indicated consumption of 54.5 litres per 100 kilometres, had the highest consumption for all the lots in question. Accordingly, no allowance could be credited

11 — See Point 20.2.2 of the special conditions.

to its vehicles. Moreover, that figure also applied as the standard as regards allowances for the vehicles of competing tenderers. It should be emphasized that, even in the event of a reduction of 8% in the indicated fuel consumption of the EMI vehicles, the resultant figure of 50.14 litres would still have been the highest figure. Even then, its vehicles would not have been credited with an allowance. The advantage enjoyed by the other vehicles would merely have been reduced. The situation is fundamentally different, if a fuel consumption reduced by 17.5%, i. e. 45 litres per 100 km, is taken as a basis. If that figure is taken, fuel consumption is lower than the figure indicated by one competitor, so that EMI's vehicles gain an advantage in the form of an allowance.

44. A comparison of the actual figures [12] shows that the allowance given to EMI's direct competitor, Van Hool, was reduced 2.5 times for Lots 2 and 3, and even 2.8 times for Lots 4, 5 and 6. While the allowance for Lots 2 and 3 was originally minus 1 875 600 and minus 1 750 560 for Lots 4, 5 and 6, it shrank to minus 750 240 for Lots 2 and 3, and to even minus 625 200 for Lots 4, 5 and 6. Meanwhile, on the basis of the amended figures, EMI obtained an allowance of plus 125 040 for all the lots in question.

12 — Annex 6, pp. 2 to 6 of the memorandum for the meeting of the *conseil d'administration* of 2 September 1993 and Annex 2, pp. 2 to 6 of the memorandum for the meeting of the *conseil d'administration* of 6 October 1993.

45. Accordingly, in my opinion, the new figures must be regarded as a variation of the original figures, also in regard to their effects on competitors' tenders, and they should not have been taken into account by the public contracting entity.

46. Finally, it is necessary to examine the Belgian Government's argument that the new figures merely corrected a material error. In my opinion, the facts indicate the contrary, it not being disputed that it was possible to achieve the optimalized results only on the basis of subsequent tests. The figures could therefore be determined only on the basis of circumstances which occurred after the final date. I therefore consider that it cannot be claimed that an error was corrected.

(b) The frequency of engine and gearbox replacement for the vehicles offered

47. The starting point for the figures concerning the replacement of individual components is Annex 23 to the special conditions. [13] Annex 23 forms the basis for calculating the working time and material costs involved when replacing certain

13 — Cahier spécial des charges, Marché 545.

mechanical components. A total of 45 headings are listed, for which the tenderer must indicate the following: number of items per bus, time for the removal of a part, time for fitting a part and, finally, the price of a new spare part. All those figures are to be included in a table. That table includes a column headed 'Foreseeable number of replacements per item'. [14] The SRWT pre-completed that column for all 45 spare parts. Line 1 refers to 'engine' and the column headed 'Foreseeable number of replacements per item' contains a '2'. The second line refers to 'gearbox' and the number '3' is inserted in that column.

48. It is undisputed that the table in Annex 23 to the special conditions was correctly completed by EMI. In the note of 23 August 1993 in question, EMI draws attention to the fact that the frequency of replacement laid down by the SRWT does not correspond to the actual statistical position concerning the vehicles offered. Paragraph (a) states, as regards '2 engine replacements', that experience gained with the vehicles in question shows that only one engine is required over an assumed life of 15 years with 50 000 km per year. Paragraph (b) states, as regards '3 gearbox replacements', that experience has shown that provision should be made for a replacement factor of 1.25.

49. The note then draws attention to the fact that those two cases concern only the most important headings and that the same approach should be adopted also for the other spare parts listed in Annex 23 to the specification. It states that the reliability of the vehicles offered should not lead to their being penalized.

50. The Commission takes the view that that note varies the original tender.

51. On the other hand, the Belgian Government is of the opinion that the note of 23 August 1993 merely drew the attention of the SRWT to the fact that, in the case of the vehicles offered, the frequency of replacement provided for did not correspond to the actual position. All the details in Annex 23, such as the price per spare part, the time for dismantling each part and that for fitting each part, had remained unchanged.

52. The comments in the note of 23 August 1993 relate to the requirements which the SRWT had prescribed in the contract documents and which could not be altered by the tenderer. The tenderers had not been requested to enter any details in the column regarding the frequency of spare-parts replacement. To that extent, the terms of the note may be understood merely as a comment by EMI on the prescriptive requirements of the SRWT, which EMI was basically unable to influence through its tender.

14 — 'Nombre de remplacements prévisibles pour un organe'.

The tenderer could not assume that its comments would lead to a variation in the SRWT's requirements.

53. Nevertheless, a tenderer is acting in accordance with its justified economic interests in drawing a contracting entity's attention to the fact that the requirements relating to the goods offered do not correspond to the actual situation and that to appraise the tender on that basis would be to misappraise it. That comment could have been included just as well in the original tender, without thereby varying the conditions applicable to the tenderer. The contracting entity's reaction to such comments must be appraised independently of the tenderer's conduct.

54. In my view, since, in the note of 23 August 1993, EMI did not adduce any new data, did not alter any of its figures and did not submit any different calculation, that note did not vary the information which was required of the tenderer.

55. The finding that EMI did not vary the tender by means of its note of 23 August — a finding based, at least partially, on the fact that it commented on requirements which EMI could basically not alter — does not preclude the terms of the note from being the reason for which the SRWT departed from its own requirements, thereby benefiting the tenderer in what might have been a discriminatory manner. That consideration leads directly to the second plea, namely that the SRWT did not observe its own criteria for the award of the contract.

III. *The failure to observe the criteria for the award of the contract*

(a) The frequency of the replacement of certain spare parts

56. The Commission examined the events relating to the taking into consideration of the frequency of replacing the essential drive components — the engine and gearbox — from two different legal aspects. First, it took the view that the note of 23 August 1993 varied EMI's original tender, a view which, for the abovementioned reasons, I am unable to endorse. Second, it claimed that, by taking into account EMI's comments when calculating the maintenance costs of the vehicles, the SRWT unlawfully departed from the award criteria laid down in the contract documents.

57. The matter therefore depends upon the meaning and details of the award criteria. In that respect, Article 27(1) and (2) of Directive 90/531 provides:

'1. The criteria on which the contracting entities shall base the award of contracts shall be:

(a) the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or

(b) the lowest price only.

2. In the case referred to in paragraph 1(a), contracting entities shall state in the contract documents or in the tender notice all the criteria they intend to apply to the award, where possible in descending order of importance.'

58. The tender notice states under Point 14 'Criteria for the award of the contract':

'The selection will be carried out on the basis of the economically most advantageous tender. The different criteria are: price, running costs (consumption, fitting/disassembly time and price of spare parts), technical qualities of the material (places, [15] access by steps, emissions, noise, height of steps and floor, platforms).' [16]

59. Point 20.2 of the special conditions lists the award criteria, with explanations, in the same order as in the tender notice. It is subdivided as follows:

'20.2 Criteria for the award of the contract. The contract will be awarded on the basis of

15 — In the invitation to tender the original language version (French) refers to 'plages'; that appears to be a typographical error, because in the contract documents the first of the criteria for the appraisal of the technical quality of the materials is the 'number of places'.

16 — That complete list appears only in the tender notice in the original language version (French). The notice in the other Community languages is in an abbreviated form. For example, in the German text the reference is to 'Zuschlagskriterien: Wirtschaftlich vorteilhaftestes Angebot nach folgenden Kriterien: Preis, Betriebskosten, Qualität, sonstige Kriterien' (award criteria: Economically most advantageous tender in terms of price, running costs, quality and other criteria).

the most economically advantageous tender, on the basis of the following criteria:

20.2.1 Unit price of the bus and the financial variants

...

20.2.2 Technical criteria.

The criteria will be the subject of an absolute weighting, measured in units of a "franc fictif".

RUNNING COSTS

20.2.2.1 Fuel consumption

...

20.2.2.2. Assembly and dismantling times, price of spare parts

...

SECURITY OF SUPPLY

20.2.2.3 Supply of spare parts

...

TECHNICAL QUALITIES OF THE MATERIAL OFFERED

20.2.2.4 Number of places

...

20.2.2.5 Height of steps

...

20.2.2.6 Noxious emissions

...

20.2.2.7 Noise level

...

20.2.2.8 Height of the floor

...

20.2.2.9 Number of steps

...

20.2.2.10 Platforms

...'.

60. The prohibition of discrimination and the consequent requirement for the calculability of the appraisement procedure demand that the contracting entity adheres to the award criteria that it has defined. Annex 23 to the special conditions, already referred to above, serves as a basis for assessing one of the two factors used to determine running costs. According to the award criteria, the running costs are a combination, on the one hand, of fuel consumption and, on the other hand, of estimated working time and material costs for replacing spare parts.

61. As has already been seen, the frequency with which spare parts are replaced is a constant prescribed by the SRWT in the same terms for all tenderers. That factor acts as the multiplier of the unit costs indicated by the tenderers. A variation of that prescriptive requirement may therefore have far-reaching consequences.

62. In the present proceedings it is accepted, and it is moreover apparent from the documents submitted, [17] that when calculating the running costs the SRWT took account of EMI's indicated reduction in the frequency of engine and gearbox replacement. A comparison between the documents used to appraise the various tenders for the individual lots shows that in the final calculations the running costs element for the EMI vehicles was estimated at a substantially lower figure than in the calculations made for the first proposal for the award of contracts prepared for the meeting of the *conseil d'administration* on 2 September 1993. While in the column headed 'Maintenance' [18] in the

17 — See the memorandum for the meeting of the *conseil d'administration* of the SRWT of 6 October 1993.

18 — 'Entretien'.

table for estimated running costs a figure of 4 901 790 had originally been inserted for Lots Nos 2 and 3 and 4 896 790 for Lots Nos 4 to 6, the more recent calculations estimated a figure of 3 744 140 for Lots Nos 2 to 6. [19] It is obvious that EMI derived more benefit from the amended method of calculation than the other tenderers.

63. In my opinion, a unilateral departure, in favour of one tenderer, from a public contracting entity's requirements set out in the contract documents, which were to be understood as being unalterable, without giving the other tenderers an opportunity to revise their figures as a result of the change in the underlying premiss, constitutes a breach of the principle of equal treatment. After the SRWT had become aware of the fact that the indications given by one tenderer were substantially better than it had expected, so that it had doubts regarding the correctness of the requirements which it had prescribed, it should either have nevertheless retained those technical requirements for all tenderers or have informed all tenderers of the fact that it was possible to vary the figures set out in the contract documents. In my opinion, the time at which a contracting entity becomes aware of the facts is of no consequence; the position is, in principle, no different if those indications were already given in the tender.

64. The Belgian Government has claimed that a public contracting entity should not be prevented from giving precedence to better material offered to it in the course of technical progress.

65. In reply it can be argued that, when awarding a contract, a public contracting entity is in no way prevented from taking account of improvements owing to technical progress in the equipment being acquired. That is shown by the fact that the Directive itself allows the admission of variants. [20] However, the desire for technical improvements in the goods to be acquired by way of public procurement does not entitle a public contracting entity to disregard the principle of equal treatment.

66. By departing, unilaterally in favour of one tenderer, from its own requirements used to evaluate the award criteria, the SRWT infringed the principle prohibiting discrimination.

67. The discriminatory effects of its conduct become apparent when the ranking of the competing vehicles with respect to running costs is considered. According to the original fuel consumption requirements and the stipulated frequency of spare-parts replacement, Van Hool's vehicles were in first place for Lots 2 and 3 and EMI's vehicles in third

19 — See Annex 6 to the memorandum for the meeting of the *conseil d'administration* of 2 September 1993, pp. 2 to 6, and Annex 2 to the memorandum for the meeting of the *conseil d'administration* of 6 October 1993, pp. 1 to 6.

20 — See Article 27(3) of Directive 90/351.

place. For Lots 4, 5 and 6, Van Hool's vehicles were in first place and those of EMI in fifth place. When the new figures were taken into account, Van Hool's vehicles were again in first place for Lots 2, 3 and 5, while EMI was in second place. According to the more recent calculations, EMI's vehicles were even in first place for Lots 4 and 6.

68. In my opinion, the change in ranking, from fifth to first place, in the course of calculating the second most important criterion for the award of the contract, namely the running costs, speaks for itself. There seems to me to be no doubt that in those circumstances there was discrimination vis-à-vis the competitors.

(b) The taking into account of special fittings

69. In the context of its claim that the SRWT awarded the contract while failing to observe the award criteria set out in the contract documents, the Commission states that the SRWT permitted a number of elements proposed by EMI, which were not provided for in the contract documents, to be included in the overall assessment to the advantage of EMI. Those elements are special cantilever seats, demisters for all side windows and a special modular assembly system for the buses.

70. *Cantilever seats* fitted to the sides of the buses had several advantages over normal seats. First, the side walls of the buses to which the seats were fitted had to be reinforced, which provided an overall increase in passenger safety. Because the seats were no longer fitted to the floor, there was a clear saving in the time required to clean the buses. Finally, the seats increased passenger comfort by providing greater leg-room and more luggage space.

71. The advantages of *demisters* for the side windows were both aesthetic and economic. They prevented condensation from forming on the windows, which would also considerably reduce the need to clean them.

72. Because of the method used to fit the elements together, the *modular system* used in the construction of the buses could lead to a considerable saving in time when repairs to the bodywork were necessary. Moreover, that system would also permit a substantial reduction in the number of components which needed to be kept in stock, because some components were equally suitable to different models of bus.

73. All three items, the seats, the demisters and the modular system, were already contained in EMI's tender. It can be seen from the decision awarding the contract that those items were included in the final evaluation, even though specific values were not accorded to them.

74. In its note of 3 August 1993 EMI did attempt to estimate what were the economic advantages of the abovementioned fittings in monetary terms. However, its method of calculation was not adopted by the SRWT.

75. The question is whether or not the items in question were variants within the meaning of the Directive and, if so, whether they were evaluated correctly.

76. Article 27(3) of the Directive provides:

'Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting entities may take account of variants which are submitted by a tenderer and meet the minimum specifications required by the contracting entities. Contracting entities shall state in the contract documents the minimum specifications to be respected by the variants and any specific requirements for their presentation ...'.

In the 32nd and 33rd recitals in the preamble to the Directive, the following principles for its application are mentioned:

'The rules to be applied by the entities concerned should establish a framework for sound commercial practice and should leave a maximum of flexibility;

As a counterpart for such flexibility and in the interest of mutual confidence, a minimum level of transparency must be ensured and appropriate methods adopted for monitoring the application of this directive.'

77. In the invitation to tender it is stated under Point 3d:

'Variants: Variants are authorized.' [21]

21 — The original document states 'Variantes: les suggestions sont autorisées'.

78. The contract documents refer to variants in different contexts. In one place reference is made to 'financial variants', [22] and in other places the terms 'compulsory variants' [23] or 'optional variants' [24] appear. In the context of the award criteria, point 20.2.1 states: 'Unit price for the bus and financial variants: ... the unit price will be increased by the price of variants other than financial variants and of any proposals taken into account.'

79. The Commission takes the view that the features should not have been taken into account when evaluating EMI's offer. It claims that technical features to which no value had been attributed could not be taken into account, unless they had been stated to be relevant in determining the economically most advantageous tender. The Commission accepts that the contract documents permit variants. However, the features requested by the contract documents could not be regarded as 'free proposals' [25] and could therefore be evaluated only in accordance with the contract documents.

80. In its reply the Commission adopts the view that even if variants were permitted by the contract documents, they should have been taken into account only in so far as they increased the unit price of the buses.

81. The Belgian Government raises the objection that the latter argument was submitted out of time and should therefore be rejected as inadmissible. Moreover, in its defence the Belgian Government submits as follows:

First, it must be held that proposals or suggestions [26] were permitted by the contract documents. The technical features taken into account by the SRWT as proposals were not the subject of an allowance which would have influenced the unit price of the vehicles offered by EMI. They were taken into account only as comfort and quality criteria, to which no monetary value was attached, which permitted the conclusion that, of all the tenders, EMI's tender was the economically most advantageous.

82. The Belgian Government emphasizes that the proposals played only a subordinate role in the award of the contract. The tenders of EMI and Van Hool were so close that in order to distinguish between the candidates the SRWT considered it necessary to take into account the special advantages of EMI's vehicles. That approach was compatible with Article 27(3) of the Directive, under which, in the case of a contract to be awarded in accordance with the criterion of the most

22 — 'Variantes financières', point 20.2 of the special conditions — award criteria.

23 — 'Variantes obligatoires' — liste des variantes.

24 — 'Variantes facultatives' — liste des variantes.

25 — 'Suggestions libres'.

26 — 'Suggestions'.

economically advantageous tender, a contracting entity could take account of variants submitted by tenderers which met the minimum specifications required by the contracting entity.

83. It adds that the purpose of a variant or a proposal is to draw new features to the attention of the administrative authority, of which it was unaware. By their very nature proposals exceed the technical minimum requirements laid down in the contract documents. Finally, it states that the claim that tenderers had been treated unequally must be rejected, it being practically impossible to compare proposals, because as a result of those proposals each tender becomes unique and dissimilar. Nor has the Commission been able to claim that other competitors made comparable proposals.

84. I would first like to deal with the Belgian Governments's objection of inadmissibility in regard to the argument in the Commission's reply concerning the increase in the unit price in the case of variants. That objection has a legal foundation in Article 42(2), first sentence, of the Rules of Procedure of the Court of Justice. That provision states:

'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.'

The argument in question is a plea in law. When considering whether a plea in law is excluded, a basic distinction must be made between pleas in law and arguments. The application must contain all the pleas in law. New pleas in law may not therefore be introduced in the subsequent proceedings unless justified in accordance with Article 42(2) of the Rules of Procedure. The position is different in regard to arguments that are intended to support and supplement the pleas in law already introduced. They may be submitted at any time, even at a later stage of the proceedings.

85. The plea that, when the contract was awarded, the award criteria were not observed because the seats, demisters and modular system proposed by EMI were taken into account by the SRWT was already raised in the application — and also in the preliminary procedure. As regards that plea, the reference to the effect on the unit price of variants which might have been admitted is only an additional argument. The objection of inadmissibility therefore misses its mark.

86. As regards the argument at issue, the Belgian Government contends that the Commission's claim is also incorrect as a matter of substance. The contract documents do in fact provide that proposals taken into account are to be added to the unit price in order to carry out a comparison. However, if the costs of those particular features were already included in the unit price — as they were in the present case — they could not be added to the price again. Even if the effect of the proposals accepted was not to increase the unit price, the SRWT was nevertheless not precluded from taking into account the merits of the material proposed.

87. When evaluating the SRWT's conduct in regard to the criteria for fittings, it must be concluded that the Directive basically permits variants. That follows expressly from Article 27(3). The invitation to tender shows that that possibility was used for the contract at issue.

88. In order to determine whether or not variants are admissible in the abstract, it must be asked what is their intended purpose. In that context there is a fundamental difference between the procedure under which the decisive criterion for the award of the contract is the lowest price and the procedure under which the most economic tender is the crucial factor. [27] Only under the latter procedure is it possible for the tenderer to submit variants. As the Belgian Government has correctly pointed out, that method of proceeding enables proposals and innovations which are drawn to the contracting entity's attention only by a tenderer to be taken into account when awarding the contract. The 32nd and 33rd recitals in the preamble to the Directive testify to the need to permit a certain flexibility in the contracting entity's commercial practice, even when applying the Directive.

89. If, in the procedure for the award of a public supply contract, tenderers are to be permitted to submit proposals and suggestions, pre-defined criteria cannot be set out in the contract documents. It seems to me to be logical that EMI's proposals for the special fittings cannot be brought within any of the variants listed in the contracts documents. That is obvious in so far as the concept of financial variants is concerned. The compulsory variants are alternative proposals requested and defined by the SRWT which relate to individual items in the contract documents. The alternative solutions defined on the relevant pages of the contract documents provide information as to their terms. The list of variants [28] gives an overview of the compulsory variants. Three of the four optional variants, also set out in that list, relate to financial matters. Only one 'optional variant' [29] relates to technical features,

27 — See Article 27(1).

28 — 'Liste des variantes' in the Annex to the special conditions.

29 — 'Variante facultative'.

which are also already defined. The distinction between compulsory and optional variants seems to lie in the fact that the tenderer must submit the compulsory variants in order to satisfy the requirements of the contract documents at all, whereas he is at liberty to submit the requested optional variants and, in any event, he cannot be excluded if he does not do so.

90. The admission of proposals and suggestions which have not been laid down by the contract documents raises the problem of how to quantify proposals which may have been taken into account. When awarding a contract according to the economically most advantageous tender, proposals must be evaluated in economic terms.

91. In the case of a procedure for the award of a contract according to the economically most advantageous tender, I consider that a public contracting entity enjoys a certain degree of discretion as to the technical approach which it ultimately prefers. That discretion is, however, not unlimited and must be capable of being reviewed for errors in the exercise of that discretion. In my opinion, the criteria in that regard may be inferred from the Directive. For example, Article 27(3) states:

'Contracting entities shall state in the contract documents the *minimum specifications to be respected by the variants.*'

In the 33rd recital in the preamble to the Directive reference is made to a '*minimum level of transparency*' as a counterpart to the permitted flexibility. I would like to add to this the *prohibition of discrimination* enshrined in Article 4.

92. The examination which follows is predicated on the assumption that a public contracting entity has a discretion when considering proposals, provided that they correspond to the minimum requirements defined in the contract documents and that the procedure is otherwise transparent and non-discriminatory. In my opinion, those principles must also apply to the economic evaluation of the proposals and suggestions.

93. The disputed criteria for fittings are to be regarded as standards for the technical quality of the equipment offered. The

'technical quality of the equipment offered' [30] is one of the criteria expressly referred to in the contract documents and includes seven standards. [31] A feature of those criteria is that they *exclusively* concern the definition of fictional credits or penalties in respect of the equipment required by the contract documents or any deviations therefrom. Since those evaluation criteria relate to the definitions in the contract documents, they cannot be extended so as to cover the evaluation of proposals not referred to in those documents. The economic evaluation of variants is expressly provided for only in connection with the determination of the unit price, its effect being to increase the price. [32]

94. It is in this context that we encounter the problem raised by the Belgian Government, namely that appropriate technical suggestions which have already been taken into account in the unit price cannot be included for a second time in the calculation, thereby increasing the price. That would indeed result in better solutions being placed at an economic disadvantage. It would be more correct if any suggestions taken into account by the contracting entity could be included in the system of bonuses and penalties for the technical material. However, as already indicated, it is not possible to define technical features in advance for that purpose, where those features are precisely those which are as yet unknown.

95. In view of the difficulties connected with the economic evaluation of alternative technical approaches, EMI's note of 3 August suggested how its proposals could be evaluated. [33] Those proposals were not adopted by the SRWT because, as already indicated, no standard for such alternative approaches had been laid down in the award criteria in the contract documents.

96. Nevertheless to take into account the tenderer's suggestions as representing an increase in value is, in my opinion, permissible in the context of the contracting entity's discretion, if the proposals meet the minimum specifications required by the contract documents, and a transparent and non-discriminatory approach is adopted when awarding the contract.

97. The requirements for the necessary seats are found in several places in the contract documents. They concern both the number of seated places in the various models and also the required compulsory variants for particular models, as for example 'anti-vandalism seats' at the rear of the buses. [34] It is clear that the cantilever seats satisfy all those technical requirements and, moreover, offer both economic advantages and greater convenience.

30 — 'Les qualités techniques du matérial offert', see the award criteria in the contract documents, introduction to point 20.2.2.4 et seq.

31 — Points 20.2.2.4 to 20.2.2.10 in the contract documents, see point 59 above.

32 — See point 20.2.1 of the criteria for the award of the contract.

33 — Cantilever seats BFR 480 000, demisters BFR 240 000, modular system BFR 100 000.

34 — See Annex II to the general conditions; Part 2, Chapter IV, Point 13, Article 42, and Part 3, Chapter II, Article 18, No 18.6, in the special conditions.

98. As regards the demisters offered, minimum specifications can be deduced from Part 2, Chapter IV, Point 14, Article 43. Reference is made there to single or double glazed windows, double glazing being a compulsory variant dependent on the heating system. I am unable to discern a departure from the minimum requirements with regard to this point either.

99. Finally, as regards the modular system, I am unable to discern any minimum requirements in that respect in the contract documents. That is not surprising, because that system was proposed precisely as characteristic and novel and could not therefore have been provided for in the contract documents. However, it is clear from the foregoing that in its appraisal of running costs (the second award criteria) the SRWT placed considerable importance on the length of time needed to repair the vehicles and the material costs involved. The third of the award criteria, security of supply, shows that it was of fundamental importance for the SRWT that the procurement of spare parts and the management of the spare parts store should be as efficient as possible. I am unable to discern any failure of the proposed modular system to meet any minimum requirements for component parts.

100. I consider that the SRWT ensured the necessary transparency by referring in its decision awarding the contract expressly to the proposals accepted by it on the basis of a previous classification under the defined award criteria, and by setting out the economic advantages of those proposals in a comprehensive manner in the decision. In the memorandum for the meeting of the *conseil d'administration* on 6 October 1993 the elements are referred to as the basis for the proposed decision and expressly discussed. [35]

101. Finally, with regard to observance of the principle of equal treatment, the SRWT did not depart from any of the requirements laid down in the contract documents as regards the fittings. Its conduct in that respect was quite different from the case of the assumed frequency of engine and gearbox replacement. A direct comparison between the proposals and suggestions and the tenders of other tenderers is rendered more difficult because the latter did not submit any comparable proposals.

102. In the final analysis, I conclude that the SRWT was acting within the scope of its discretion when it took into account the cantilever seats, demisters and modular system, and that its decision to award the contract is not unlawful in that respect.

35 — See p. 6 of the memorandum for the meeting of the *conseil d'administration* of 6 October 1993.

Costs

103. Under Article 69(3) of the Rules of Procedure of the Court of Justice, the Court may order that the costs be shared or that the parties bear their own costs, where each party succeeds on some and fails on other heads. I propose that such an order should be made in this case.

C — Conclusion

104. As a result of the foregoing considerations I therefore propose that the Court should:

(1) declare that, by taking into account, in the procedure for the award of a public contract by the SRWT, amendments made to one of the tenders after the opening of the tenders and by accepting a tender which did not meet the criteria for the award of the contract, the Kingdom of Belgium has failed to fulfil its obligations under Directive 90/531/EEC;

(2) dismiss the remainder of the action;

(3) order each party to bear its own costs.