

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE  
7 July 1994 \*

In Case T-185/94 R,

**Geotronics SA**, a company incorporated under French law, with its registered office at Lognes (France), represented by Tommy Pettersson, of the Swedish Bar, with an address for service in Luxembourg at the Chambers of Messrs Arendt and Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

**Commission of the European Communities**, represented by Karen Banks, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for, first, suspension of the operation of the Commission decision of 10 March 1994 rejecting the applicant's tender for the supply of 'total stations' (electronic tachometers) under the PHARE programme, and, second, by

\* Language of the case: English.

way of other interim measures, an order that the Commission take such measures as may be necessary to prevent the award of a contract, or, if such a contract should already have been awarded, to cancel such contract,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts

- 1 By application lodged at the Registry of the Court of First Instance on 29 April 1994 the applicant applied under Articles 173 and 174 of the Treaty Establishing the European Community (hereinafter referred to as 'the EC Treaty') for the annulment of the decision addressed by the Commission to the applicant on 10 March 1994 and rejecting its tender for the supply of 'total stations' made pursuant to a restricted tender issued under the PHARE programme, and, in the alternative, applied under Articles 178 and 215 of the EC Treaty for compensation for the losses the applicant considers it has suffered as a result of that decision.
  
- 2 By a separate document lodged at the Registry of the Court of First Instance on the same day the applicant also applied, under Articles 185 and 186 of the EC Treaty, for suspension of the operation of the decision at issue in the main proceedings and for an order that the Commission take such measures as might be

necessary to prevent the award of a contract, or, if such a contract should already have been awarded, to cancel such contract.

3 The Commission submitted its written observations on the application for interim measures on 24 May 1994.

4 Before considering whether the application for interim measures is well founded, it is appropriate to summarize the background to the dispute, as evidenced by the pleadings and documents lodged by the parties.

5 This case concerns a restricted tender issued jointly on 9 July 1993 by the Commission and the Romanian Ministry of Agriculture and Food Industry through the intermediary of the 'EC/PHARE Programme Management Unit-Bucharest' (hereinafter 'PMU-Bucharest') for the supply of 'total stations' (electronic tachometers) to the Romanian Ministry of Agriculture and Food Industry for use in the Romanian land reform programme. Under the conditions specified in the invitation to tender, the goods to be supplied had to originate in a Member State of the European Community or in one of the beneficiary countries of the PHARE programme.

6 The PHARE programme is the means by which the European Community channels financial aid to the countries of Central and Eastern Europe. It is based on Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to

certain countries of Central and Eastern Europe (OJ 1989 L 375, p. 11), as last amended by Council Regulation (EEC) No 1764/93 of 30 June 1993 (OJ 1993 L 162, p. 1).

- 7 Following the submission of the applicant's tender on 16 July 1993, PMU-Bucharest informed the applicant in a fax letter of 18 October 1993 that it had been successful in its application and that the contract would shortly be submitted to the Contracting Authority for approval.
  
- 8 On 19 November 1993 the Commission informed the applicant that the evaluation committee had recommended that the contract be awarded to it. The Commission did, however, express doubts as to whether the requirement concerning the origin of the goods had been complied with and asked the applicant for further information in that respect.
  
- 9 By a fax message of 2 March 1994 the applicant informed the Commission that it had heard that its tender would be rejected because its products were not of Community, but of Swedish, origin. However, the applicant took the view that the legal requirements as to origin of the products had changed following the entry into force on 1 January 1994 of the Agreement on the European Economic Area signed in Oporto on 2 May 1992 (OJ 1994 L 1, p. 3, hereinafter 'the EEA Agreement'), and asked the Commission to re-issue the invitation to tender.
  
- 10 By a fax message to the applicant of 10 March 1994 the Commission rejected its tender on the ground that, contrary to the conditions set out in the invitation to

tender, the products in question were not of Community origin. At the same time, the Commission informed the applicant that, because another technically and financially acceptable offer had been made which was in line with the rules as to origin of equipment laid down in the invitation to tender, it did not intend to re-issue the tender.

- 11 By letter of 11 March 1994 the Commission informed PMU-Bucharest that the offer made by the only other tenderer, the German company Carl Zeiss (hereinafter 'Zeiss'), was acceptable and requested it to contact Zeiss to finalize the contract.
- 12 By a fax message of 17 May 1994 PMU-Bucharest informed the Commission that, by a decision of 15 April 1994, the Romanian Ministry of Agriculture and Food Industry had awarded the contract to Zeiss.

## Law

- 13 Under the combined provisions of Articles 185 and 186 of the Treaty and Article 4 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 amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that circumstances so require, order that application of contested acts be suspended or prescribe any necessary interim measures.
- 14 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim measures as envisaged under Articles 185 and 186 of

the Treaty must state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. Such measures must be provisional in the sense that they do not prejudice the decision on the substance of the case (see the order of the President of the Court of First Instance in Case T-543/93 R *Gestevisión Telecinco v Commission* [1993] ECR II-1409).

*The arguments of the parties*

- 15 As regards the existence of a *prima facie* case for its action, the applicant argues, essentially, that by rejecting its tender for the sole reason that the products in question did not have EC origin but originated within the EEA, the Commission has acted in breach of Articles 6 and 228(7) of the EC Treaty and of Articles 4, 8, 11 and 65(1) of the EEA Agreement.
- 16 As regards the requirement of urgency, the applicant considers that, without the interim measures applied for, there is a great risk that the Commission will award the contract to another supplier, thus depriving it of the opportunity to sell its products within the PHARE programme. It is therefore urgent that suspension be ordered by the Court so that serious and irreparable damage to the applicant can be avoided.
- 17 For its part, the defendant challenges the admissibility of the main action and thus of the application for interim measures also. It considers that the Commission's letter of 10 March 1994 was not capable of producing legal effects, since it was the Romanian authorities, and not the Commission, which were in a position to accept or reject the applicant's tender.

- 18 In any case, the Commission argues, the EEA Agreement (which had not even entered into force when the applicant submitted its tender in July 1993) did not require a re-opening of the invitation to tender. In the Commission's opinion, the EEA Agreement does not concern the Romanian authorities, which were alone competent to make a decision on the award of the contract, nor does it cover external Community aid programmes. The Commission considers, moreover, that none of the articles of the EEA Agreement referred to by the applicant are relevant to the present case, since they are concerned only with the scope of the Agreement and the relations between the Contracting Parties. It follows, in the Commission's opinion, that the applicant has failed to establish a *prima facie* case for its main action.
- 19 As regards the risk of serious and irreparable damage, the Commission argues that the applicant has not established the urgency of its application for interim measures. It does not explain why it could not be adequately compensated in damages, were its claim in the main action to succeed. The Court of Justice has consistently held that damage of a financial nature is not in principle considered to be serious and irreparable unless it could not be wholly made good if the applicant were to be successful in the main action (see the order of the President of the Court of Justice in Case C-358/90 R *Compagnia Italiana Alcool v Commission* [1990] ECR I-4887, paragraph 26).

*Findings of the President of the Court of First Instance*

- 20 It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for them. It is for the party seeking suspension of operation to prove that it cannot wait for the outcome of the main pro-

ceedings without suffering damage that would entail serious and irreparable consequences (see the order in *Gestevisión Telecinco v Commission*, cited above).

- 21 In its application for interim relief the applicant confines itself to putting forward, as a circumstance establishing urgency, the fact that it will suffer serious and irreparable damage if the contested decision is put into operation, because such operation will permanently deprive it of the contract in question and thus of the opportunity to sell its products within the PHARE programme.
- 22 For the applicant, denial of the opportunity to obtain the contract in question constitutes damage of a purely financial nature. On that point, it has been consistently held (see, in particular, the order in *Compagnia Italiana Alcool v Commission*, cited above) that damage of a purely financial nature cannot in principle be regarded as being irreparable, or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation.
- 23 In the present case the applicant has not established, or even alleged, that its financial loss could not be wholly made good if the Court were to annul the contested decision at the conclusion of the main proceedings.
- 24 In that regard, it should be noted that in its main application the applicant seeks compensation for all the losses which it considers it has suffered as a result of the contested decision and which it quantifies at ECU 500 400 together with interest from the date on which it was notified of the Commission's decision. At the same



time, in its application for interim measures, the applicant makes no reference to the risk of any loss other than that referred to in its main application.

25 Accordingly, and without there being any need to consider whether the applicant's pleas in support of its main action disclose a *prima facie* case, the application for interim measures does not satisfy the requirement of urgency and must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.
2. Costs are reserved.

Luxembourg, 7 July 1994.

H. Jung

Registrar

J. L. Cruz Vilaça

President