Reports of Cases

ORDER OF THE PRESIDENT OF THE GENERAL COURT

3 July 2017 *

(Interim measures — Public procurement — Negotiated procedure — Application for interim measures — No urgency))

In Case T-117/17 R,

Proximus SA/NV, established in Brussels (Belgium), represented by B. Schutyser, lawyer,

applicant,

v

Council of the European Union, represented by A. Jaume and S. Cholakova, acting as Agents, and by P. de Bandt, P. Teerlinck and M. Gherghinaru, lawyers,

defendant,

APPLICATION pursuant to Articles 278 and 279 TFEU for the grant of interim measures, (i), suspending implementation of the decision of the Council to award the framework contract to another tenderer and, (ii), suspending the implementation of the framework contract concluded between the Council and the successful tenderer,

THE PRESIDENT OF THE GENERAL COURT

makes the following

Order

Background to the dispute, procedure and forms of order sought

1 By letter of 28 July 2016, the Council of the European Union invited the applicant, Proximus SA/NV, and [*confidential*] [1] to participate in a negotiated procurement procedure for the award of a framework contract.

2 By letter of 24 November 2016, the tenderers participating in the procurement procedure were invited to a negotiation meeting on financial aspects, including, in particular, some requests for clarification.

3 The negotiation meeting was held on 1 December 2016.

* Language of the case: English.

1 Confidential information redacted.

4 Following that meeting, the Council invited the tenderers to reply to the points raised in its minutes by submitting an amended financial offer, which was to constitute their last and best offer, by 8 December 2016.

5 By letter of 23 December 2016, the Council informed the applicant that its tender had not been accepted and that the contract had been awarded to another tenderer ('the contested decision'). On the same day, the applicant was notified of the evaluation of its tender.

6 On 29 December 2016, the applicant sent a letter to the Council. It asked for further information on the characteristics and relative advantage of the successful tender. Furthermore, it stated that the application of the price criterion appeared to be incorrect in so far as it had obtained a lower score than that of the successful tenderer whereas the latter's tender had a higher total price. Finally, the applicant requested the Council to reconsider its decision.

7 By letter of 6 January 2017, the applicant again invited the Council to reconsider its decision and not to sign the contract with the successful tenderer. In that letter, the applicant set out in detail the reasons why, in its view, the method used to assess the most economically advantageous tender had been incorrect and its application had led to an 'unacceptable' result. Furthermore, the applicant relied on the fact that the prices offered by the successful tenderer for 'service packages' 1 and 2 were abnormally low. On 10 January 2017, the applicant sent another letter to the Council, which set out, with slight amendments, the text of the letter of 6 January 2017.

8 By letter of 13 January 2017, the Council replied to the applicant's letter of 29 December 2016 and informed the applicant that it would reply separately to the applicant's letter of 6 January 2017.

9 By letter of 16 January 2017, the applicant developed its arguments concerning the abnormally low price offered by the successful tenderer for 'service packages' 1 and 2 and repeated its request that the Council reconsider its decision and not conclude the contract with the successful tenderer.

10 By letter of 23 January 2017, the Council expressed a view on the applicant's letters of 6 and 16 January 2017. Furthermore, it stated that it saw no reason to reconsider its award decision or not to conclude the contract.

11 By letter of 7 February 2017, the applicant informed the Council that it was of the opinion that the replies which the Council had given to it were unsatisfactory and that it had decided to take legal action both by means of a main action and by an application for interim measures which would be brought a few weeks later. In addition, it requested the Council not to sign the contract in the meantime.

12 By application lodged at the Court Registry on 23 February 2017, the applicant brought an action, seeking, in essence, annulment of the contested decision.

13 By separate document lodged at the Court Registry on 23 February 2017, the applicant brought the present application for interim measures, in which it claims, in essence, that the President of the Court should:

– suspend the implementation of the contested decision;

– postpone the implementation of the contract, if it has already been concluded with the successful tenderer, until a final judgment is delivered;

– order the Council to pay the costs.

14 In its observations on the application for interim measures, lodged at the Court Registry on 10 March 2017, the Council contends, in essence, that the President of the Court should:

– reject the application for interim measures; and

– order the applicant to pay the costs.

15 In reply to the question raised by the President of the Court, the Council stated, on 28 February 2017, that the contract had been signed with the successful tenderer on 15 February 2017 and that implementation of the contract had already begun.

Law

16 It is apparent from reading Articles 278 and 279 TFEU together with Article 256(1) TFEU that the judge hearing an application for interim measures may, if he considers that the circumstances so require, order that the operation of a measure challenged before the General Court be suspended or prescribe any necessary interim measures, pursuant to Article 156 of the Rules of Procedure of the General Court. Nevertheless, Article 278 TFEU establishes the principle that actions do not have suspensory effect, since acts adopted by the institutions of the European Union are presumed to be lawful. It is therefore only exceptionally that the judge hearing an application for interim measures may order the suspension of operation of an act challenged before the General Court or prescribe any interim measures (order of 19 July 2016, *Belgium* v *Commission*, T-131/16 R, EU:T:2016:427, paragraph 12).

17 Article 156(4) of the Rules of Procedure requires applications for interim measures to state 'the subject matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for.'

18 The judge hearing an application for interim relief may order suspension of operation of an act and other interim measures, if it is established that such an order is justified, prima facie, in fact and in law, and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, and consequently an application for interim measures must be dismissed if any one of them is not satisfied. The judge hearing an application for interim relief is also to undertake, when necessary, a weighing of the competing interests (see order of 2 March 2016, *Evonik Degussa* v *Commission*, C-162/15 P-R, EU:C:2016:142, paragraph 21 and the case-law cited).

19 In the context of that overall examination, the judge hearing the application has a wide discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of law imposing a pre-established scheme of analysis within which the need to order interim measures must be assessed (see order of 19 July 2012, *Akhras* v *Council*, Case C-110/12 P(R), not published, EU:C:2012:507, paragraph 23 and the case-law cited).

20 Having regard to the material in the case-file, the judge hearing the application considers that he has all the information needed to rule on the present application for interim measures without there being any need first to hear oral argument from the parties.

21 In the circumstances of the present case, it is appropriate to examine first whether the condition relating to urgency is satisfied.

22 In order to determine whether the interim measures sought are urgent, it should be noted that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the future final decision, in order to prevent a lacuna in the legal protection afforded by the EU Courts (see, to that effect, order of 14 January 2016, *AGC Glass Europe and Others* v *Commission*, C-517/15 P-R, EU:C:2016:21, paragraph 27).

23 To attain that objective, urgency must generally be assessed in the light of the need for an interlocutory order to avoid serious and irreparable damage to the party requesting the interim measure. That party must demonstrate that it cannot await the outcome of the main proceedings without suffering serious and irreparable damage (see, to that effect, order of 14 January 2016, *AGC Glass Europe and Others* v *Commission*, C-517/15 P-R, EU:C:2016:21, paragraph 27 and the case-law cited).

24 As regards, however, public procurement litigation, in order to assess whether or not it is urgent, account must be taken of the particular features of that litigation.

25 It follows from the case-law that, having regard to the requirements which follow from the effective protection which must be guaranteed in public procurement matters, when an unsuccessful tenderer is able to show that there is a particularly serious prima facie case, it cannot be required to establish that the rejection of its application for interim measures risks causing it irreparable harm, otherwise the effective legal protection which it enjoys pursuant to Article 47 of the Charter of Fundamental Rights of the European Union would be undermined in a manner that is both excessive and unjustified (see, to that effect, order of 23 April 2015, *Commission* v *Vanbreda Risks & Benefits*, C-35/15 P(R), EU:C:2015:275, paragraph 41).

26 Nevertheless, as follows from the case-law, that easing of the requirements applicable to assessment of the existence of urgency, justified by the right to an effective judicial remedy, applies only during the pre-contractual phase, provided that the standstill period resulting from Article 118(2) and (3) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1), and from Article 171(1) of Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation No 966/2012 (OJ 2012 L 362, p. 1) is respected. Where the adjudicating authority has concluded the contract with the successful tenderer after the expiry of that period and before the application for interim measures was lodged, such easing is no longer justified (see, to that effect, order of 23 April 2015, *Commission* v *Vanbreda Risks & Benefits*, C-35/15 P(R), EU:C:2015:275, paragraphs 34 and 42).

27 In that regard, it is clear from Article 171(2)(d) of Regulation No 1268/2012 that the standstill period did not apply in the present case, as the contract had been awarded under the negotiated procedure.

28 According to the applicant, that easing of the requirements applicable to assessment of the existence of urgency should apply to the present case in view of the complexity of the case and the care and attention which it displayed following notification of the contested decision.

29 That argument cannot be accepted.

30 Assuming that the case-law providing for the easing of the requirements applicable to assessment of the existence of urgency can be transposed to the situation where, as in the present case, Regulation No 1268/2012 specifies that the standstill period does not apply, the fact remains that the applicant has not brought its application for interim measures in sufficient time to benefit from that easing.

31 It should be noted, first, that the applicant did not bring its application for interim measures in the pre-contractual phase, but only on 23 February 2017, whereas the contract had been signed on 15 February 2017.

32 As the applicant's letter of 6 January 2017 shows, the latter had at the latest on that date sufficient evidence to determine whether there was a potential irregularity in the award decision for the purposes of bringing an application for interim measures before the conclusion of the contract between the Council and the successful tenderer on 15 February 2017.

33 In that regard, it must be observed that the four pleas of law relied on by the applicant in support of its application for interim measures concern the method of evaluating the most economically advantageous tender and its application in the present case. Yet, the applicant had already made that criticism in its letter of 6 January 2017.

34 That criticism, presented as a ground of annulment and in support of the application for interim measures, would have enabled the applicant to bring an effective application for annulment and an application for interim measures seeking to prevent the conclusion of the contract between the Council and the successful tenderer. Lodged in good time, such an application would have enabled the applicant to obtain an order under Article 157(2) of the Rules of Procedure suspending the operation of the decision awarding the contract for the duration of the proceedings for interim measures, even before the other party had made its submissions (see, to that effect, order of 30 May 2017, *Enrico Colombo and Corinti Giacomo* v *Commission*, T-690/16 R, not published, EU:T:2017:370, paragraph 40 and the case-law cited).

35 Next, the applicant also cannot rely on the fact that it has repeatedly requested the Council not to sign the contract. At no time did the Council suggest that it was prepared to suspend signing the contract. In contrast, in its letter of 23 January 2017, the Council stated that it saw no reason to reconsider its award decision or not to conclude the contract.

36 Finally, the applicant's argument that it should have 'had a reasonable time to analyse the reply' from the Council of 23 January 2017 can also not be accepted. In any event, it is clear from the applicant's letter of 7 February 2017 that it had considered the Council's replies to be unsatisfactory and informed the Council of its intention to take legal action. However, it brought its action for annulment and an application for interim measures only on 23 February 2017.

37 In the light of the foregoing, it must be concluded that the easing of the requirements applicable to assessment of the existence of urgency of public procurement cannot be applied in the present case.

38 It is also necessary to analyse whether the applicant has established to the requisite legal standard that the implementation of the contested decision would give rise to damage which could be categorised as not only serious but also irreparable within the meaning of the case-law referred to in paragraph 23 above.

39 In that regard, in the first place, it is necessary to bear in mind the settled case-law according to which damage of a pecuniary nature cannot, otherwise than in exceptional circumstances, be regarded as irreparable since, as a general rule, pecuniary compensation is capable of restoring the aggrieved person to the situation that obtained before he suffered the damage. Any such damage could be recouped by the applicant's bringing an action for compensation on the basis of Articles 268 TFEU and 340 TFEU (see order of 23 April 2015, *Commission* v *Vanbreda Risks & Benefits*, C-35/15 P(R), EU:C:2015:275, paragraph 24 and the case-law cited).

40 In the second place, it must be noted that the adverse financial consequences which the unsuccessful tenderer would suffer as a result of the rejection of its tender have, generally, to be considered to be part of the normal commercial risk which each undertaking active in the market must face.

Accordingly, the mere fact that the rejection of a tender may have adverse, even serious, financial consequences for the unsuccessful tenderer cannot therefore justify, in itself, the interim measures sought by the latter (see, to that effect, order of 11 March 2013, *Communicaid Group* v *Commission*, T-4/13 R, EU:T:2013:121, paragraphs 28 to 30 and the case-law cited).

41 In the last place, it must be borne in mind that the essential and main elements of the contract concluded following a tendering procedure for the award of a public contract are, on the one hand, performance of the contract by the successful tenderer and, on the other, payment of the contractually agreed sum by the contracting authority. In contrast, considerations relating to the reputation of the selected tenderer and the opportunity for it to use the award of a prestigious public contract as a reference in the context of a future tender or in other competitive contexts relate only to accidental and incidental elements of that contract. If the fact that an unsuccessful tenderer suffers a serious loss of profits by failing to obtain the contractually agreed sum, which is the essential and principal element of the public contract at issue, cannot justify the grant of an interim measure, this should also apply, and even more so, as regards the loss of those accidental and incidental elements (see, to that effect, order of 30 May 2017, *Enrico Colombo and Corinti Giacomo* v *Commission*, T-690/16 R, not published, EU:T:2017:370, paragraph 55 and the case-law cited).

42 The applicant's arguments seeking to show serious and irreparable damage, alleging that the nature of the relevant market is a 'reference market', the nature of the market is 'prestigious', the impossibility of being able to develop its market and to establish an effective partnership with other companies or the loss of the opportunity, in the light of the size of the market, to obtain reductions and benefits from its suppliers which it could then pass on to its customers, concern the accidental and incidental elements of the market in dispute within the meaning of the case-law cited in the preceding paragraph. Therefore, in accordance with that case-law, those arguments cannot be accepted.

43 It follows from all of the foregoing that the application for interim measures must be dismissed, as the applicant has failed to establish urgency, without it being necessary to rule on the prima facie case or even to weigh up the interests.

44 Under Article 158(5) of the Rules of Procedure, the costs must be reserved.

On those grounds,

THE PRESIDENT OF THE GENERAL COURT

hereby orders:

1. The application for interim measures is dismissed.

2. The costs are reserved.

Luxembourg, 3 July 2017.

E. Coulon
Registrar

M. Jaeger
President