



## Reports of Cases

**Case T-117/17 R**

**Proximus SA/NV**

**v**

**Council of the European Union**

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

Summary — Order of the President of the General Court, 3 July 2017

1. *Application for interim measures — Suspension of operation of a measure — Interim measures — Conditions for granting — Prima facie case — Urgency — Serious and irreparable damage — Cumulative nature — Order of examination and method of verification — Discretion of the court hearing the application for interim relief — Balancing of all the interests involved*

(Arts 256(1) TFEU, 278 TFEU and 279 TFEU; Rules of Procedure of the General Court, Art. 156(4))

2. *Application for interim measures — Suspension of operation of a measure — Interim measures — Conditions for granting — Urgency — Serious and irreparable damage — Burden of proof borne by the party seeking the interim measure*

(Arts 278 TFEU and 279 TFEU; Rules of Procedure of the General Court, Art. 156(4))

3. *Application for interim measures — Suspension of operation of a measure — Conditions for granting — Urgency — Assessment in public procurement litigation — Serious damage — Sufficient in the case of a particularly serious prima facie case constituted by an obvious and serious illegality — Condition — Application for interim measures brought in the standstill period before conclusion of the contract with the successful tenderer*

(Art. 278 TFEU; Charter of Fundamental Rights of the European Union, Art. 47; Rules of Procedure of the General Court, Art. 157(2); Regulation of the European Parliament and of the Council No 966/2012, Art. 118(2) and (3); Commission Regulation No 1268/2012, Art. 171(1))

4. *Application for interim measures — Suspension of operation of a measure — Interim measures — Conditions for granting — Urgency — Serious and irreparable damage — Financial loss — Decision to exclude a tenderer from a tender procedure — Loss of opportunity — Damage to its reputation — Damage which cannot be regarded as irreparable*

(Arts 268 TFEU, 278 TFEU, 279 TFEU and 340 TFEU; Rules of Procedure of the General Court, Art. 156(4))

1. See the text of the decision.

(see paras 16, 18, 19)

2. See the text of the decision.

(see paras 22, 23)

3. 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. Nevertheless, 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 No 966/2012 on the financial rules applicable to the general budget of the Union, and from Article 171(1) of Regulation No 1268/2012 on the rules of application of Regulation No 966/2012 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.

As regards an application for interim measures brought after the signing of the contract with the successful tenderer, the easing of the requirements applicable to assessment of the existence of urgency of public procurement cannot be applied, since, as the applicant's letter to the adjudicating authority during the pre-contractual phase so that it would reconsider its award decision shows, the applicant had sufficient evidence to determine whether there was a potential irregularity in that decision for the purposes of bringing an application for interim measures before the conclusion of the contract between the adjudicating authority and the successful tenderer. Lodged in good time, an application for interim measures 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 paras 25, 26, 31, 32, 34, 37)

4. As regards interim measures, the adverse financial consequences which an 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.

5. Moreover, 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 concluded at the end of the tendering procedure. 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 paras 40, 41)