



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber, Extended Composition)

26 January 2022 *

(Public supply contracts – Tendering procedure – Aerial surveillance services – Action for annulment – No interest in bringing proceedings – Inadmissibility – Non-contractual liability)

In Case T-849/19,

Leonardo SpA, established in Rome (Italy), represented by M. Esposito, F. Caccioppoli and G. Calamo, lawyers,

applicant,

v

European Border and Coast Guard Agency (Frontex), represented by H. Caniard, C. Georgiadis, A. Gras and S. Drew, acting as Agents, and by M. Umbach, F. Biebuyck, V. Ost and M. Clarich, lawyers,

defendant,

APPLICATION, first, based on Article 263 TFEU seeking annulment of contract notice FRONTEX/OP/888/2019/JL/CG, of 18 October 2019, entitled ‘Remotely Piloted Aircraft System (RPAS) for Medium Altitude Long Endurance Maritime Aerial Surveillance’, as corrected, the respective acts attached to it, the questions and answers published by Frontex, the minutes of the information meeting held at Frontex’s premises on 28 October 2019, the contract award decision, and any other prior, associated or subsequent act and, secondly, based on Article 268 TFEU seeking compensation for the damage allegedly suffered by the applicant as a result thereof,

THE GENERAL COURT (Ninth Chamber, Extended Composition),

composed of S. Papasavvas, President, M.J. Costeira, J. Schwarcz, M. Kancheva and T. Perišin (Rapporteur), Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written part of the procedure and further to the hearing on 11 June 2021,

gives the following

* Language of the case: Italian.

Judgment

Background to the dispute and events subsequent to the bringing of the action

- 1 On 18 October 2019, by contract notice published in the Supplement to the *Official Journal of the European Union* (OJ 2019/S 202-490010), the European Border and Coast Guard Agency (Frontex) launched the tendering procedure FRONTEX/OP/888/2019/JL/CG entitled 'Remotely Piloted Aircraft System (RPAS) for Medium Altitude Long Endurance Maritime Aerial Surveillance' ('the contested contract notice') in order to acquire aerial surveillance services by the means of Medium Altitude Long Endurance Remotely Piloted Aircraft System for maritime purposes ('MALE RPAS'). That notice was corrected twice, on 8 and 22 November 2019, extending the deadline for submission and the date of opening of tenders.
- 2 The deadline for the submission of tenders was set, in accordance with the corrections made to the contract notice during the procedure, at 13 December 2019 and the date for the opening of tenders at 20 December 2019. Three undertakings submitted tenders.
- 3 The applicant, Leonardo SpA, a company operating in the aerospace sector, did not participate in the tendering procedure launched by the contested contract notice.
- 4 On 31 May 2020, the tender evaluation committee submitted its evaluation report to the authorising officer responsible.
- 5 On 12 June 2020, the authorising officer responsible approved the tender evaluation report and signed the contract award decision ('the contested award decision') and the letters addressed to the three tenderers to inform them of the status of the procedure. Since the applicant did not participate in the procedure, it did not receive a letter.
- 6 By a request for access to documents registered on 30 June 2020, the applicant requested a copy of all of the documents relating to the procedure for the award of the contract at issue, and in particular the contested award decision, the minutes of the tendering procedure, the documents submitted by the successful tenderer and all of the other documents in the procedural file ('the request for access'). By letter of 10 August 2020, Frontex refused access to the documents requested.

Procedure and forms of order sought

- 7 By application lodged at the Registry of the General Court on 16 December 2019, the applicant brought the present action.
- 8 By separate document lodged at the Court Registry on the same date, the applicant brought an application for interim measures, in which it claimed, in essence, that the President of the General Court should suspend the execution of the contested contract notice, as corrected, the respective acts attached to it, the questions and answers published by Frontex ('the questions and answers'), the minutes of the information meeting held in Warsaw on 28 October 2019 ('the information meeting') and any other prior, associated or subsequent act. By order of 20 April 2020, *Leonardo v Frontex* (T-849/19 R, not published, EU:T:2020:154), the President of the General Court dismissed that application and reserved the costs.

- 9 On 18 February 2020, Frontex lodged its defence.
- 10 By separate document, lodged at the Court Registry on 11 August 2020, the applicant lodged new pleadings in which it claimed, in essence that the Court should also annul the contested award decision, and any other prior, associated or subsequent act, and order Frontex to produce the documents sought in the request for access to documents, in accordance with Article 91 of the Rules of Procedure of the General Court.
- 11 By separate document, lodged at the Court Registry on 12 August 2020, the applicant made an application for interim measures, in which it claimed, in essence, that the President of the General Court should suspend the execution of the contested acts referred to in the application and those referred to in the pleadings of 11 August 2020. On the same date, the applicant submitted a supplement to the application for interim measures. By order of 11 November 2020, *Leonardo v Frontex* (T-849/19 RII, not published, EU:T:2020:539), the President of the General Court dismissed that application and reserved the costs.
- 12 By separate document, lodged at the Court Registry on 1 September 2020, the applicant introduced new pleas in law, pursuant to Article 84 of the Rules of Procedure.
- 13 By document lodged at the Court Registry on 4 October 2020, Frontex submitted observations on the pleadings of 11 August and 1 September 2020.
- 14 On 27 January 2021, by way of a measure of organisation of procedure, the Court invited the parties to reply in writing to a number of questions concerning the admissibility of the action. The parties complied with that measure within the prescribed period.
- 15 On a proposal from the Ninth Chamber of the General Court, the Court decided, pursuant to Article 28 of its Rules of Procedure, to refer the case to a chamber sitting in extended composition.
- 16 As a member of the Ninth Chamber, Extended Composition was prevented from sitting, the President of the General Court designated another judge to complete the Chamber.
- 17 The parties presented oral argument and replied to the questions put by the Court at the hearing on 11 June 2021.
- 18 The applicant claims that the Court should:
 - annul the contested contract notice, as corrected, the respective acts attached to it, the questions and answers, the minutes of the information meeting and any other prior, associated or subsequent act (together, ‘the contested acts referred to in the application’);
 - annul the contested award decision and any other prior, associated or subsequent act referred to in the pleadings of 11 August 2020;
 - order Frontex to pay compensation for all the direct and indirect damage that has been suffered and continues to be suffered, in whatever capacity, as a result of the unlawful nature of the call for tenders at issue;
 - order the commissioning of an expert’s report in order to establish that the contested terms of the contested contract notice are unreasonable, unnecessary and do not comply with the

relevant sectoral regulations, that those terms prevented it from making an offer and that there were appropriate reasons in terms of costs and technical feasibility for dividing the contract into two or more lots;

- order Frontex to produce the documents requested in the request for access to documents relating to the procedure for the award of the contract at issue;
- order Frontex to pay the costs.

19 Frontex contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

Law

The applications for annulment

- 20 First, it is necessary to examine the admissibility of the applications for annulment of the contested acts referred to in the application and in the pleadings of 11 August 2020.
- 21 In its replies to the written questions put by the Court, referred to in paragraph 14 above, Frontex submits that the application for annulment of the contested acts referred to in the application is inadmissible in so far as it does not meet the requirements laid down in Article 263 TFEU. It submits that the contested contract notice is not a challengeable act, that the applicant is neither directly nor individually concerned by the contested acts referred to in the application and that the applicant cannot rely on any interest in bringing proceedings.
- 22 The applicant claims that its action satisfies the conditions of admissibility laid down in Article 263 TFEU.
- 23 In that regard, in the first place, it should be recalled that, according to settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as the applicant has an interest in the annulment of the contested measure. Such an interest requires that the annulment of that act must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party which brought it (see judgment of 20 December 2017, *Binca Seafoods v Commission*, C-268/16 P, EU:C:2017:1001, paragraph 44 and the case-law cited).
- 24 In the present case, the applicant submits that it did not participate in the tendering procedure at issue since the requirements of the tender specifications prevented it from submitting a tender. The question is therefore whether, in such circumstances, it has an interest in bringing proceedings for the purposes of Article 263 TFEU against that call for tenders.
- 25 In that regard, the Court of Justice has held, in response to a question referred for a preliminary ruling on the interpretation of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works

contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31), that participation in a contract award procedure may, in principle, validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he or she risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract (see judgment of 28 November 2018, *Amt Azienda Trasporti e Mobilità and Others*, C-328/17, EU:C:2018:958, paragraph 46 and the case-law cited).

- 26 However, the Court of Justice held that, where an undertaking has not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested, it would be too much to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender, before being able to avail itself of the review procedures provided for by Directive 89/665 against such specifications, in the award procedure for the contract at issue, even though its chances of being awarded the contract are non-existent by reason of the existence of those specifications (see judgment of 28 November 2018, *Amt Azienda Trasporti e Mobilità and Others*, C-328/17, EU:C:2018:958, paragraph 47 and the case-law cited).
- 27 Moreover, the Court of Justice specified that, since it is only in exceptional cases that a right to bring proceedings is given to an operator which has not submitted a tender, it cannot be regarded as excessive to require that operator to demonstrate that the clauses in the call for tenders make it impossible to submit a tender (judgment of 28 November 2018, *Amt Azienda Trasporti e Mobilità and Others*, C-328/17, EU:C:2018:958, paragraph 53).
- 28 Although that judgment was delivered in response to a question referred for a preliminary ruling on the interpretation of provisions of Directive 89/665, which is binding only on the Member States, the solution it provides can be applied, *mutatis mutandis*, in a case such as the present one, in which the applicant claims that it was prevented from submitting a tender on account of the technical specifications of the tender documents launched by an agency of the European Union, technical specifications which it disputes.
- 29 It must therefore be determined whether the applicant has established that it was prevented from submitting a tender and, therefore, whether it has an interest in bringing proceedings.
- 30 In order to demonstrate that it was prevented from submitting a tender, the applicant submits that the contested contract notice, as corrected, the respective acts attached to it, the questions and answers and the minutes of the information meeting, referred to in the application, contained discriminatory terms making it impossible for it to provide all the services requested.
- 31 In that regard, as the Court of Justice has already held, the principles of equal treatment, non-discrimination and transparency are of crucial importance with regard to the technical specifications, in the light of the risks of discrimination linked to the choice of those specifications or the manner in which they are formulated (see, as regards Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), judgment of 10 May 2012, *Commission v Netherlands*, C-368/10, EU:C:2012:284, paragraph 62).

- 32 First, it should be recalled that the stage of assessing and establishing needs is, as a general rule, unilateral in the case of the award of a normal public contract. The contracting authority does no more than launch a call for tenders setting out the specifications which it has itself drawn up (judgment of 4 June 2020, *Remondis*, C-429/19, EU:C:2020:436, paragraph 33).
- 33 In the present case, the tendering procedure at issue was preceded by the tendering procedure FRONTEX/OP/800/2017/JL, launched in 2017, for the trials of two types of RPAS. The objective pursued by that procedure was, according to the contract notice, ‘to enable Frontex to continue its assessment and evaluation of remote piloted surveillance aircraft capable to deliver long endurance maritime border surveillance’. It also stated that ‘specific focus of this assessment will be on the ability of such a platform to deliver surveillance services in a regular, reliable, and cost-efficient way’. That contract was divided into two lots, the first for the trial of a standard size MALE RPAS for long endurance aerial surveillance of the maritime border, for up to 600 flying hours in designated areas of the Mediterranean Sea between the second and fourth quarters of 2018, and the second was for the trial of a small MALE RPAS for long endurance aerial surveillance of the maritime border, for up to 300 flying hours in designated areas of the Mediterranean Sea between the second and fourth quarters of 2018. In that regard, on 29 December 2017, the applicant won the contract for the second lot.
- 34 Once those contracts were performed, Frontex carried out detailed assessments. The performance of the first lot was assessed positively, which led Frontex to recommend the organisation of a procurement procedure in order to acquire aerial surveillance services by means of the standard size MALE RPAS. In contrast, the assessment of the second lot was positive only to a certain extent, which led Frontex to consider that further assessments were necessary in order to confirm the reliability of the small RPAS and their ability to fly beyond the visual line of sight. It was then on the basis of those evaluation reports that Frontex established the requirements contained in the contested contract notice, as corrected, the respective acts attached to it, the questions and answers and the minutes of the information meeting, referred to in the application, which include those which the applicant considers to be discriminatory. The establishment of those requirements was therefore at the end of a staged process marked by feedback which enabled Frontex to assess their necessity in detail and diligently.
- 35 Secondly, although the applicant asserts that ‘the rules of the call for tenders contain clauses which are *contra legem* and unjustified and which expose potential competitors to claims which are not technically feasible’, the fact remains that three undertakings submitted a tender and two of them, at the very least, fulfilled all of the technical specifications as the contract was awarded to them.
- 36 Thirdly, the applicant has not established either that the technical specifications were applied differently to it than to the other candidates, or, more generally, that it was treated differently even though it was in a similar situation to those candidates.
- 37 Fourthly, the applicant asserts that its participation was made ‘impossible’ or that it was subject to ‘excessive economic burdens to the point of undermining the submission of a competitive tender’. Such an assertion cannot demonstrate any discrimination against the applicant. On the contrary, as Frontex rightly points out, such an assertion suggests that the applicant’s inability to submit a tender was attributable more to its own circumstances than to discriminatory technical requirements. In addition, it should be noted that, as it has publicly announced, the applicant is currently working on an RPAS model which is close to most of the requirements set by Frontex in the call for tenders at issue.

- 38 In those circumstances, the applicant has not demonstrated that the requirements of the call for tenders at issue could be discriminatory against it.
- 39 Accordingly, the applicant has not established that it was prevented from submitting a tender and therefore it does not have an interest in seeking the annulment of the contested contract notice, as corrected, the respective acts attached thereto, the questions and answers and the minutes of the information meeting, referred to in the application. The claims for annulment of those acts must therefore be rejected as inadmissible and, as a result, also those directed against the award decision.
- 40 In the second place, it should be recalled that an application initiating proceedings must state the subject matter of the proceedings and set out a summary of the pleas in law and that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the EU judicature to rule on the action. Similarly, the form of order sought in the application initiating proceedings must be set out unambiguously so that the EU judicature does not rule *ultra petita* or indeed fail to rule on a complaint (see judgment of 14 September 2017, *Università del Salento v Commission*, T-393/15, not published, EU:T:2017:604, paragraph 75 and the case-law cited).
- 41 It follows that claims for the annulment of acts which are prior to, associated with or subsequent to other acts referred to in the action for annulment, without those prior, associated or subsequent acts having been identified, must be regarded as not complying with those requirements, in that they lack precision as to their subject matter (see judgment of 14 September 2017, *Università del Salento v Commission*, T-393/15, not published, EU:T:2017:604, paragraph 76 and the case-law cited).
- 42 It follows that the applications for annulment of the contested acts referred to in the application and in the pleadings of 11 August 2020 are inadmissible in so far as they relate to any act which is prior to, associated with or subsequent to the other acts referred to therein.
- 43 In the light of the foregoing, the applications for annulment of the contested acts must be dismissed as inadmissible, without there being any need to rule on the requirements relating to the existence of a challengeable act and the applicant's legal standing to bring proceedings, and without there being any need to rule on the effectiveness of the measures of inquiry sought or the admissibility of the pleadings of 11 August and 1 September 2020.

The claim for compensation

- 44 The applicant seeks compensation for all the direct and indirect damage that has been suffered and continues to be suffered, in whatever capacity, as a result of the unlawful nature of the call for tenders at issue. The damage claimed is said to result from the loss of the contract at issue and the amount of the damage therefore corresponds to the value of that contract.
- 45 Frontex disputes those arguments.
- 46 According to settled case-law, non-contractual liability on the part of the European Union is incurred under the second paragraph of Article 340 TFEU if a number of conditions are fulfilled relating to the illegality of the conduct alleged against the institution, actual damage and the existence of a causal link between that conduct and the damage complained of. Moreover, it should be recalled that, if any one of those conditions is not satisfied, the entire action must be

dismissed and it is unnecessary to consider the other conditions for such liability (see judgment of 14 October 1999, *Atlanta v European Community*, C-104/97 P, EU:C:1999:498, paragraph 65 and the case-law cited).

- 47 In that regard, with respect to the condition requiring actual damage to have been suffered, the European Union will incur liability only if the applicant has actually suffered ‘real and certain’ loss. It is for the applicant to produce to the EU Courts the evidence to establish the fact and the extent of such loss (see judgment of 8 November 2011, *Idromacchine and Others v Commission*, T-88/09, EU:T:2011:641, paragraph 25 and the case-law cited).
- 48 In the present case, the applicant is merely seeking compensation for all of the damage that has been suffered and continues to be suffered as a result of the unlawful nature of the call for tenders at issue, without adducing evidence to establish the fact and the extent of that damage.
- 49 The applicant merely submits that the value of the damage claimed results from the loss of the contract at issue and the amount of the harm therefore corresponds to the value of that contract.
- 50 With regard to the alleged damage suffered by the applicant as a result of the loss of the chance of securing the contract, it should be recalled that the loss of the chance of securing a contract constitutes real and certain damage only if, in the absence of the improper conduct by the institution, there would be no doubt that the applicant would have been awarded that contract (see, to that effect, order of 22 June 2011, *Evropaiki Dynamiki v Commission*, T-409/09, EU:T:2011:299, paragraph 85 and the case-law cited). That is not the case here. Even if the contract documents contained unlawful terms, it is established that three undertakings participated in the tendering procedure launched by the contested contract notice and that the applicant has not demonstrated that, if the documents at issue had not contained the allegedly unlawful terms, the contract would undoubtedly have been awarded to it and not to one of those three undertakings.
- 51 It follows that the condition requiring actual damage to have been suffered has not been satisfied for the European Union to incur non-contractual liability under the second paragraph of Article 340 TFEU.
- 52 Moreover, given the cumulative nature of the conditions to which the contractual liability of the Union, within the meaning of the second paragraph of Article 340 TFEU, is subject, there is no need to examine the other conditions required by the case-law in that regard.
- 53 In those circumstances, the claim for compensation must be rejected.
- 54 In the light of all of the foregoing, the present action must be dismissed in its entirety.

Costs

- 55 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, including those incurred in the proceedings for interim measures, in accordance with the form of order sought by Frontex.

On those grounds,

THE GENERAL COURT (Ninth Chamber, Extended Composition)

hereby:

- 1. Dismisses the action;**
- 2. Orders Leonardo SpA to pay, in addition to its own costs, the costs incurred by the European Border and Coast Guard Agency (Frontex), including those incurred in the proceedings for interim measures.**

Papasavvas

Costeira

Schwarcz

Kancheva

Perišin

Delivered in open court in Luxembourg on 26 January 2022.

[Signatures]