

Action brought on 16 December 2019 — Leonardo v Frontex**(Case T-849/19)**

(2020/C 54/63)

*Language of the case: Italian***Parties**

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

Defendant: European Border and Coast Guard Agency (Frontex)

Form of order sought

The applicant claims that the Court should, as regards the substance:

- annul the acts referred to below;
- order the defendant 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 tender at issue;
- by way of a measure of inquiry, order the commissioning of an expert's report pursuant to Articles 91(e) and 96 of the Rules of Procedure of the General Court, in order to establish that: (a) the terms of the call for tender at issue are unreasonable, unnecessary and do not comply with the relevant sectoral regulations; (b) the contested terms prevent Leonardo from making an offer; (c) there are cost-related reasons and reasons of technical feasibility for dividing the contract into two or more lots;
- order the defendant to pay the costs.

Pleas in law and main arguments

The present action has been brought against the call for tender FRONTEX/OP/888/2019/JL/CG for the service 'Remotely Piloted Aircraft Systems (RPAS) for Medium Altitude Long Endurance Maritime Aerial Surveillance', published on 18 October 2019 in the Supplement to the Official Journal of the European Union (Tenders Electronic Daily (TED)) under reference 2019/S 202-490010, and the respective acts attached to it, in particular:

- Invitation to Tender, available online at <https://etendering.ted.europa.eu/cft/cft-document.html?docId=61915>;
- Financial proposal, available online at <https://etendering.ted.europa.eu/cft/cft-document.html?docId=61916>;
- Declaration, available online at <https://etendering.ted.europa.eu/cft/cft-document.html?docId=61917>;
- Annex I — Tender Specifications, available online at <https://etendering.ted.europa.eu/cft/cft-document.html?docId=61918>;
- Tender Submission Form, available online at <https://etendering.ted.europa.eu/cft/cft-document.html?docId=61919>;

- Draft Contract, available online at <https://etendering.ted.europa.eu/cft/cft-document.html?docId= 61921>;
- Agreement of non-disclosure, available online at <https://etendering.ted.europa.eu/cft/cft-document.html?docId= 61922>;
- Appendix 1, available online at <https://etendering.ted.europa.eu/cft/cft-document.html?docId= 61924>;
- Appendix 2, available online at <https://etendering.ted.europa.eu/cft/cft-document.html?docId= 61925>;
- Appendix 3, available online at <https://etendering.ted.europa.eu/cft/cft-document.html?docId= 61926>;
- Corrigendum — Notice for changes or additional information, published in the Official Journal of the European Union (Tenders Electronic Daily (TED)) under reference 2019/S 216-528930;
- Corrigendum — Notice for changes or additional information, published in the Official Journal of the European Union (Tenders Electronic Daily (TED)) under reference 2019/S 226-553006;
- the explanations (questions and answers) provided by FRONTEX under the *lex specialis* (published online at <https://etendering.ted.europa.eu/cft/cft-questions.html?cftId= 5444>);
- the minutes of the Informative Meeting held at FRONTEX's premises on 28 October 2019;
- any other prior, associated or subsequent act to those set out above.

In support of the action, the applicant relies on four pleas in law.

1. The applicant seeks annulment of the contested acts in so far as they fail to observe the principles of transparency, proportionality, equal treatment and non-discrimination, as a result of their generic and irrational content, that is, the fact that in certain cases they impose on the tenderers, and in so far as that concerns the applicant, specific technical requirements that are completely unnecessary, disproportionate, excessive and non-functional for the purposes of the service or such that they make the applicant's participation impossible or subject to excessive economic burdens to the point of undermining the competitiveness of its tender. As a result, those acts infringe recitals 96 and 108 and Articles 160, 161 and 166 of General Financial Regulation (EU, Euratom) 2018/1046⁽¹⁾ and points 17.1, 17.3 and 17.8 of Annex I thereto, as well as Directives 2014/23/EU⁽²⁾ and 2014/24/EU⁽³⁾ of the European Parliament and of the Council. They are also vitiated by *ultra vires* in the form of failure to observe the principle of proportionality, their illogical nature, the incorrect nature and distortion of their assumptions, inequality of treatment, injustice and misuse of power.
2. The applicant also seeks annulment of the contested acts on account of the failure to divide the contract at issue into lots. In particular, the applicant claims infringement of Article 160(1), (2) and (3) of General Financial Regulation (EU, Euratom) 2018/1046 as well as infringement of point 33.1 of Annex 1 thereto and failure to apply the third provision of point 18.2 of Annex I to the same regulation.
3. The applicant also claims infringement of Articles 176 and 179 of the abovementioned regulation, on account of the provision contained in the tender documents which allows the participation of undertakings from third countries.
4. Lastly, on account of the unlawful nature of the acts, the applicant seeks compensation for all the direct and indirect damage that has been suffered and continues to be suffered as a result, in any capacity, of the unlawful nature of the call for tender at issue.

⁽¹⁾ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1).

⁽²⁾ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

⁽³⁾ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).