



Reports of Cases

Case T-4/13 R

Communicaid Group Ltd
v
European Commission

(Application for interim measures — Public services contracts — Tendering procedure — Language training services — Rejection of tender submitted by a tenderer — Application for suspension of operation and interim measures — Loss of opportunity — No serious and irreparable damage — No urgency)

Summary — Order of the President of the General Court, 11 March 2013

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 — Balancing of all the interests involved — Order of examination and method of verification — Discretion of the judge dealing with the application for interim relief*
(Arts 256(1) TFEU, 278 TFEU and 279 TFEU; Rules of Procedure of the General Court, Art. 104(2))
2. *Application for interim measures — Suspension of operation of a measure — Interim measures — Conditions for granting — Urgency — Serious and irreparable damage — Burden of proof*
(Arts 278 TFEU and 279 TFEU)
3. *Application for interim measures — Suspension of operation of a measure — Interim measures — Conditions for granting — Serious and irreparable damage — Financial loss — Situation which could jeopardise the existence of the applicant company — Burden of proof*
(Arts 278 TFEU and 279 TFEU; Rules of Procedure of the General Court, Art. 104(2))
4. *Application for interim measures — Suspension of operation of a measure — Interim measures — Conditions for granting — Urgency — Serious and irreparable damage — Loss of opportunity through exclusion from a tendering procedure — Loss not in itself constituting serious damage*
(Arts 278 TFEU and 279 TFEU; Rules of Procedure of the General Court, Art. 104(2))
5. *Application for interim measures — Suspension of operation of a measure — Interim measures — Conditions for granting — Serious and irreparable damage — Financial loss — Loss of opportunity through exclusion from a tendering procedure — Damage capable of full remedy in the context of an action for compensation*
(Arts 268 TFEU, 278 TFEU, 279 TFEU and 340 TFEU; Rules of Procedure of the General Court, Art. 104(2))

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

(Arts 278 TFEU and 279 TFEU; Rules of Procedure of the General Court, Art. 104(2))

7. *Application for interim measures — Suspension of operation of a measure — Suspension of operation of a decision on public contracts — Conditions for granting — Urgency — Scope*

(Art. 278 TFEU)

8. *Fundamental rights — Rights of defence — Right to effective judicial protection — Applicant, in interim proceedings, claiming the urgency of its situation but without having applied for an expedited procedure in the main proceedings — No infringement*

(Arts 278 TFEU and 279 TFEU; Rules of Procedure of the General Court, Art. 76a)

1. See the text of the decision.

(see paras 12-14)

2. See the text of the decision.

(see para. 21)

3. Damage of a pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable or even as being reparable only with difficulty, since financial compensation for that damage can normally be obtained subsequently. In such a case, the interim measure sought will be justified only if it appears that, without such a measure, the applicant would be in a position that could imperil its financial viability before final judgment is given in the main action, or that its market share would be affected irremediably and substantially, regard being had in particular to the size of its business.

In order to determine whether the damage claimed is serious and irreparable and therefore justifies, by way of exception, the granting of the interim measures requested, the judge hearing the application for interim measures must have hard and precise information, supported by detailed documents showing the applicant's financial situation and enabling the judge to determine with precision the effects which would probably arise if the measures sought were not granted. Accordingly, the applicant must produce information, supported by documents, capable of producing a true and complete picture of its financial situation.

That true and complete picture must be provided in the text of the application for interim measures. Such an application must be sufficiently clear and specific in itself to enable the defendant to prepare its observations and the judge hearing the application to rule on it, where necessary, without other supporting information, it being necessary that the essential elements of fact and law on which it is founded be set out in a coherent and comprehensible fashion in the actual text of the application for interim measures. Further, the information providing such a true and complete picture must be supported by detailed documents, certified by an expert who is independent of the applicant and external, on the basis of which it is possible to assess the accuracy of that information.

(see paras 22, 24, 25)

4. The object of a tendering procedure for the award of a public contract is to enable the authority concerned to select, from a number of competing tenders, that which appears best to conform to predetermined selection criteria, that authority having, to that end, a wide discretion. Accordingly, an undertaking taking part in a tendering procedure never has an absolute guarantee that it will be awarded the contract, but must always keep in mind the possibility that the contract could be awarded to another tenderer. In those circumstances, the adverse financial consequences which the undertaking in question 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.

It follows that the loss of an opportunity to be awarded and to perform a public contract forms an integral part of exclusion from the tendering procedure in question and cannot be regarded as constituting in itself serious damage, all the more so since even a tenderer whose offer has been accepted must anticipate that, before signing the contract, the contracting authority may, pursuant to the first paragraph of Article 101 of Regulation No 1605/2002, on the Financial Regulation applicable to the general budget of the European, either abandon the procurement or cancel the tendering procedure, without that tenderer being entitled, as a general rule, to claim any compensation. Before the signature of the contract with the successful tenderer the contracting authority is not bound and may therefore, in the context of its responsibilities relating to the general interest, freely abandon the procurement or annul the tendering procedure, without any obligation to compensate that tenderer.

In that regard, the first paragraph of Article 101 of Regulation No 1605/2002 therefore rules out the possibility that even the successful tenderer can oblige the contracting authority to conclude the contract concerned, by asserting that his financial well-being, or even his economic survival, is dependent on performance of the contract being awarded to him.

That insecurity, which is inherent in the legal and economic situation of the undertaking awarded the contract which, notwithstanding the award of the contract concerned, must initially be prepared to lose it without compensation, is but one of the factors which must be taken into account by the judge hearing the application when assessing an application for interim measures brought by a tenderer whose tender has been rejected: no less than in the case of the successful tenderer, the mere fact that the rejection of a tender may have adverse, even serious, financial consequences for the rejected tenderer cannot therefore justify, in itself, the interim measures sought by the latter.

(see paras 28-30)

5. See the text of the decision.

(see paras 33, 34, 37)

6. See the text of the decision.

(see para. 40)

7. Urgency might — especially in interim measures proceedings in the area of public procurement — reside in the imperative need to provide a remedy as rapidly as possible for what is clearly, *prima facie*, a flagrant et extremely serious illegality and, consequently, a particularly serious *prima facie* case.

(see para. 45)

8. In interim proceedings, if an applicant chooses not to attach to its application in the main proceedings an application for an expedited procedure under Article 76a of the Rules of Procedure, thereby waiving the opportunity to obtain urgent judicial protection, it cannot validly maintain that the dismissal of its application for interim measures would, as such, constitute an infringement of its right to effective judicial protection.

(see para. 48)