Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

7 December 2018 *

(Public procurement — Financial Regulation — Exclusion from procurement and grant award procedures covered by the general EU budget for a two-year period — Article 108 of the Financial Regulation — Rights of the defence — Proof of receipt of a notification)

In Case T-280/17,

GE.CO. P. Generale Costruzioni e Progettazioni SpA, established in Rome (Italy), represented by G. Naticchioni, lawyer,

applicant,

v

European Commission, represented by F. Dintilhac and F. Moro, acting as Agents,

defendant,

ACTION under Article 263 TFEU for the annulment, first, of the Commission Decision of 7 March 2017 excluding the applicant from participation in procurement and grant award procedures covered by the general budget of the European Union and participation in procedures for the award of funds governed by Council Regulation (EU) 2015/323 of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund (OJ 2015 L 58, p. 17), and ordering the publication of that exclusion on the Commission's website and, second, of all acts previous and subsequent to that decision, including those of which the applicant is unaware,

THE GENERAL COURT (Third Chamber),

composed of S. Frimodt Nielsen, President, V. Kreuschitz and N. Półtorak (Rapporteur), Judges,

Registrar: E. Coulon,

gives the following

Judgment [1]

…

* Language of the case: Italian.

1 Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

Law

…

Substance

…

The first plea, alleging infringement of Article 108 of the Financial Regulation and Article 41 of the Charter of Fundamental Rights

…

42 It should be recalled from the outset that observance of the rights of the defence is a fundamental principle of EU law, in which the right to be heard is inherent (see judgment of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 28 and the case-law cited).

43 The right to be heard is now affirmed not only in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) of the Charter of Fundamental Rights provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken (see judgment of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 29 and the case-law cited).

44 In accordance with that principle, which applies where the authorities are minded to adopt a measure which will adversely affect an individual, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision (see judgment of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 30 and the case-law cited). The right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement (see judgment of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraphs 31 and 39 and the case-law cited).

45 In the present case, the applicable legislation provides, in Article 108(8)(c) of the Financial Regulation, that, before adopting any recommendation, the panel established under Article 108 is to give the economic operator and the notified contracting authorities the opportunity to submit observations. That paragraph also provides that the economic operator and the notified contracting authorities are to have at least 15 days to submit their observations.

46 However, the applicable legislation does not specify the means of communication by which the economic operator is to be notified by the panel established under Article 108 of the classification in law of the facts in question and the sanction envisaged.

47 In that regard, it follows from the case-law that a decision — and, a fortiori, a letter containing the classification in law of the facts in question and the sanction envisaged by the panel established under Article 108 — is properly notified provided that it is communicated to the person to whom it is addressed and the latter is placed in a position to become acquainted with it (see, to that effect, order of 9 July 2013, *Page Protective Services* v *SEAE*, T-221/13, not published, EU:T:2013:363, paragraph 12).

48 In the present case, the question of whether the Commission properly notified the letter at issue to the applicant is a matter of disagreement between the parties. First, in the contested decision, the Commission states that it consigned the letter at issue to an express delivery service. Second, the Commission states that it also sent the letter by email to the applicant's sole administrator. In order to prove that the letter at issue had been properly notified to the applicant, the Commission relies on the email of 23 December 2016 and the read receipt that it received on the same date. The applicant claims that it never knew of the existence or dispatch of the letter at issue.

…

60 As is apparent from paragraphs 42 to 44 and 47 above, it is for the Commission to ensure the effectiveness of the right to be heard, and consequently, it is for the Commission to show that it placed the applicant in a position in which it could effectively make known its views as regards the information on which the Commission intended to base its decision. In the present case, it was not sufficient for the Commission to rely on the read receipt, which it recognises to be an email sent automatically by the addressee's computer system, in asserting, as it did in the contested decision, that the applicant had been placed in a position to become acquainted with the letter at issue and had failed to follow up on that letter

61 In view of the file, in particular the information submitted by the Commission, and taking account of the observations on that information made by the parties, it must be noted that a read receipt is an email likely to be generated and sent automatically by the addressee's computer system without any manual intervention on the part of the addressee and, therefore, without the addressee necessarily being made aware of the existence of that email. Accordingly, it must be held that the read receipt does not enable the Commission to prove that the applicant had been duly placed in a position to become acquainted with the letter at issue or that the applicant was aware of the existence or dispatch of the letter.

62 In that regard, it should be noted that, although notification by registered letter with acknowledgement of receipt is not the only possible means of notification of administrative decisions, it remains a particularly safe solution due to the specific guarantees it offers both to the individual concerned and to the administration (see, to that effect, order of 16 December 2010, *AG* v *Parliament*, F-25/10, EU:F:2010:171, paragraph 38), especially when the individual concerned is external to the institutions (see, to that effect, order of 16 December 2010, *AG* v *Parliament*, F-25/10, EU:F:2010:171, paragraph 39). One of those guarantees is the confirmation afforded by the addressee's signature on the acknowledgement of receipt that the addressee knows that a letter is addressed to him and requires his attention. It is clear from the file that a read receipt differs from a postal acknowledgement of receipt in that it offers no such guarantee. Unlike the signature on an acknowledgement of receipt by the addressee of a letter, or the composing and sending of a confirmation of receipt of an email by its addressee, the read receipt at issue, which is generated and sent automatically by the addressee's computer system as described in paragraph 61 above, does not enable it to be established beyond doubt that the applicant was aware of or was placed in a position to become acquainted with the letter at issue on the day that the read receipt was sent.

63 When the effectiveness of the right to be heard is at stake, as in the present case, a read receipt, as relied on by the Commission, cannot suffice to prove that the Commission duly ensured that the applicant was placed in a position in which it could effectively make known its views.

64 Since it has not been proved that the applicant was duly placed in a position to make known its views as regards the information on which the Commission intended to base the contested decision, the first plea in law, alleging infringement of Article 108 of the Financial Regulation and Article 41 of the Charter of Fundamental Rights, must be upheld.

65 Accordingly, the contested decision must be annulled, without there being any need to consider the merits of the other arguments put forward by the applicant in the context of the first plea.

…

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls the decision of the European Commission of 7 March 2017 excluding GE.CO.P. Generale Costruzioni e Progettazioni SpA from participating in procurement and grant award procedures covered by the general budget of the European Union and from participating in procedures for the award of funds governed by Council Regulation (EU) 2015/323 of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund and ordering the publication of that exclusion on the Commission's website;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Commission to pay the costs.**

Frimodt Nielsen Kreuschitz Półtorak

Delivered in open court in Luxembourg on 7 December 2018.

[Signatures]