Reports of Cases

ORDER OF THE VICE-PRESIDENT OF THE COURT

23 April 2015*

(Appeals — Order for interim measures — Public service contracts — Procurement procedure concerning the supply of insurance services for property and persons — Rejection of the bid made by a tenderer and decision to award the contract to another tenderer — Application for suspension of operation — Particularly serious prima facie case — Urgency — Serious harm — No irreparable harm — Right to an effective remedy — Directive 89/665/EEC — Article 47 of the Charter of Fundamental Rights of the European Union — Standstill period before conclusion of the contract — Access to information permitting assessment of the lawfulness of the award decision)

In Case C-35/15 P(R),

APPEAL under the second paragraph of Article 57 of the Statute of the Court of Justice of the European Union, brought on 29 January 2015,

European Commission, represented by S. Delaude and L. Cappelletti, acting as Agents,

appellant,

the other party to the proceedings being:

Vanbreda Risk & Benefits, represented by P. Teerlinck, P. de Bandt and M. Gherghinaru, avocats,

applicant at first instance,

THE VICE-PRESIDENT OF THE COURT,

after hearing First Advocate General M. Wathelet,

makes the following

Order

1 By its appeal, the European Commission seeks to have set aside the order of the President of the General Court of the European Union in *Vanbreda Risk & Benefits* v *Commission* (T-199/14 R, EU:T:2014:1024; 'the order under appeal'), by which that court upheld the application for suspension of operation made by Vanbreda Risk & Benefits ('Vanbreda').

* Language of the case: French.

Legal context

2 Article 2(1) 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; 'Directive 89/665'), reads as follows:

'Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

3 The second subparagraph of Article 2(7) of the directive reads as follows:

'Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.'

4 Article 2a of that directive lays down a standstill period of 10 days after adoption of the contract award decision, or 15 days if it is sent other than by fax or electronic means, during which the contract covered by that decision may not be concluded ('the 10-day standstill period'). That article provides:

'1. The Member States shall ensure that the [persons involved in a contract] have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of 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)] before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

– a summary of the relevant reasons as set out in Article 41(2) of [Directive 2004/18], subject to the provisions of Article 41(3) of that directive, and,

– a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.'

5 Articles 1(5) and 2(3) of Directive 89/665 implement the 10-day standstill period in particular situations. Articles 2b to 2f complete the review system laid down by that directive, based on compliance with the standstill period laid down in Article 2a thereof.

6 Article 171(1) of Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union is worded as follows:

'The contracting authority shall not sign the contract or framework contract, covered by Directive [2004/18], with the successful tenderer until 14 calendar days have elapsed.

That period shall run from either of the following dates:

(a) the day after the simultaneous dispatch of the notifications to successful and unsuccessful tenderers;

(b) where the contract or framework contract is awarded pursuant to a negotiated procedure without prior publication of a contract notice, the day after the contract award notice … has been published in the *Official Journal of the European Union*.

Where a fax or electronic means are used for the dispatch referred to in point (a) of the second subparagraph, the standstill period shall be 10 calendar days.

If necessary, the contracting authority may suspend the signing of the contract for additional examination if this is justified by the requests or comments made by unsuccessful or aggrieved tenderers or candidates or by any other relevant information received. The requests, comments or information must be received during the period set in the first subparagraph. In the case of suspension all the candidates or tenderers shall be informed within three working days following the suspension decision.

…'

The background to the dispute, the procedure before the General Court and the order under appeal

7 On 10 August 2013, the Commission published a call for tenders bearing reference OIB.DR.2/PO/2013/062/591, concerning a contract for insurance services for property and persons, divided into four lots, in the *Official Journal of the European Union*. Lot 1 involved insurance cover, from 1 March 2014, for buildings and their contents, the contract being concluded between the Commission in its own name and on behalf of the following adjudicating authorities, namely the

Council of the European Union, the European Economic and Social Committee, the Committee of the Regions of the European Union, the European Research Council Executive Agency, the Executive Agency for Competitiveness and Innovation, the Research Executive Agency, the Education, Audiovisual and Culture Executive Agency and the Innovation and Networks Executive Agency.

8 That call for tenders sought to replace the contract in force at the time, concluded with a consortium for which Vanbreda was the broker, which was to expire on 28 February 2014.

9 On 7 September 2013, an amendment notice was published in the supplement to the Official Journal of the European Union (OJ 2013 S 174) extending the deadline for the submission of tenders until 25 October 2013 and the date of the public tender-opening session until 31 October 2013. At that session, the opening committee formally acknowledged receipt of two tenders for lot 1, lodged by Marsh SA ('Marsh'), an insurance broker, and Vanbreda respectively.

10 On 30 January 2014, the Commission informed Marsh that its tender had been successful for the award of lot 1 and Vanbreda that its tender had not been successful for that lot, since it did not offer the lowest price ('the decision at issue'). The letter by which the Commission informed Vanbreda of the decision at issue was sent to it by DHL and by e-mail.

11 The service contract concluded between the Commission, Marsh and the insurers was signed on 27 February 2014 and that contract entered into force on 1 March 2014.

12 By separate applications of 28 March 2014 lodged at the Registry of the General Court, Vanbreda brought, first, an action under Article 263 TFEU seeking the annulment of the decision at issue and a claim for compensation under Articles 268 TFEU and 340 TFEU seeking an order that the Commission pay it the sum of EUR 1 million and, secondly, an application for interim measures, in which, in essence, it requested the judge hearing the application to order, under Article 105(2) of the Rules of Procedure of the General Court, the suspension of operation of the decision at issue pending the delivery of the order closing the interim proceedings before the General Court and the suspension of operation of the decision at issue until the General Court had ruled in the main proceedings.

13 On 3 April 2014, by order in *Vanbreda Risk & Benefits* v *Commission* (T-199/14 R), the President of the General Court ordered, first, the suspension of operation of the decision at issue and of the service contract concluded between the Commission, Marsh and the insurer(s) concerned in that respect until delivery of the order closing the interim proceedings and, secondly, the production of certain documents identified by Vanbreda.

14 On 8 April 2014, the Commission lodged an application requesting the President of the General Court to rescind, immediately, retroactively and in full, paragraph 1 of the operative part of his order in *Vanbreda Risk & Benefits* v *Commission* (T-199/14 R) of 3 April 2014. In the light of the elements brought to his attention in that application, the President of the General Court adopted, on 10 April 2014, an new order in *Vanbreda Risk & Benefits* v *Commission* (T-199/14 R), granting the Commission's application. On 25 April 2014, the Commission submitted its observations on the application for interim measures.

15 On 4 December 2014, by the order under appeal, the President of the General Court ordered the suspension of operation of the decision at issue. After having held, in paragraph 136 of that order, that the condition that there be a prima facie case was satisfied and, in paragraphs 142 to 145 of that order, that the harm alleged was serious, he held, in paragraphs 148 to 165 of the order, that, having regard to the specific features of the applications for interim measures in public procurement matters and the particularly serious nature of the prima facie case established in the case, the requirement for urgency was also met, notwithstanding the lack of irreparable harm. In support of that conclusion, he

based his findings, inter alia, on a general principle of EU law which follows from the effective provisional protection which must be guaranteed in public procurement matters, which he described, as a preliminary point, in paragraphs 16 to 20 of the order under appeal.

16 The operative part of the order under appeal is worded as follows:

'1. The decision of the European Commission of 30 January 2014 rejecting the tender that Vanbreda Risk & Benefits had submitted following a call for tenders in respect of insurance services for property and persons and awarding the contract to another company is suspended in respect of the award of lot 1.

2. The effects of the decision of the Commission of 30 January 2014 shall be maintained until the expiry of the period for bringing an appeal against the present order.

3. Costs are reserved.'

Forms of order sought by the parties

17 The Commission claims that the Court of Justice should:

– set aside paragraphs 1 and 2 of the order under appeal;

– reject the application for interim measures; and

– order Vanbreda to pay the costs, including those incurred in the proceedings before the General Court.

18 Vanbreda contends that the Court should:

– dismiss the appeal in its entirety;

– confirm the operative part of the order under appeal and the interim measures granted; and

– order the Commission to pay the costs, including those incurred in the proceedings before the General Court.

The appeal

19 In support of its appeal, the Commission puts forward four grounds of appeal, alleging an error of law in the application of the requirement for urgency as regards the consequences of the fact that there is no irreparable harm, errors of law in the application of the same requirement as regards the allegedly serious harm not suffered by Vanbreda itself, an error of law in the weighing up of the interests as regards the framework applicable for the purposes of assessing Vanbreda's interest and an error of law in that weighing up as regards the failure to take into account the interests of third parties.

Arguments of the parties

20 In respect of its first ground of appeal, the Commission submits, in essence, that the President of the General Court erred in law by holding, having regard to the alleged existence of a particularly serious prima facie case, that the requirement of urgency was satisfied in the case, despite the fact that Vanbreda had not established that the rejection of its application for interim measures was likely to cause it irreparable harm. It notes, in particular, that Directive 89/665, referred to by the President of

the General Court, does not apply to the EU institutions and does not determine the conditions applicable to the grant of a suspension of operation. It also points out that, in accordance with the case-law of the Court of Justice, the purpose of the procedure for interim measures is to guarantee that the final decision to be taken is fully effective and not definitively to remedy an unlawful act.

21 Vanbreda contends, in particular, that, having regard to the specific features of the procedure for interim measures in public procurement matters and taking account of the prime importance of the right to effective legal protection in those matters, in accordance with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), the General Court, by the order under appeal, correctly applied the legal framework applicable to applications for interim measures.

Findings of the Court

22 It should be borne in mind, first of all, that, in accordance with Article 104(2) of the Rules of Procedure of the General Court, applications for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Thus, the judge hearing an application for interim relief may order suspension of operation of an act, or other interim measures, if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, so that an application for interim measures must be dismissed if either of them is absent (order in *SCK and FNK* v *Commission*, C-268/96 P(R), EU:C:1996:381, paragraph 30).

23 It must be held that the reasoning set out in the order under appeal, according to which the requirement for urgency is satisfied in this case, despite the fact that there is no irreparable harm, departs from the settled case-law of the EU Courts as regards that requirement, more particularly as regards the reparable nature of the financial loss suffered by a tenderer unsuccessful in a public procurement procedure.

24 In accordance with settled case-law of the Court of Justice and of the General Court, damage of a pecuniary nature cannot, otherwise than in exceptional circumstances, be regarded as irreparable since, as a general rule, pecuniary compensation is capable of restoring the aggrieved person to the situation that obtained before he suffered the damage. Any such damage could be recouped by the applicant's bringing an action for compensation on the basis of Articles 268 TFEU and 340 TFEU (order of the President of the Court of Justice in *Commission* v *Pilkington Group*, C-278/13 P(R), EU:C:2013:558, paragraph 50 and the case-law cited; see also, in public procurement matters, order of the President of the General Court in *Communicaid Group* v *Commission*, T-4/13 R, EU:T:2013:121, paragraphs 22, 28 to 30, 33, 34 and 37). As the President of the General Court held, in paragraphs 154 to 156 of the order under appeal, the harm alleged in this case is not irreparable, for the purposes of that case-law.

25 Nevertheless, since the President of the General Court based his finding that the requirement for urgency is satisfied in the present case on a general principle of EU law, based on the right to an effective remedy laid down in Article 47 of the Charter, it is appropriate to examine the existence and scope of that principle.

26 In that regard, Directive 89/665, referred to by the President of the General Court to show that such a principle exists, is addressed to the Member States and therefore does not apply, as such, to the EU institutions.

27 None the less, the Court of Justice has held that a general principle of EU law may be given specific expression in a directive (judgment in *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraphs 20 and 21 and the case-law cited).

28 It must be held that Directive 89/665 gives specific expression to the general principle of EU law enshrining the right to an effective remedy in the particular field of public procurement and that it is therefore necessary to take into consideration, as regards the contracts awarded by the EU itself, the expression of that general principle contained in the provisions of that directive, as the President of the General Court held in paragraph 20 of the order under appeal.

29 In accordance with the right to an effective remedy, enshrined in Article 47 of the Charter, the Court of Justice has held, on the basis of the provisions of Directive 89/665, that effective legal protection requires that the interested parties be informed of an award decision a reasonable length of time before the contract is concluded so that they have a real possibility of bringing proceedings and, in particular, of applying for interim measures pending conclusion of the contract (judgment in *Fastweb*, C-19/13, EU:C:2014:2194, paragraph 60 and the case-law cited).

30 In those circumstances, the President of the General Court was correct to take the view, in paragraph 158 of the order under appeal, that the application, without qualification, of case-law, even settled case-law, which makes it practically impossible for an unsuccessful tenderer to obtain a suspension of the operation of a contract award decision from an institution or other body of the EU, on the ground that the loss which it is likely to suffer, being financial in nature, is not irreparable, cannot be reconciled with the requirements which follow from the effective provisional protection which must be guaranteed in public procurement matters, implemented by the provisions of Directive 89/665.

31 Where they take account of the provisions of a directive laying down a general principle of EU law, the EU Courts cannot, however, disregard the content of those provisions, notwithstanding the fact that they do not apply as such in the case in question. More particularly, to the extent that it is apparent from the provisions of such a directive that the EU legislature sought to establish a balance between the different interests involved, the EU Courts must take account of that balance in their application of the general principle thus laid down.

32 In the present context, it must be noted that Directive 89/665 provides, in Article 2(1) thereof, that the Member States are required to provide in their national law for three types of action enabling a person adversely affected in a public procurement procedure to seek from the court having jurisdiction, first, 'interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of [the] public contract or the implementation of any decision taken by the contracting authority', secondly, the setting aside of decisions taken unlawfully, and thirdly, damages.

33 However, the second subparagraph of Article 2(7) of Directive 89/665 provides that, 'except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement'.

34 As the Court held in paragraphs 62 and 63 of the judgment in *Fastweb* (C-19/13, EU:C:2014:2194), the EU legislature sought, by the provisions of Directive 89/665, to accommodate the interests of the tenderer adversely affected, on the one hand, and the interests of the contracting authority and of the successful tenderer, on the other hand, by limiting the right to apply for interim measures which the Member States are required to open to an unsuccessful tenderer in the standstill period, an action for

damages under Article 2(1)(c) of Directive 89/665 being the only form of action which must be made available to that tenderer after that period (see also, to that effect, judgment in *Alcatel Austria and Others*, C-81/98, EU:C:1999:534, paragraph 37).

35 Accordingly, the requirement that the Member States, in their national law, provide for the possibility for a person adversely affected by a decision adopted following a public procurement procedure to seek interim measures in accordance with Article 2(1) of Directive 89/665 is limited to the period between adoption of that decision and the conclusion of the contract.

36 In accordance with the provisions of Articles 1(5), 2(3) and 2a to 2f of that directive, a contract may not, however, be concluded before the expiry of the 10-day standstill period.

37 As the Court has ruled in paragraph 61 of the judgment in *Fastweb* (C-19/13, EU:C:2014:2194), the 10-day standstill period is intended to give the interested parties an opportunity to challenge the award of a contract before the courts before the contract is concluded.

38 In the light of the foregoing, the President of the General Court was incorrect to hold, in paragraph 20 of the order under appeal, that there was a general principle of EU law based on the right to effective legal protection, under which an unsuccessful tenderer must be able to obtain not only damages but also interim measures, without limiting that finding to the period preceding the conclusion of the contract by the adjudicating authority and the successful tenderer.

39 Indeed, where the 10-day standstill period laid down in Directive 89/665 has expired before the conclusion of the contract, it cannot be deduced from the provisions of that directive that the fact that an unsuccessful tenderer may seek only damages before the court constitutes an infringement of a general principle of EU law based on the right to effective legal protection. With regard to contracts awarded by the adjudicating authorities of the EU itself, the same standstill period applies by virtue of Article 171(1) of Regulation No 1268/2012. That period is also one of 10 calendar days where an electronic means of communication is used to send the award decision to the interested parties.

40 Next, it is appropriate to examine whether, in the light of the foregoing, the conclusion reached by the President of the General Court in paragraph 164 of the order under appeal, that the requirement for urgency was satisfied in the present case, despite the fact that the harm alleged, although serious, is not irreparable, is vitiated by an error of law.

41 Having regard to the requirements which follow from the effective protection which must be guaranteed in public procurement matters, the view must be taken, as the President of the General Court considered in paragraph 162 of the order under appeal, that, 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 would be undermined in a manner that is both excessive and unjustified.

42 Nevertheless, in accordance with the finding in paragraph 38 of the present order, 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 10-day standstill period laid down in Article 171(1) of Regulation 1268/2012 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.

43 As regards the application of those principles to the present case, it is apparent from paragraph 4 of the order under appeal that, on 30 January 2014, the Commission informed, first, the successful tenderer that its tender had been successful for the award of lot 1 and, secondly, Vanbreda that its tender had not been successful for that lot, since it had not offered the lowest price. Furthermore, it

was noted, in paragraph 5 of the order of the President of the General Court of 10 April 2014 in *Vanbreda Risk & Benefits* v *Commission* (T-199/14 R), that the service contract concluded between the Commission, Marsh and the insurers was signed on 27 February 2014 and that that contract entered into force on 1 March 2014.

44 Thus, since Vanbreda was informed of the decision at issue by letter of 30 January 2014, sent to it by an electronic means of communication, the standstill period, applicable by virtue of Article 171(1) of Regulation No 1268/2012, was 10 days and was complied with in the present case. In accordance with that provision, that period began to run on 31 January 2014, that is to say, 28 days before the contract was concluded.

45 Moreover, it is apparent from paragraph 5 of the order under appeal that Vanbreda lodged its application for interim measures on 28 March 2014. Thus, the contract between the Commission, Marsh and the insurers was concluded on 27 February 2014, before that application for interim measures was made.

46 In those circumstances, in accordance with the finding in paragraph 42 of the present order, the easing of the requirement for urgency is, in principle, not justified.

47 None the less, it must be noted that the 10-day standstill period can place interested parties in the position of being able to contest in law the award of a contract before the contract is concluded only if those interested parties have sufficient information to ascertain whether the award decision was unlawful in any way.

48 The view cannot be taken that the 10-day standstill period was complied with in circumstances where the possibility of making an application for interim measures before the contract is concluded was not effective because the unsuccessful tenderer did not have, during that period, sufficient information to enable it to make such an application. Otherwise the principle enshrining the right to effective legal protection would be infringed.

49 Having regard to the requirements of the principle of legal certainty, that exception to the purely mechanical application of the 10-day standstill period must, however, be reserved for exceptional cases in which the unsuccessful tenderer had no reason to believe that the contract award decision was vitiated by unlawfulness before the contract was concluded with the successful tenderer.

50 It is therefore appropriate to examine whether, in the light of the findings of fact in the order under appeal, Vanbreda had sufficient information to make use of the standstill period to make an application for interim measures before the contract was concluded between the Commission, Marsh and the insurers on 27 February 2014.

51 In that regard, the President of the General Court, in paragraphs 38 to 43 of the order under appeal, analysed the contacts between the Commission and Vanbreda before that contract was concluded with a view to assessing the admissibility of a new ground of appeal. In paragraph 45 of the order under appeal, he held that Vanbreda discovered, after it made its application for interim measures on 28 March 2014 and therefore after the contract was concluded on 27 February 2014, that Marsh had not submitted its bid for lot 1 jointly with the insurers, but as a single tenderer. The President of the General Court therefore took the view that a ground of appeal based on that fact, although put forward after the initial application was made, was admissible.

52 None the less, it is apparent from the findings of fact made by the President of the General Court in the order under appeal that Vanbreda had reason to doubt the lawfulness of the decision at issue well before the contract was concluded between the Commission, Marsh and the insurers on 27 February 2014.

53 It is apparent from paragraph 37 of the order under appeal that Vanbreda informed the Commission, on 8 November 2013, of its doubts as to the lawfulness of Marsh's tender and, more particularly, as to Marsh's compliance with the requirement for joint liability where the submission was made with a number of insurers. Furthermore, it follows from paragraphs 38 to 40 of the order under appeal that, by e-mails of 31 January and 4 February 2014 and by registered letters of 3 and 7 February 2014, Vanbreda repeated those doubts and requested that the Commission produce certain documents in that regard. Finally, by letter of 7 February 2014, examined in paragraph 41 of the order under appeal, the Commission informed Vanbreda that Marsh had been designated as the successful tenderer for the contract for lot 1 on the ground that it had submitted a bid found to be in order and for the lowest price. It is apparent from paragraph 43 of the order under appeal that Vanbreda answered that letter on 11 February 2014, repeating its request for information and the documents referred to in its earlier communications to be sent.

54 It therefore follows from the findings of fact made in the order under appeal that, in the days following the communication of the decision at issue to Vanbreda and at the latest on 11 February 2014, Vanbreda was in a position to formulate specific criticisms with regard to the decision at issue. Thus, the 10-day standstill period must be regarded as having begun to run at the latest on 11 February 2014, that is to say, 16 calendar days before the contract was concluded between the Commission, Marsh and the insurers on 27 February 2014.

55 The fact, found by the President of the General Court, that Vanbreda was not aware on 11 February 2014 that Marsh had not submitted its bid for lot 1 jointly with the insurers, but as a single tenderer, did not make it wholly impossible for Vanbreda to make an application for interim measures within the 10-day standstill period. Indeed, as has been noted in paragraph 51 of the present order, the President of the General Court also held, in paragraph 45 of the order under appeal, that Vanbreda was still not aware of that fact at the time when it actually brought its action for annulment and made its application for interim measures before the General Court on 28 March 2014.

56 It follows that the 10-day standstill period, laid down in Article 171(1) of Regulation No 1268/2012, was fully complied with in the present case.

57 In the light of all the foregoing, although the President of the General Court was correct to hold, having regard to the existence of a general principle of EU law resulting from the right to an effective judicial remedy, that there were grounds for easing the requirement laid down in case-law for urgency in public procurement matters, to the effect that serious but not irreparable harm is sufficient to establish it, where the prima facie case established is particularly serious, he erred in law in the order under appeal by holding that that easing applied without any limit in time. That easing of the requirement for urgency in public procurement matters applies only if the application for interim measures is made by the unsuccessful tenderer to the EU Courts before the contract is concluded with the successful tenderer. Furthermore, that limitation in time is itself subject to two conditions: first, that the standstill period laid down in Article 171(1) of Regulation No 1268/2012 has been complied with before conclusion of the contract and, secondly, that the unsuccessful tenderer had sufficient information to exercise its right to make an application for interim measures within that period.

58 In the present case, the easing of the requirement for urgency in public procurement matters does not, therefore, apply. It follows that paragraphs 1 and 2 of the operative part of the order under appeal must be set aside, in accordance with the form of order sought by the Commission, without its being necessary to examine the other grounds of appeal.

The application for interim measures

59 According to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, that Court may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment. The abovementioned provision also applies to appeals brought under the second paragraph of Article 57 of the Statute of the Court (see the order of the Vice-President of the Court in *EDF* v *Commission*, C-551/12 P(R), EU:C:2013:157, paragraphs 36 and 37 and the case-law cited).

60 Since the state of the proceedings so permits, it is appropriate to adjudicate on Vanbreda's application for interim measures.

61 In that regard, it must be held that the reasons set out in the present order which lead to the setting aside of the order under appeal also justify the rejection of the application for interim measures.

62 Indeed, in accordance with the finding in paragraph 38 of the present order, a tenderer that is adversely affected in an EU public procurement procedure must be able to obtain interim measures before the conclusion of the contract by the adjudicating authority and the successful tenderer, notwithstanding the fact that it was not able to establish that it had suffered irreparable harm in order to meet the requirement for urgency. However, as has been noted in paragraph 42 of this order, after that contract has been concluded and provided that the standstill period has been complied with, there are no grounds to ease the application of the requirement for urgency, even if a particularly serious prima facie case has been established.

63 In the present case, in accordance with the finding in paragraph 56 of the present order, the 10-day standstill period was complied with before the contract was concluded by the Commission with Marsh and the insurers.

64 Furthermore, the contract in question was concluded on 27 February 2014, long before Vanbreda brought its action for annulment and made its application for interim measures on 28 March 2014.

65 In those circumstances, the view must be taken, in accordance with the case-law cited in paragraph 24 of the present order, that the pecuniary harm and the concomitant non-pecuniary harm alleged by Vanbreda in this case do not constitute irreparable harm and that, in consequence, the requirement of urgency is not satisfied.

66 It follows from the settled case-law referred to in paragraph 22 of the present order that the requirements of a prima facie case, on the one hand, and urgency, on the other, are cumulative.

67 Thus, without its being necessary to examine whether there is a prima facie case or to weigh up the interests, the application for interim measures must be rejected.

Costs

68 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

69 Under Article 138(1) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

70 In the present case, since Vanbreda has been unsuccessful in its claims in the appeal and since the Commission applied for costs, Vanbreda must be ordered to pay the costs of these proceedings.

On those grounds, the Vice-President of the Court of Justice hereby orders:

1. **Paragraphs 1 and 2 of the operative part of the order of the President of the General Court of the European Union in *Vanbreda Risk & Benefits* v *Commission* (T-199/14 R, EU:T:2014:1024) are set aside.**

2. **The application for interim measures is rejected.**

3. **Vanbreda Risk & Benefits shall pay the costs incurred in the appeal proceedings.**

[Signatures]