



Reports of Cases

ORDER OF THE PRESIDENT OF THE GENERAL COURT

4 December 2014 *

(Application for interim measures — Public service contracts — Tendering procedure — Supply of insurance services for property and persons — Rejection of a tender — Application for suspension of operation of a measure — Admissibility — Prima facie case — Urgency — Balancing of interests)

In Case T-199/14 R,

Vanbreda Risk & Benefits, established in Antwerp (Belgium), represented by P. Teerlinck and P. de Bandt, lawyers,

applicant,

v

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

defendant,

APPLICATION for interim measures seeking, in essence, suspension of the operation of the decision of the Commission of 30 January 2014 by which it rejected the tender that the applicant had submitted following a call for tenders in respect of a contract relating to the insurance of property and persons and awarded the contract to another company,

THE PRESIDENT OF THE GENERAL COURT

makes the following

Order¹

Background to the dispute, procedure and forms of order sought

- 1 On 10 August 2013, the European Commission published a call for tenders in the *Official Journal of the European Union*, under reference number OIB.DR.2/PO/2013/062/591, concerning a contract for insurance of property and persons which was divided into four lots. Lot 1 related to insurance cover — from 1 March 2014 — for buildings and their contents, with the contract to be concluded by the Commission on its own behalf and on behalf of the following contracting authorities: the Council of the European Union; the European Economic and Social Committee; the Committee of the Regions

* Language of the case: French.

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

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 Network Executive Agency ('the call for tenders').

- 2 The purpose of the call for tenders was to replace the contract then in force which was due to expire on 28 February 2014 and had been concluded with a consortium of which the applicant, Vanbreda Risk & Benefits, was the broker.
- 3 On 7 September 2013, an amendment to the call for tenders was published in the Supplement to the Official Journal (OJ 2013 S 174) extending the deadline for the submission of tenders to 25 October 2013 and postponing the public tender-opening session to 31 October 2013. At that session, the opening committee recorded that two tenders had been received for Lot 1: one submitted by Marsh SA, an insurance broker, and the other submitted by the applicant.
- 4 On 30 January 2014, the Commission informed Marsh that its tender had been selected for the award of Lot 1 and informed the applicant that its tender had not been selected for the award of Lot 1 because it had not offered the lowest price ('the contested decision').
- 5 By separate applications lodged at the Court Registry on 28 March 2014, the applicant (i) brought an action for annulment of the contested decision under Article 263 TFEU as well as an action for damages under Articles 268 TFEU and 340 TFEU claiming that the Court should order the Commission to pay it EUR 1 million and (ii) made the present request for interim measures in which it claimed, in essence, that the judge hearing the application should:
 - order (i) the suspension of operation of the contested decision, under Article 105(2) of the Rules of Procedure of the General Court, until the order terminating the present interim proceedings has been made and (ii) the suspension of operation of the contested decision until the General Court has ruled on the main action;
 - order production of the following documents:
...
— order the Commission to pay the costs.
- 6 By order of 3 April 2014 in *Vanbreda Risk & Benefits v Commission* (T-199/14 R; 'the order of 3 April 2014'), in accordance with Article 105(2) of the Rules of Procedure, the President of the General Court ordered the suspension of operation of both the contested decision and the contract for services concluded between the Commission, Marsh and the relevant insurer(s), until the order terminating the present interim proceedings has been made.
- 7 On 8 April 2014, the Commission lodged the following documents with the Court: (i) contract for services OIB.DR.2/PO/2013/062/591/C0/L1 and (ii) a request asking the President of the General Court to cancel, without delay, retroactively and without reservation, paragraph 1 of the operative part of the order of 3 April 2014. In the light of the new information brought to the attention of the President of the General Court by the Commission regarding the expiry of the previous insurance contract and the resulting implications, the President of the General Court made an order granting the Commission's request on 10 April 2014.

...

- 9 On 25 April 2014, the Commission submitted its observations on the application for interim measures, in which it claims, in essence, that the President of the General Court should:
- dismiss the applicant's application for suspension of operation of the contested decision;
 - reserve the decision as to costs of the present interim proceedings.
- ...
- 12 By letter of 7 October 2014, the parties were invited to attend a hearing which took place on 21 October 2014.

Law ...

- 16 Account should be taken of the particular role of interim relief proceedings in public procurement procedures (order of 4 February 2014 in *Serco Belgium and Others v Commission*, T-644/13 R, ECR, EU:T:2014:57, paragraph 18 et seq.). In this connection, regard must also be had to the legal framework put in place by the EU legislature which is applicable to public procurement procedures organised by Member States' contracting authorities. In particular, as stated in recital 40 in the preamble to [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 (OJ 2012 L 362, p. 1; 'the delegated regulation')], read in conjunction with Article 91(2) of 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), substantive rules on procurement should be based on the provisions of Directive 2014/24.
- 17 Furthermore, as stated in the first three recitals in the preamble to 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) and in recital 3 in the preamble to Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31), in order to ensure the effective application of those provisions, the legislature has considered it necessary to require procedures to be established that make speedy remedies available at a stage where infringements can still be effectively corrected.
- 18 Moreover, it is apparent from the second, third and fifth recitals and Article 2(1) of Directive 89/665 that, within the particular context of public procurement, interim measures are conceived not only as a means of suspending the award procedure but also as a means of correcting an illegality, an objective which would otherwise fall within the scope of the main proceedings.
- 19 Justification for taking into account the impact of such considerations on the exercise by the court hearing an application for interim measures of its jurisdiction is provided by the fact that, first, as is the case at national level, measures under Chapter 1 of Title 3 of the Rules of Procedure have the purpose, in public procurement cases, of ensuring effective judicial protection with regard to the application by EU institutions and bodies of the rules on public procurement, which are, in essence, based on Directive 2014/24 (see paragraph 16 above and recital 4 of Directive 2007/66), and, secondly, in accordance with the general principle of interpretation as applied in the judgment of 19 September 2013 in *Review of Commission v Strack* (C-579/12 RX-II, ECR, EU:C:2013:570, paragraph 40), those directives underline the existence of a fundamental principle of EU public procurement law: effective judicial protection for tenderers. It is clear from the case-law of the Court that this is a particularly

important principle (see, to that effect, judgment of 11 September 2014 in *Fastweb*, C-19/13, ECR, EU:C:2014:2194, paragraph 60 and the case-law cited) and it is guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union.

- 20 Accordingly, although it is not disputed that the Court rejects as inoperative pleas in law alleging infringement by an EU institution of a provision of a directive concerning public procurement, which, by definition, is addressed to the Member States (see, to that effect, judgments of 19 March 2010 in *Evropaiki Dynamiki v Commission*, T-50/05, ECR, EU:T:2010:101, paragraph 104; 11 May 2010 in *PC-Ware Information Technologies v Commission*, T-121/08, ECR, EU:T:2010:183, paragraph 50; and 6 May 2013 in *Kieffer Omnitec v Commission*, T-288/11, EU:T:2013:228, paragraphs 22 to 24), the Courts of the European Union are, nevertheless, not precluded from taking account of the general principles of EU law as expressed in that act of the European Union. Here, directives adopted in the field of public procurement merely reflect the vital importance of the right to effective judicial protection in this field.

...

1. *Prima facie* case

- 22 It should be recalled that the condition relating to a *prima facie* case is satisfied where there is, at the stage of the interim proceedings, a major legal disagreement whose resolution is not immediately obvious, so that the action is not *prima facie* without reasonable substance (see, to that effect, orders of 13 June 1989 in *Publishers Association v Commission*, 56/89 R, ECR, EU:C:1989:238, paragraph 31, and 8 May 2003 in *Commission v Artegoda and Others*, C-39/03 P-R, ECR, EU:C:2003:269, paragraph 40). Since the purpose of the interim proceedings is to guarantee that the final decision to be taken is fully effective, in order to avoid a lacuna in the legal protection ensured by the Courts of the European Union, the court hearing the application for interim relief must restrict itself to assessing *prima facie* the merits of the grounds put forward in the main proceedings in order to ascertain whether there is a sufficiently large probability of success of the action (orders of 19 December 2013 in *Commission v Germany*, C-426/13 P(R), ECR, EU:C:2013:848, paragraph 41, and 8 April 2014 in *Commission v ANKO*, C-78/14 P-R, ECR, EU:C:2014:239, paragraph 15).
- 23 Although it is true that, in the context of interim proceedings, the court hearing the application for interim measures is not required, as a rule, to undertake as detailed an assessment as in the context of the main proceedings, that finding cannot be interpreted as meaning that a detailed assessment is absolutely prohibited (order [of 3 April 2007] in *Vischim v Commission*, [C-459/06 P(R)], EU:C:2007:209, paragraph 50).
- 24 In the present case, the applicant relies on a single plea in law, alleging non-compliance of the tender submitted by Marsh with the tender specifications. That plea is divided into three parts and, according to the applicant, establishes that the contested decision is *prima facie* unlawful.

The first part of the single plea ...

– The merits of the first part of the single plea ...

– The alleged unlawfulness of Marsh participating in the tender procedure as a single tenderer ...

- 75 It is apparent from the foregoing that permitting a broker to participate in a tender procedure as a single tenderer makes it possible for the tender to be assessed without having regard to the economic and financial capacity of the insurance companies which will, ultimately, cover the risk insured against.

That is inconsistent with all the other situations expressly provided for in the tender specifications and, given that there is no apparent objective justification for that differentiation in the light of the rationale of the system, its legality appears *prima facie* questionable.

...

- 81 It follows from that *prima facie* assessment that permitting a broker to participate in a tender procedure as a single tenderer instructed by a number of insurance companies, first, *prima facie* makes the assessment by the evaluation committee illusory when it examines the merits of a tender in relation to the conditions set out in the tender specifications and, secondly, in some circumstances, gives that broker a competitive advantage over the other tenderers.

...

- 83 In the light of the foregoing, it appears, *prima facie*, that, in the present case, the application of the selection criteria and the arrangements for submitting tenders, and their interpretation by the Commission, have failed to ensure genuine competition.

...

- 86 Consequently, it must be held that, following a *prima facie* assessment, there is sufficiently strong evidence to establish the validity of the claim that permitting Marsh to participate in the tender procedure as a single tenderer was unlawful.

– The allegation that the Commission treated the tender submitted by Marsh as a joint tender ...

- 96 Consequently, following a preliminary examination of the exchanges that took place between the contracting authority and Marsh in this instance, it is apparent that the original tender was submitted as that of a single tenderer (which was therefore not required to comply with the condition of joint and several liability), but subsequently became equivalent to a joint tender. However, in order to comply with the tender specifications, a joint tender is required to include an agreement/authority. Since Marsh's tender was not accompanied by that document, it appears that the Commission failed to comply with its own rules by treating it as valid. In that regard, it must be borne in mind that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which it has thus defined in regard to any of the tenderers without being in breach of the principle of equal treatment of tenderers (judgment of 20 March 2013 in *Nexans France v Entreprise commune Fusion for Energy*, T-415/10, ECR, EU:T:2013:141, paragraph 80).

...

- 102 In the light of the foregoing, it appears that the system of instruction, as accepted by the Commission in the present case, results in a circumvention of the rules applicable to joint tenders.

- 103 Consequently, it must be held that, at this stage, there is evidence to establish, *prima facie*, the validity of the claim that the Commission, *de facto*, treated Marsh's tender as a joint tender, even though, on that basis, the tender should have been declared improper since it did not include an agreement/authority.

- 104 Thus, it is clear from the foregoing analysis that the applicant has established a particularly strong *prima facie* case as regards the first part of the single plea.

The second part of the single plea

105 In the second part of its single plea, the applicant observes, first of all, that allowing a tenderer to amend his tender after the tenders have been opened constitutes an infringement of the principle of equal treatment of tenderers. The applicant then states that the list of the insurers which instructed Marsh was amended after the opening of tenders. Although contracting authorities have the right to contact tenderers in the event that some clarification is required in connection with their tender, or if clerical errors contained in the tender must be corrected, the applicant claims that the amendment made in the present case goes beyond that framework and constitutes a substantial amendment to the tender. The applicant submits that, since the contractor is appointed according to the selection criteria set out in the tender specifications, an amendment of that sort required a fresh examination on the basis of those criteria. Accordingly, the applicant maintains that, in accepting that amendment, the Commission infringed the principle of equal treatment of tenderers read in conjunction with Article 112(1) of [Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1; ‘the financial regulation’)] and Article 160 of the delegated regulation.

...

109 In the present case, it should be recalled, first, that the analysis carried out by this Court concluded that the modification of the share of risk coverage provided by the insurers which instructed Marsh could be classified as an amendment of a material element of the tender since that alteration resulted in one of the tenderers gaining a competitive advantage (see paragraphs 78 to 80 above).

110 Secondly, the consideration of the application for interim measures also highlighted that Marsh’s tender was modified with regard to the joint and several liability of the insurance companies. Contrary to what the Commission states in its observations of 25 April 2014, the fact that the signed contract includes a clause establishing the joint and several liability of the signatories and that the inclusion of that clause had been stipulated in the tender specifications of the call for tenders does not mean that Marsh’s tender had necessarily taken into account the costs and risks arising from that clause (see paragraphs 95 and 96 above).

111 In that regard, and as stated by the applicant in its application for interim measures, it is appropriate to stress the importance of the condition of joint and several liability in the context of the call for tenders at issue, on account of the size of the contract in question and its influence on the tender price. In view of the capital involved and the possibility of a large scale accident occurring, it is essential for insurers to be bound by the joint and several liability clause in order to avoid each insurer being liable only for the financial consequences arising from the part of the contract that it carries out and, in the event of one of the insurers failing, its share of the cover for the accident not being paid out. However, that requirement has the effect of exposing an insurance company, and therefore its capital, to liability for the full amount of all the risks covered by the contract for services. Since that liability can exceed its own financial capacity, each insurer must obtain that extra capacity by way of mechanisms such as a bank guarantee or reinsurance, creating an additional financial risk and generating additional costs. Consequently, the premium quoted for a contract with joint and several liability among all insurers will a priori be higher than that for a contract without joint and several liability.

...

113 Accordingly, since the original tender did not necessarily take into account the requirement of joint and several liability and the vague nature of the terms of the call for tenders with regard to the submission of a tender by a single tenderer allowed the original tender to be altered in order to function as a joint tender, it must, prima facie, be concluded that an essential element of the tender was amended.

...

120 Consequently, at this stage, it must be held, *prima facie*, that Marsh's original tender underwent improper amendments under Article 112(1) of the financial regulation and Article 160 of the delegated regulation, infringing the principle of equal treatment of tenderers applicable in the field of EU public procurement law.

121 Thus, it is clear from the foregoing analysis that the applicant has established a particularly strong *prima facie* case as regards the second part of the single plea.

...

2. Urgency

138 According to settled case-law, urgency must be assessed in the light of the need for an interim order in order to avoid the party requesting the interim relief personally suffering serious and irreparable harm (order of 14 December 2001 in *Commission v Euroalliances and Others*, C-404/01 P(R), ECR, EU:C:2001:710, paragraphs 61 and 62). In that regard, it is for the party seeking the adoption of interim measures to prove that it cannot wait for the outcome of the main proceedings without suffering serious and irreparable harm. In order to establish the existence of such serious and irreparable harm, it is not necessary for the occurrence of the damage to be demonstrated with absolute certainty, but that it be foreseeable with a sufficient degree of probability (see order of 12 June 2014 in *Commission v Council*, C-21/14 P-R, ECR, EU:C:2014:1749, paragraph 37 and the case-law cited).

...

Irreparable nature of the harm ...

157 It follows that, if the existing case-law were applied, the condition relating to urgency would not be satisfied in the present case. More generally, it is apparent that, when applied to the situation of an unsuccessful tenderer, the requirement to demonstrate irreparable harm can be satisfied only with excessive difficulty, due to the systemic reasons pointed out above.

158 Yet such an outcome is irreconcilable with the requirements of effective interim protection, which has to be guaranteed in the area of public procurement (see paragraphs 16 to 20 above). Moreover, it should be underlined that failure to comply with the rules governing public procurement is not only liable to have harmful effects upon unsuccessful tenderers, but may also undermine the protection of the European Union's financial interests. Accordingly, this branch of litigation requires a new approach adapted to its specific features and designed to enable an unsuccessful tenderer to establish urgency other than by demonstrating, in all circumstances, an imminent risk of irreparable harm.

159 In that regard, first, it should be noted that the court hearing an application for interim measures cannot apply the condition relating to the irreparable nature of the harm — or, for that matter, the condition relating to the serious nature of the harm — in a rigid and mechanical manner, but must take into account the circumstances of each case (see, to that effect, order of 28 April 2009 in *United Phosphorus v Commission*, T-95/09 R, EU:T:2009:124, paragraph 74 and the case-law cited).

160 Secondly, the court hearing an application for interim measures is not precluded from directly applying Articles 278 TFEU and 279 TFEU, provisions of primary law which allow it to order a suspension of operation if it considers 'that circumstances so require' and to prescribe any 'necessary' interim

measures (see, to that effect, orders of 24 February 2014 in *HTTS and Bateni v Council*, T-45/14 R, EU:T:2014:85, paragraph 51, and 25 July 2014 in *Deza v ECHA*, T-189/14 R, EU:T:2014:686, paragraph 105).

- 161 Thirdly, the President of the Court of Justice has not ruled out the possibility of ordering a suspension of operation or adopting interim measures on the sole basis of the manifest illegality of the contested measure, for example where it lacks even the appearance of legality (see, to that effect, orders of 7 July 1981 in *IBM v Commission*, 60/81 R and 190/81 R, ECR, EU:C:1981:165, paragraphs 7 and 8, and 26 March 1987 in *Hoechst v Commission*, 46/87 R, ECR, EU:C:1987:167, paragraphs 31 and 32). In that regard, the order [of 11 March 2013] in *Communicaid Group v Commission*, [T-4/13 R, ECR], EU:T:2013:121, has already envisaged the possibility of holding that, in interim measures proceedings in the area of public procurement, urgency resides in the need to provide a remedy as rapidly as possible for what is, *prima facie*, a sufficiently manifest and serious illegality and, consequently, a particularly strong *prima facie* case (see, to that effect, paragraph 45 of the order).
- 162 Thus, in the context of proceedings relating to public procurement, it must be held that, where the unsuccessful tenderer succeeds in demonstrating the existence of a particularly strong *prima facie* case, he cannot be required to prove that the dismissal of his application for interim measures would be liable to cause him irreparable harm, if he is not to suffer an excessive and unjustified breach of his right to effective judicial protection under Article 47 of the Charter of Fundamental Rights. Such a *prima facie* case exists where it reveals the existence of a sufficiently manifest and serious illegality, the production or continuation of the effects of which must be prevented as soon as possible, unless the balance of the interests involved ultimately opposes doing so. In those exceptional circumstances, merely proving the seriousness of the harm that would be caused by failure to suspend the operation of the contested decision is sufficient to meet the condition relating to urgency, given the need to render ineffective an illegality of that nature.
- 163 In the present case, it is clear from the consideration of the condition relating to a *prima facie* case (see paragraphs 22 to 136 above) that serious infringements concerning elements of the procurement procedure have, *prima facie*, been committed, thus entailing the irregularity of the successful tender. It follows that the Commission's conduct and decisions in the present case must be regarded, at this stage of the proceedings, as infringements of EU law that are sufficiently manifest and serious for it to be necessary to prevent the production of their effects as regards the future, without the applicant being required to demonstrate that it would suffer irreparable harm if suspension of operation of the contested decision were not ordered.
- 164 Consequently, in the light of the nature of the unlawful elements identified, the condition relating to urgency must be regarded as satisfied in the present case.

...

3. *The balance of interests ...*

General interest in the need to bring an immediate end to an infringement of EU law which is of a sufficiently manifest and serious nature ...

- 197 It must therefore be concluded that, in view of (i) the force with which the conditions relating to a *prima facie* case and to urgency are satisfied, in particular the, *prima facie*, sufficiently manifest and serious nature of the alleged breaches of EU law, and (ii) the specific features of the case, in particular the judicial protection that should be afforded to tenderers in the specific context of public procurement, the balance of interests weighs in favour of the applicant.

198 It follows from the foregoing that the condition relating to the balance of interests, the importance of which in proceedings relating to public procurement has been particularly highlighted (see paragraphs 147, 158 and 165 above), is satisfied.

...

200 However, having regard to the characteristics of the public contract at issue and to the grounds stated, in particular, in paragraph 184 above, the present order is not to take effect until the period for bringing an appeal against it has expired.

On those grounds,

THE PRESIDENT OF THE GENERAL COURT

hereby orders:

1. **The decision of the European Commission of 30 January 2014 by which it rejected the tender that Vanbreda Risk & Benefits had submitted following a call for tenders in respect of a contract relating to the insurance of property and persons and awarded 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 period for bringing an appeal against the present order has expired.**
3. **Costs are reserved.**

Luxembourg, 4 December 2014.

E. Coulon
Registrar

M. Jaeger
President