



Press and Information

General Court of the European Union
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Order in Case T-199/14 R
Vanbreda Risk & Benefits v Commission

The President of the General Court orders the Commission to suspend the decision awarding an insurance contract to a broker

Even if the harm invoked is not irreparable, the sufficiently manifest and serious nature of the illegalities identified prima facie justifies the imposition of interim measures

On 10 August 2013, the Commission published a call for tenders concerning a contract for insurance cover for property and persons, Lot 1 of which related to insurance cover for buildings and their contents, the contract being concluded by the Commission on its own behalf and on behalf of several EU institutions and agencies.¹ The aim of the call for tenders was to replace the contract then in force, concluded with a consortium of which the applicant, Vanbreda Risk & Benefits, was the broker.

On 30 January 2014, the Commission informed Marsh SA, an insurance broker, that its tender had been selected and informed Vanbreda that its tender had not been selected, because it had not offered the lowest price.

By separate applications of 28 March 2014, Vanbreda (i) brought an action for annulment of that decision and an action for damages claiming that the Court should order the Commission to pay it €1 million and (ii) made a request in which, in essence, it asked the President of the Court, as the judge hearing an application for interim measures, to order the suspension of operation of the Commission's decision awarding the contract.

In his order today, the President of the Court orders the Commission to suspend operation of the contested decision until the Court has ruled on the main action.

The President first notes that, to order suspension of operation of an act, or other interim measures, several cumulative conditions must be met: it must be established that such an order is justified, *prima facie*, in fact and in law (*fumus boni juris*) 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). Where appropriate, the judge hearing such an application must also weigh up the interests involved.

As regards the first condition, the President concludes that there is a particularly serious *prima facie* case in support of Vanbreda's action.

In that connection, it can be seen from the case-file that one of the essential conditions of the call for tenders was that a tenderer submitting a joint tender was required to guarantee that all members of the grouping were jointly and severally liable for the performance of the contract.

The examination of Marsh's tender shows that initially that requirement was not satisfied. The insurance companies which had mandated that broker had accepted liability only as regards the part of the contract that they proposed to perform. The fact that, when the contract was signed, all the parties accepted the joint and several liability clause shows that contacts between the

¹ Namely, the Council of the EU, the European Economic and Social Committee, the Committee of the Regions of the EU, 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.

contracting authority and Marsh led to an unlawful amendment of the tender after the closing date for the submission of tenders.

In addition, the tenderer was required to guarantee the contracting authority 100% coverage of the risks referred to in the technical specifications. In the present case, when it submitted its tender, Marsh presented an allocation of risks between the insurance companies in order to achieve that objective. However, following the withdrawal of one of the insurers taking part in its tender, Marsh proposed a new allocation of that risk, without amending the total price of the successful tender, implying that the contribution of that insurer would be replaced by increasing the contributions of the remaining insurance companies and by allocating a part of that contribution to two new insurance companies which were not included in Marsh's initial tender.

Accordingly, when Marsh had to, on the one hand, renegotiate the increase of the contribution of the insurance companies which had mandated it and, on the other, negotiate the participation of two new insurers, not only was the competing tender known, but it was certain that the contract would be awarded to Marsh. Therefore, although the total price of the successful tender had not changed for the Commission, the conditions of negotiation between the tenderer and the insurance companies had undoubtedly changed, thus giving Marsh a competitive advantage.

It therefore appears, *prima facie*, that, in the present case, the application of the selection criteria and arrangements for submitting tenders, as well as their interpretation by the Commission, were not such as to ensure genuine competition.

Lastly, the single tenderer system, as interpreted by the Commission, allowed a broker to include new insurance companies among the contracting parties after the award of the contract. Those companies were not subject to the evaluation of their economic and financial capacities or their technical capacities, at the very least before the contract was awarded and the other tenderers eliminated. That raises, *prima facie*, serious doubts as regards the lawfulness of the procurement procedure.

As regards the assessment of the condition as to urgency, the President takes the view that, in the light of the sufficiently manifest and serious nature of the illegalities identified, that condition must be regarded as having been met.

According to the President, the serious nature of the harm is established, particularly since the financial damage is objectively significant, without it being necessary to assess it by reference to Vanbreda's turnover.

However, Vanbreda has not proved the irreparable nature of the financial and non-material damage invoked. According to settled case-law, financial damage cannot, save in exceptional circumstances, be regarded as irreparable, since normally it can be the subject of subsequent financial compensation.

Nevertheless, the President notes that it thus appears that, for systemic reasons, the requirement of irreparable harm can be satisfied by an unsuccessful tenderer only in an excessively difficult manner.

In his view, such an outcome appears irreconcilable with the need for effective interim protection in relation to public procurement. It is necessary, therefore, to adopt a new approach.

Thus, in the context of proceedings relating to public procurement, where the unsuccessful tenderer is able to demonstrate the existence of a particularly serious *prima facie* case, he cannot be required to prove that the rejection of his application for interim measures would be liable to cause him irreparable harm: otherwise, he would 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 a sufficiently manifest and serious illegality, the occurrence or continuation 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 as to urgency, given the need to render ineffective an illegality of that nature.

In the present case, serious infringements have, *prima facie*, been committed, which entail 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 that it is necessary to prevent the production of their effects as regards the future.

As regards the balance of the parties' respective interests, the President considers that it weighs in favour of the applicant.

In that context, he points out that the applicant's interest in preserving its right to an effective remedy as well as the protection of the EU's financial interests and the need to counter the effects of the illegalities identified outweigh the Commission's interest in maintaining the contested decision.

In that regard, he rejects, *inter alia*, the Commission's argument that, in the event that the contested decision is suspended, it would be exposed to extremely serious consequences for the EU's financial interests. As regards the alleged risk relating to the absence of insurance covering the buildings concerned, there are several solutions to ensure that those buildings are insured against the risks covered by the contract currently in force, all of which would allow the protection of the EU's financial interests.

The President therefore considers that the circumstances of the present case require that the suspension of operation of the contested decision be ordered. However, the present order should take effect only as from the date of expiry of the period for bringing an appeal.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery

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