ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

2 June 2005 *

In Case T-125/05 R,

Umwelt- und Ingenieurtechnik GmbH Dresden, established in Dresden (Germany), represented by H. Robl, lawyer,

applicant,

v

Commission of the European Communities, represented by M. Wilderspin and S. Fries, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

ACTION for suspension of implementation of the decisions of the Commission not to award the applicant Lot No 2 of the EuropeAid/119151/D/S/UA contract called 'Plan Improvement Project for South Ukraine NPP' and to award the lot to another company and, alternatively, for an order for other interim measures,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Background to the dispute

1 Council Regulation (EC, Euratom) No 99/2000 of 29 December 1999 concerning the provision of assistance to the partner States in Eastern Europe and Central Asia (OJ 2000 L 12, p. 1) provides in particular for the financing of nuclear safety programmes in those States.

2 An annual action programme in the field of nuclear safety was established for the year 2001 in the context of Regulation No 99/2000. In that context a tendering procedure was launched for a public procurement contract entitled 'Plan Improvement Project for South Ukraine NPP'. Lot No 2 of that contract related to the supply of an expert system for collection and processing of data concerning the control of water quality in a nuclear power station in South Ukraine.

3 In response to that tendering procedure, published in the *Official Journal of the European Union* on 19 June 2004 (OJ 2004 S 119), three tenders, including that of the applicant, were submitted within the time-limit.

4 On 4 October 2004, the tenders submitted were made public in the presence of the tenderers.

5 The committee in charge of the technical evaluation of the tenders ('the evaluation committee') proceeded to the examination of the different tenders received and checked that they complied with the administrative and technical specifications.

6 The evaluation committee requested the applicant to clarify several elements of its tender by letters of 6, 8 and 12 October 2004 respectively, to which the applicant replied by letters of 7, 12 and 14 October 2004 respectively.

7 Taking the view that the explanations provided by the applicant on two technical aspects ('Clarification No 9' and 'Clarification No 13') were insufficient, the committee did not accept the applicant's tender. The prices proposed by the applicant were therefore not compared with those of the other tenderers.

8 The contract was awarded to the company All Trade, whose tender was the most advantageous of those submitted.

9 The award was notified to All Trade and the required steps were taken for the signature of the contract. The contract was concluded directly between Energoatom, the beneficiary of the project, and the successful tenderer. It was signed on 20 December 2004.

10 By letter of 23 December 2004, received by the applicant on 10 January 2004, the Commission informed the applicant that it had not been awarded the contract having regard to the fact that its offer did not comply with the technical requirements ('the first decision'). In addition, that letter informed the applicant that the contract had been awarded to All Trade ('the second decision').

11 By letter of 14 January 2005 to the Commission, the applicant disputed the reasons given for those two decisions.

12 By letter of 31 January 2005, the Commission replied to the complaints made by the applicant.

Procedure and forms of orders sought by the parties

13 By application lodged at the Registry of the Court of First Instance on 18 March 2005, the applicant brought an action for annulment under the fourth paragraph of Article 230 EC of the first and second decisions (together 'the contested decisions').

14 By a separate document, lodged at the Registry of the Court on 21 March 2005 pursuant to Article 104 of the Rules of Procedure of the Court of First Instance and Articles 242 EC and 243 EC, the applicant brought the present application for interim relief in which it claims:

— suspension of the execution of the contested decisions until the Court rules on the main action;

— in the alternative, an order for the necessary interim measures to prevent implementation of the challenged decisions from becoming a fait accompli to the detriment of the applicant and, in particular, to prevent the defendant:

— firstly, awarding the contested contract to All Trade;

— secondly, drawing up the contract stipulated in paragraph 21 of the call for tenders and submitting it to All Trade for signature, or taking any other measure for awarding or implementing the contract.

15 In its written observations lodged at the Registry of the Court on 11 April 2005, the Commission contended that the application should be dismissed as unfounded.

Law

16 Under, first, the combined provisions of Articles 242 EC and 243 EC and, secondly, Article 225(1) EC, the Court of First Instance can, if it considers that the circumstances require, order the suspension of a measure challenged before it or order necessary provisional measures.

17 Article 104(2) of the Rules of Procedure provides that requests 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 (fumus boni juris) for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (Order of the President of the Court of Justice in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30).

18 Having regard to the contents of the file, the President considers that it contains all the information necessary in order to rule on the current request for provisional measures without the need for an oral hearing.

Arguments of the parties

Prima facie case

19 In relation to the first decision the applicant maintains that the Commission infringed the principle of non-discrimination. That principle is of fundamental importance in the context of public contracts and Article 89(1) of the Financial Regulation is a particular expression of it.

20 First, contrary to what is stated in the Commission's letters of 23 December 2004 and 31 January 2005, the applicant's tender was in conformity with the technical specifications stated in the call for tenders, namely, those mentioned, firstly, in section 2.2.6 of the specifications and, secondly, in sections 2.3.1 and 2.3.4 of those technical specifications. Moreover, contrary to what is claimed by the Commission, the detailed explanations and the additional information provided to the Commission were not inadequate.

21 The applicant adds that the technical reservations set out in the letters of 23 December 2004 and 31 January 2005 have nothing to do with the Commission's previous requests for clarification.

22 In relation to the second decision the applicant maintains that the Commission's finding in relation to the financial assessment is manifestly in error.

23 In the award notice for the supply contract, All Trade is mentioned as holding a contract to the value of EUR 3 423 658, which corresponded to the price of the offer, including all extras and services. According to the applicant, the statements in relation to the prices of offers mentioned in the Commission's letter of 31 January 2005 are not correct.

24 According to the applicant, the Commission's reference to paragraph 1.3 of the instructions to tenderers is incorrect. Paragraph 1.3 in substance provides that, in the context of the evaluation of offers, only the base price of tenders was to be taken into consideration to the exclusion of the unit price and the overall price of spare parts, except if those latter two prices differed substantially from one offer to another. According to the applicant, that was precisely the case in this instance.

25 The applicant considers that All Trade in all likelihood proposed a higher number of spare parts, with the consequence that the overall price of the tender had to be higher by more than 300 000 euros. According to the applicant, the Commission failed in its obligation under paragraph 1.3 of the instructions to tenderers to take that circumstance into consideration.

26 The applicant also maintains that All Trade possesses neither the qualifications nor the references required. According to the applicant, All Trade clearly proposed a product with a high risk of failure. The award of Lot No 2 to All Trade therefore raised serious doubts from a technical, commercial, personnel and financial viewpoint as to the guarantee that the envisaged service, the subject of the contract, could be carried out with the required competence and in the required time frame.

27 In that regard, the applicant adds, firstly, that All Trade's company capital is not in line with the value of the contract, secondly, that All Trade clearly wants to carry out the contract by itself, with the help of three collaborators and, thirdly, that All

Trade's references relate only to a project in Armenia in a contract the value of which is less that one million euros and which was carried out nearly two years ago.

28 In reply, the Commission maintains that the application for annulment in the main proceedings is manifestly unfounded.

29 The Commission recalls that it is established case-law that it enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender. Review by the Community Courts is therefore limited to checking compliance with the applicable procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (Case T-211/02 *Tideland Signal* v *Commission* [2002] ECR II-3781, paragraph 33).

30 In this case the invitation to tender procedure was carried out in conformity with the applicable provisions. The decision to reject the applicant's offer was, moreover, reasoned. The reasons given in that regard were of a technical nature. When assessing those arguments the Commission relied on the opinion of experts, in this case, the evaluation committee. The Commission concludes from this that no manifest error of assessment or abuse of power has been demonstrated by the applicant and that there is nothing to suggest that they exist.

Urgency and the balance of interests

31 The applicant maintains that, if the orders sought are not made, the decisions at issue will take effect. This 'fait accompli' will definitively affect the applicant's legal position and will do irreversible harm to its rights.

32 For its part the Commission maintains that the applicant has not proven that it cannot await the outcome of the main proceedings without suffering serious and irreparable damage.

33 The Commission further argues that it is settled case-law that pecuniary damage cannot, in principle, except in exceptional circumstances, be regarded as irreparable, or even reparable only with difficulty, if it may be the subject of subsequent compensation (Orders of the President of the Court of First Instance in Case T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 45; Case T-181/02 R *Neue Erba Lautex* v *Commission* [2002] ECR II-5081, paragraph 84, and Case T-148/04 R *TQ3 Travel Solutions Belgium* v *Commission* [2004] II-3027, paragraph 46).

34 In any event, the applicant's interests should not prevail, firstly, over those of the tenderer with which the contract was signed and, secondly, over the interest of the safety of nuclear installations.

Findings of the President of the Court of First Instance

35 In its application, the applicant in essence requests the President of the Court of First Instance to prohibit the defendant, firstly, from awarding the contract at issue to All Trade and, secondly, from drawing up the contract envisaged at paragraph 21 of the invitation to tender file and offering it for signature by All Trade. It also requests the suspension of the decision not to award it Lot No 2 of the contract at issue and to suspend the execution of any contract signed with All Trade.

36 The Commission has stated, without being contradicted by the applicant, or by any of the documents on the file, that the contract between All Trade and Energoatom was signed on 23 December 2004. For that reason, the application for interim relief, in so far as it aims to avoid the award of the contract to All Trade and the signature of the contract, has been devoid of purpose since it was lodged. This head of claim is therefore inadmissible.

37 In relation to the head of claim seeking to obtain suspension of the execution of the decision not to award the contract to the applicant and the execution of the contract made with All Trade, the President of the Court of First Instance considers that, without there being any need to rule on the conformity of the application with the requirements of Article 104(2) of the Rules of Procedure, as interpreted by the Community judicature (Orders of the President of the Court of First Instance in Case T-306/01 R *Aden and Others* v *Council and Commission* [2002] ECR II-2387, paragraph 52, and Case T-303/04 R *European Dynamics* v *Commission* [2004] ECR II-3889, paragraphs 63 and 64), it is appropriate to examine whether the condition for urgency is fulfilled.

38 In that regard, according to well-established case-law, the urgency of an application for the adoption of interim measures must be assessed in the light of the extent to which an interlocutory order is necessary to avoid serious and irreparable damage to the party seeking the adoption of the interim measure (Order of the President of the Court of Justice in Case 310/85 R *Deufil* v *Commission* [1986] ECR 537, paragraph 15, and Order of the President of the Court of First Instance in Case T-13/99 R *Pfizer Animal Health* v *Council* [1999] ECR II-1961, paragraph 134).

39 The party seeking the suspension of the operation of the contested decision must provide proof that he cannot await the conclusion of the main action without suffering prejudice of that nature (Order of the President of the Court of Justice in Case C-356/90 R *Belgium* v *Commission* [1991] ECR I-2423, paragraph 23, and Order of the President of the Court of First Instance in Case T-151/01 R *Duales System Deutschland* v *Commission* [2001] ECR II-3295, paragraph 187).

40 In this case, the applicant limits itself to stating, without more, that the 'appeal does not have suspensive effect and therefore it must be feared that, in the context of the decision process at issue, the decision in favour of All Trade challenged ... would take effect' and that 'this would create a fait accompli and would definitively affect the applicant's legal position'.

41 The applicant does not give any reasons as to why it cannot wait for the request for annulment to be decided and adduces no proof of such serious and irreparable damage.

42 In so far as the applicant can be understood as arguing that the damage alleged concerns the fact that its non-selection has caused financial loss, it suffices to recall that damage of such a kind cannot, save in exceptional circumstances, be regarded as irreparable, or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation (Orders in *Esedra* v *Commission*, cited above, paragraph 45, *Neue Erba Lautex* v *Commission*, cited above, paragraph 84, and *TQ3 Travel Solutions Belgium* v *Commission*, cited above, paragraph 46).

43 In these circumstances it must be concluded that, since the condition regarding urgency is not satisfied, the present application must be dismissed without the need to consider whether the other conditions for the grant of interim measures are satisfied.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 2 June 2005.

H. Jung — B. Vesterdorf

Registrar — President