ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
20 July 2000 *

In Case T-169/00 R,

Esedra SPRL, established in Brussels, Belgium, represented by G. Vandersanden, É. Gillet and L. Levi, of the Brussels Bar, with an address for service in Luxembourg at the office of Société de Gestion Fiduciaire SARL, 2–4 Rue Beck,

applicant,

v

Commission of the European Communities, represented by X. Lewis and L. Parpala, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

APPLICATION, first, for the suspension of operation of the Commission's decisions not to award to the applicant the contract forming the subject-matter of Notice No 99/S 132-97515/FR for services relating to the management of a day nursery and to award that contract to another undertaking and, second, for the Commission to be directed to take the necessary steps to suspend implementation of the decision to award that contract or any contract concluded in pursuance of that decision,

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

makes the following

Order

Facts and procedure

1 In 1994 the Commission decided to entrust to a private company the management of the Centre de la Petite Enfance Clovis, which is a day nursery and kindergarten for children of the staff of the European institutions situated on its premises in Boulevard Clovis, Brussels (hereinafter 'the CPE Clovis'). It issued an invitation to tender and subsequently awarded the contract to two Italian companies, Aristea and Cooperativa Italiana di Ristorazione. The management of the CPE Clovis was entrusted to the applicant, which was formed of the two aforementioned companies. The management contract was concluded for an

initial term of two years from 1 August 1995, renewable for three one-year periods.

2 By letter of 15 April 1999, the applicant informed the Commission that it had decided not to seek renewal of the contract. The letter included the following passage:

'Furthermore, the company can already state that it will be available to participate in any future invitations to tender, if the objective will be to provide a more efficient management of the service and to foster the relations which ought to exist between the interested parties, especially in the case of non-contracting parties.'

3 On 26 May 1999 the Commission, pursuant to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), published in the Supplement to the *Official Journal of the European Communities* a first notice of invitation to tender (OJ 1999 S 100, p. 35), by restricted procedure, for the services relating to the management of the CPE Clovis. Three undertakings, amongst them the applicant and the company Centro Studi Antonio Manieri (hereinafter 'the Centro Studi'), applied to participate.

4 The Commission considered that the number of candidates was too low to ensure proper competition, and therefore published on 10 July 1999 a further notice of invitation to tender (OJ 1999 S 132) for the management of a day nursery (No 99/S 132-97515/FR). The notice specified that the contract would be awarded to 'the economically most advantageous tender taking account of the prices tendered and the quality of the services proposed (details in the contract documents)'.

5 Following the selection of candidates, as described in the notice of invitation to tender, the contract documents were sent on 29 October 1999 to the seven companies invited to tender. It was made clear in the documents that tenders had to be submitted by 6 January 2000 at the latest, that the tender was valid for a term of nine months from 6 January 2000 and that the contract was for an initial two-year period, renewable for three one-year periods. Moreover, the criteria on which the contract would be awarded were as follows:

'The contract will be awarded to the economically most advantageous tender taking account of:

— the prices tendered and

— the quality of the tender and of the services proposed, evaluated, in descending order of importance, according to:

(a) the quality of the teaching programme (40%)

(b) the measures and resources implemented to provide cover for staff absences (30%)

(c) the methodology and monitoring devices proposed for monitoring: (30%)

— the quality of service and management

— the maintenance of staffing levels

— the implementation of the teaching programme.'

6 According to the report of the site visit and mandatory information meeting on 24 and 25 November 1999, the Commission's staff added further details to the contract documents on those occasions.

7 By fax of 20 December 1999, written in Italian, the Commission informed the applicant that the final date for submission of tenders had been deferred to 7 January 2000. In addition, it was stated with regard to the specific criteria contained in the contract documents:

'The current contracting party has ... stated that it will keep on staff and assign them to other posts if the contract is not awarded to it. Accordingly, the problem of safeguarding the rights of workers would not arise at all.'

8 On 7 January 2000, a representative of the applicant went to the Commission's offices to submit a tender. He was told that, in fact, the final date had been deferred to 7 February 2000, and not to 7 January 2000 as had been wrongly copied in the fax of 20 December 1999. The applicant's representative therefore took back the tender.

9 By the final date set for the purpose, four companies, amongst them the Centro Studi and the applicant, had submitted tenders.

10 When the tenders had been submitted, the Commission sent the candidates two requests for further particulars, on 25 and 29 February 2000.

11 The tenders were examined by an appraisal committee composed of six people, of whom five were appointed in their capacity as officials in the Directorate-General for Personnel and Administration, and the sixth in her capacity as representative of the Parents' Association. This sixth person, who was the Vice-President of the Association, did not have a child attending the CPE Clovis day nursery.

12 By letter of 31 May 2000, the applicant was informed that it had not been awarded the contract in question (hereinafter 'the refusal').

13 By letter of 2 June 2000, the applicant's lawyers asked the Commission to inform them of the reasons for that decision. They also asked the institution to suspend any measure designed to implement the decision to award the contract at issue to

another candidate (hereinafter 'the award') and, consequently, not to conclude the contract referred to in the contract documents.

14 By fax of 9 June 2000, the Commission provided information regarding the reasons for the refusal. It pointed out, in particular, that the tender submitted by the Centro Studi was better than that of the applicant in respect of both price and quality (in the first place, the applicant's price rating was 102.9 whereas the Centro Studi's was 100 as against the tender of the lowest bidder, and secondly the applicant's quality rating was 80.4 while that of the Centro Studi was 100 in relation to the bid which obtained the best assessment). Moreover, the Commission refused to suspend the operation of the award.

15 By an application lodged at the Court Registry on 20 June 2000, the applicant brought an action under the fourth paragraph of Article 230 EC before the Court of First Instance for annulment of the award and the refusal, and a claim for compensation to redress the damage it has allegedly suffered on account of those decisions.

16 By a separate document lodged at the Court Registry on the same day, the applicant brought the present application seeking, first, suspension of the operation of the Commission's award and refusal and a direction to the Commission to take the steps necessary to suspend the legal effects of the award or of any contract concluded in pursuance thereof and, secondly, under Article 105(2) of the Rules of Procedure of the Court of First Instance, a ruling to be given as a matter of urgency on these requests for suspension.

17 On 21 June 2000, the President of the Court asked the Commission to answer questions concerning the progress made in the tendering procedure at issue and to produce any contract it had concluded with the Centro Studi.

18 On 22 June 2000 the Commission replied to the questions put to it. It produced the contract concluded with the Centro Studi and pointed out that it had been signed on 21 June 2000 and would take effect on 1 August 2000.

19 On 26 June 2000 the Commission was requested to produce documents relating to the Centro Studi.

20 On 30 June 2000, the Commission submitted its observations on this application for interim measures, and enclosed the documents requested. It stated that the Centro Studi's tender and the letter of guarantee were confidential and should not be communicated to the applicant.

21 The President of the Court therefore decided not to add those documents to the file.

Law

22 Under the combined provisions of Articles 242 EC and 243 EC and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court may, if it considers that the circumstances so require, order the suspension of the operation of the contested measure or prescribe the necessary interim measures.

23 Article 104(2) of the Rules of Procedure provides that applications for interim measures must state the circumstances giving rise to urgency and the pleas of fact

and law establishing a prima facie case (*fumus boni juris*) for the measures applied for. These requirements are cumulative; accordingly, an application for suspension of operation must be dismissed if one of them is lacking (order of the President of the Court of First Instance in Case T-211/98 R *Willeme* v *Commission* [1999] ECR-SC I-A-15 and II-57, paragraph 18). Also, where appropriate, the judge hearing the application for interim measures weighs up the interests involved (order of the President of the Court of Justice in Case C-107/99 R *Italy* v *Commission* [1999] ECR I-4011, paragraph 59).

24 Having regard to the documents in the case, the President of the Court considers that he has all the information necessary to give a ruling on this application for suspension of operation, without the need to hear oral argument from the parties first.

25 It is necessary, in the present case, to examine the condition relating to urgency.

Arguments of the parties

26 The applicant points out that the implementation of the award and of the refusal are liable to cause it serious and irreparable damage. Its action on the merits could only lead to an award for compensation which, in this instance, would be inadequate in the circumstances of the case and having regard to the main purpose of its action.

27 The damage allegedly suffered by the applicant is not exclusively pecuniary. It consists, on the one hand, of direct loss, which can be evaluated at BEF 40 000 000 (EUR 991 574.09) and, on the other hand, indirect loss, in the light of the fact that the applicant set up an original, collaborative scheme for day nursery management, based on franchise agreements. Such a structure can

succeed only if supported by an adequate volume of business. The loss of the management of the CPE Clovis places that structure at risk.

28 According to the applicant, the contract in question is a reference contract, on which the selected candidate may quite properly rely in order to obtain future contracts. Consequently, references play a decisive role in awarding the public contracts. It adds that this is also apparent from the qualitative selection process established by Directive 92/50, Article 32 of which lays down criteria based, in particular, on the experience which the service provider may refer to when submitting a tender.

29 Consequently, the applicant will not be able, in the future, to rely on the contract in question and the damage incurred thereby cannot be redressed by an award of damages. The interim measures sought will make it possible for the applicant to avoid being precluded, once and for all, in spite of the illegality of the award decision, from obtaining the contract.

30 Arguing that no lesson can be drawn from the Community case-law relating specifically to the notion of loss of references in respect of public contracts, the applicant proposes to refer to the case-law of the Belgian courts, since Belgian law is, after all, the law applicable to the contract in question. According to that case-law, the loss of a reference or prestige contract is, to a certain extent, regarded as coming under the heading of risk of serious damage reparable only with difficulty.

31 In the present case, the contract was a reference contract, and the award and refusal adversely affected the applicant's credibility and reputation. In that connection, it states that the contract is especially significant on account of both its annual financial value (EUR 3 470 509.35) and the number of child placements (400). The quality and very specific and prestigious nature of the contracting authority should also be taken into account. For the applicant, which

had obtained the previous contract to manage the CPE Clovis, the fact of not being awarded the one in question amounts to a public rejection very detrimental to its business interests and compromises its credibility and reputation. Consequently, various projects in which the applicant is involved, and which are based on the reference provided by the contract at issue, will be jeopardised.

32 The applicant also maintains that it has some 95 assistants (members of staff), whose work is organised in such a way as to comply with the ISO 9001:94 management and organisation principles. It has held an ISO 9001 certificate since February 1998. It will probably be unable to redeploy them all and will therefore lose the main potential of its service-providing company and the investments made in acquiring the quality label afforded by the aforementioned certificate.

33 The situation is also urgent because the contract in question will be not only concluded but also, to a large extent, performed before judgment is delivered on the merits. The judgment in the main action will therefore have no useful effect (see, to that effect, the orders of the President of the Court of Justice in Case 45/87 R *Commission* v *Ireland* [1987] ECR 783, in Case 194/88 R *Commission* v *Italy* [1988] ECR 5647, and in Case C-272/91 R *Commission* v *Italy* [1992] ECR I-457, delivered in actions for failure to fulfil obligations).

34 Finally, the applicant states that the Commission was informed that it intended to contest the award and the refusal; the fact that the institution has taken steps to implement them by concluding the contract cannot prevent the present application from being upheld (see, by analogy, the order of the President of the Court of Justice in Case C-87/94 R *Commission* v *Belgium* [1994] ECR I-1395).

35 The Commission considers that the damage alleged by the applicant is neither serious nor irreparable within the meaning of the case-law of the Court of First Instance. The applicant is in a position to quantify the direct damage, which may therefore be fully redressed by the payment of damages.

36 As regards the other head of damage which the applicant claims to have suffered and describes as 'indirect loss', this is the loss of a 'reference contract'. By describing this head of damage as indirect loss, the applicant has acknowledged that there is no causal link between that damage and the award and refusal, and that its position with regard to other contracts is uncertain. The applicant has been unable to establish a link between obtaining the contract in question and obtaining other contracts. Furthermore, Community law provides no protection against the indirect consequences of acts of the Community institutions.

37 Moreover, damage arising from the loss of a reference contract is not defined, in Belgian case-law, as serious and irreparable damage, but rather as 'serious damage reparable only with difficulty'. For a candidate not to retain a limited-term contract when a new invitation to tender is issued is the inevitable consequence of the periodic nature of invitations to tender for public service contracts. In any event, the applicant's argument that the interim measures should be imposed to prevent it being precluded from obtaining the contract in dispute is not well founded.

38 The Commission points out that, contrary to what the applicant claims, references do not play a decisive part in awarding contracts, the criteria for which are listed in Articles 36 and 37 of Directive 92/50. They are one of many factors in the qualitative selection made before contracts are awarded, pursuant to Article 32 of the Directive.

39 The Commission also considers that the applicant has not shown that there are exceptional circumstances enabling the pecuniary damage it has incurred to be defined as serious and irreparable. Indeed, the applicant did not adduce proof that, if the interim measures it seeks are not granted, it risks being placed in a position which might jeopardise its very existence or irremediably alter its share of the market.

40 The Commission then states that the alleged loss of profit from part of the applicant's investment, in particular in staff training in order to obtain an ISO 9001 certificate, which would result if the staff were made redundant, is also purely pecuniary damage.

41 The applicant's argument that the matter is urgent because the contract concluded between the Commission and the candidate whose tender was successful will have been performed, to a large extent, before a ruling is given on the merits, is irrelevant in this case. The applicant relies on the case-law applicable to actions for failure to fulfil obligations. These are very specific cases and cannot give rise to a claim for compensation before the Community court. Moreover, the facts in the order in *Commission* v *Italy*, cited by the applicant, are not comparable to those in the present case. If the Court of First Instance were to annul the award in this case, the Commission could arrange another tendering procedure, in which the applicant could participate without encountering any particular difficulty.

42 Finally, the Commission points out that it was the applicant itself which had expressed the wish not to continue with the contract to manage the CPE Clovis. It is thus impossible to define as serious and irreparable damage a loss which was contemplated on its own initiative.

Findings of the Court

43 It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the party who requests the interim measure. It is for that party to adduce proof that it cannot await the outcome of the main action without suffering such damage (orders of the President of the Court of First Instance in Case T-73/98 R *Prayon-Rupel* v *Commission* [1998] ECR II-2769, paragraph 36, in Joined Cases T-38/99 R to T-42/99 R, T-45/99 R and T-48/99 R *Sociedade Agrícola dos Arinhos and Others* v *Commission* [1999] ECR II-2567, paragraph 42, and in Case T-144/99 R *IMA* v *Commission* [2000] ECR II-2067, paragraph 42).

44 As regards the pecuniary damage alleged by the applicant, it should be noted that, as the Commission has pointed out, according to settled case-law such damage cannot, in principle, 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 Justice in Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, paragraph 24, and in Case T-70/99 R *Alpharma* v *Council* [1999] ECR II-2027, paragraph 128).

45 Pursuant to those principles, the requested suspension would be justified, in the circumstances of this case, only if it appeared that, if the measure were not granted, the applicant would find itself in a situation which could jeopardise its very existence or irremediably alter its position in the market.

46 The applicant has not been able to establish that, if the interim measures it has requested are not granted, the loss of the management of the CPE Clovis would jeopardise the day nursery management structure it has set up or, in any event, the applicant's very existence. In that regard, it should be noted that the applicant has

referred to several other projects in which it is already involved and which could lead to the establishment of day nurseries with a capacity of over 410 places.

47 It follows that the financial damage alleged by the applicant must be considered to be reparable. The damage constitutes a loss which can be redressed economically by means of the legal remedies provided for by the Treaty, particularly Article 235 EC (order of the President of the Court of First Instance in Case T-230/97 R *Comafrica and Dole Fresh Fruit Europe* v *Commission* [1997] ECR II-1589, paragraph 38).

48 As regards the non-pecuniary damage alleged by the applicant, and its argument that interim measures are urgent because of the irreparable damage which would be caused to its reputation and credibility, it should be noted that the refusal will not necessarily cause such damage. Participation in a public tender procedure, by nature highly competitive, necessarily involves risks for all the participants, and the elimination of a tenderer under the rules on tenders is not, in itself, prejudicial (order of the President of the Court of Justice in Case 118/83 R *CMC* v *Commission* [1983] ECR 2583, paragraph 51). Furthermore, the applicant was aware of the risk when it decided not to seek renewal of its contract with the Commission, leading the Commission to initiate a new public contract tendering procedure.

49 As for the applicant's argument that references play a decisive role in the award of public contracts, it should be noted, as the Commission has rightly indicated, that it is apparent from Article 32 of Directive 92/50 that references represent merely one of many criteria taken into account in the qualitative selection of service providers. Furthermore, the prejudicial effects which the applicant claims would result if its credibility and reputation were compromised cannot be regarded as an inevitable consequence of the implementation of the award and refusal. The harm which that implementation could cause the applicant is therefore purely hypothetical (order of the President of the Court of First Instance in Case T-322/94 R *Union Carbide* v *Commission* [1994] ECR II-1159, paragraph 31).

50 In the same way, as regards the damage which would allegedly be occasioned by the redundancy of its members of staff, the fact that the applicant itself describes this as 'likely' shows that it is hypothetical.

51 Finally, the fact that the performance of the contract concluded with the Centro Studi will already have commenced before judgment is delivered in the main action is not a circumstance establishing urgency. If the Court of First Instance considers the main action well founded, the Commission will have to adopt the measures necessary to ensure appropriate protection of the applicant's interests (order of the President of the Court of First Instance in Case T-108/94 R *Candiotte* v *Council* [1994] ECR II-249, paragraph 27). The applicant has not referred to any circumstance which might prevent its interests from being protected, possibly by payment of compensation together with a new tendering procedure.

52 In the circumstances, it must be concluded that the evidence adduced by the applicant has not established to the requisite legal standard that the non-pecuniary damage which it alleges is certain or irreparable and is the direct consequence of the decisions taken by the Commission or of their implementation.

53 It follows from the above that the applicant has not succeeded in proving that it will suffer serious and irreparable damage if the requested interim measures are not granted.

54 Accordingly, the application for interim measures must be dismissed, and it is not necessary to consider whether the other conditions for granting suspension of operation are fulfilled.

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, 20 July 2000.

H. Jung

Registrar

B. Vesterdorf

President