



13 November 2020

Case 5/2020

FINAL DECISION

[.],

Appellant,

v

the Single Resolution Board

Christopher Pleister, Chair
Marco Lamandini, Rapporteur
Luis Silva Morais, Vice-Chair
Helen Louri-Dendrinou
Kaarlo Jännäri

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FINAL DECISION

In Case 5/20

APPEAL under Article 85(3) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010¹ (the “SRMR”),

[.], with address for service in [.] (hereinafter the “Appellant”)

v

the Single Resolution Board (hereinafter the “Board” or “SRB”),

(together referred to as the “Parties”),

THE APPEAL PANEL,

composed of Christopher Pleister (Chair), Marco Lamandini (Rapporteur), Luis Silva Morais (Vice-Chair), Helen Louri-Dendrinou and Kaarlo Jännäri,

makes the following final decision:

Background of facts

1. This appeal relates to the SRB decision of 24 July 2020 (hereinafter the “Confirmatory Decision”) rejecting the Appellant’s confirmatory application, by which the Appellant requested the SRB to reconsider its position in relation to its initial request and the SRB’s response thereto, concerning the access to documents in accordance with Article 90(1) of SRMR and Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereinafter “Regulation 1049/2001”), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents³ (hereinafter “Public Access Decision”).
2. By his initial email of 18 February 2020, the Appellant requested access to the following contracts: (i) FWC BUDG/15/PO/02; (ii) FWC DI/07622 ABC IV; (iii) FWC BUDG/16/PO/01 – LOT 1; (iv) FWC BUDG/16/PO/01 – LOT 2; (v) FWC SRB/NEG/1/2018; (vi) SRB/NEG/16/2018.
3. In its initial response of 28 May 2020 the SRB informed the Appellant that it identified the contracts under points (i) to (vi) above, including their annexes as falling within the scope of

¹ OJ L 225, 30.7.2014, p.1.

² OJ L 145, 31.5.2001, p. 43

³ SRB/ES/2017/01.

the request and granted access to all contractual documents with the exception of a limited number of annexes. The Board also clarified the reasons why access to such annexes could not be granted, based on Article 4(2) first indent (protection of commercial interests of a natural or legal person) and, with respect to personal data contained therein, Article 4(1)(b) (protection of privacy and integrity of individual) of Regulation 1049/2001.

4. On 10 June 2020 the Appellant submitted a confirmatory application, requesting the SRB to reconsider its position with respect to the annexes whose access was refused “claiming that it would affect the commercial rights of the bidder”. In response, on 24 July 2020, the SRB rejected the confirmatory application with the Confirmatory Decision, which is the subject matter of the present appeal.
5. On 26 July 2020 the Appellant filed an appeal against the Confirmatory Decision. The Secretariat notified the Board of the appeal on 30 July 2020.
6. On 31 July 2020 the Board requested an extension of the initial deadline to respond, which was granted by the Appeal Panel on 5 August 2020.
7. On 10 September 2020 the Board filed its response.
8. On 17 September 2020 the Appeal Panel, having considered the initial submissions of both Parties, notified the Parties the following procedural order:

The Appeal Panel has determined that, for the just determination of the appeal in case 5/2020 it is necessary for the Appeal Panel to examine, under strict confidentiality vis-à-vis the Appellant, the following documents: (1) Annex III to Framework Contract BUDG/15/PO/02; (2) Annex II and Annex IV to Framework Contract DI/07622 ABC IV; (3) Annex II to Framework Contract BUDG/16/PO/01 Lot 1; (4) Annex II to Framework Contract BUDG/16/PO/01 Lot 2; (5) Annex II and IV to Framework Contract SRB/NEG/1/2018; (6) Annex II to Service Contract SRB/NEG/16/2018.

*For this purpose, as a measure of inquiry weighing confidentiality against the right to an effective legal remedy at this stage of the proceedings, having regard also to Article 104 of the General Court’s Rules of Procedure, the Appeal Panel orders the Board: (i) to deposit with the Secretariat of the Appeal Panel by **7 October 2020** at the SRB premises, one or more numbered hardcopies of the above documents and/or (ii) subject to the adoption of appropriate technical means and all necessary security measures, to allow remote access to the Appeal Panel Members via electronic devices to an electronic copy of the same for reading only. Having regard also to Article 104 of the General Court’s Rules of Procedure, the above documents shall neither be communicated to the Appellant nor shall be part of the file of these proceedings open to the access of the Appellant, corresponding exclusively to a mere element intended for comprehensive information and due diligence on the case on the part of the Appeal Panel.*

*In accordance with the Appeal Panel’s Rules of Procedure both Parties are kindly requested, by the same deadline of **7 October 2020**, to inform the Secretariat if they intend to make oral representations before the Appeal Panel at an oral hearing. In the same time, the Appeal Panel informs [the Parties] that it does not see necessary for the good determination of the case to hear the Parties.*

9. On 7 October 2020 the Board filed observations on the determination by the Appeal Panel that it considered unnecessary the examination of the full content of the requested documents for the just determination of the appeal, and invited therefore the Appeal Panel to reconsider the request for such examination.
10. On 15 October 2020 the Appeal Panel, having thoroughly considered the observations of the Board of 7 October 2020, notified the Parties the following procedural order:

By Procedural Order No 1 the Appeal Panel has determined the following:

For the just determination of the appeal in case 5/20 it is necessary for the Appeal Panel to examine, under strict confidentiality vis-à-vis the Appellant, the following documents: (1) Annex III to Framework Contract BUDG/15/PO/02; (2) Annex II and Annex IV to Framework Contract DI/07622 ABC IV; (3) Annex II to Framework Contract BUDG/16/PO/01 Lot 1; (4) Annex II to Framework Contract BUDG/16/PO/01 Lot 2; (5) Annex II and IV to Framework Contract SRB/NEG/1/2018; (6) Annex II to Service Contract SRB/NEG/16/2018.

*For this purpose, as a measure of inquiry weighing confidentiality against the right to an effective legal remedy at this stage of the proceedings, having regard also to Article 104 of the General Court's Rules of Procedure, the Appeal Panel orders the Board: (i) to deposit with the Secretariat of the Appeal Panel by **7 October 2020** at the SRB premises, one or more numbered hardcopies of the above documents and/or (ii) subject to the adoption of appropriate technical means and all necessary security measures, to allow remote access to the Appeal Panel Members via electronic devices to an electronic copy of the same for reading only. Having regard also to Article 104 of the General Court's Rules of Procedure, the above documents shall neither be communicated to the Appellant nor shall be part of the file of these proceedings open to the access of the Appellant, corresponding exclusively to a mere element intended for comprehensive information and due diligence on the case on the part of the Appeal Panel.*

By letter of 7 October 2020 the Board presented observations on the determination of the Appeal Panel that it considers the examination of the Annexes necessary for the just determination of the appeal. The Board noted that the documents requested by the Appellant were disclosed with redactions for the protection of commercial interests of a natural or legal person under Article 4(2) first indent of Regulation 1049/2001, based upon a presumption that certain information commercially sensitive are covered by a general presumption that their disclosure would undermine the protection of commercial interests. The Board notes that the Appellant failed to put forward any argument to rebut the presumption and the Board did not identify an overriding public interest in the disclosure. For these reasons, the Board concludes that, in its view, a just determination of the appeal in case 5/2020 does not necessitate an examination of the Annexes by the Appeal Panel.

The Appeal Panel thanks the Board for its observation and appreciates the importance of the matter of a careful handling of data which may be commercially sensitive.

The Appeal Panel finds however that, in order to be able to properly assess the content of the appealed Confirmatory Decision and to verify that the reasons stated in the Confirmatory Decision correspond to the actual content of the documents whose access has been refused and that these documents or parts of documents show indeed a commercially sensitive content which could be validly covered by the exception under Article 4(2) first indent or any presumption thereof, it needs to read directly the unredacted and complete text of the Annexes.

*The Appeal Panel, therefore, invites the Board (i) to deposit with the Secretariat of the Appeal Panel within **ten working days** from the date of notice of this Procedural Order No 2 at the SRB premises, one or more numbered hardcopies of the documents listed in Procedural Order No 1 and/or (ii) subject to the adoption of appropriate technical means and all necessary security measures, to allow remote access to the Appeal Panel Members via electronic devices to an electronic copy of the same for reading only.*

11. On 28 October 2020 the Board, fulfilling the aforementioned procedural order of the Appeal Panel, allowed to the Appeal Panel remote access on a “read-only” basis to the full content of the requested documents.
12. Both Parties notified the Appeal Panel that they did not intend to make oral representation at an oral hearing and considered therefore sufficient for the just determination of the case the submissions already made.
13. On 4 November 2020 the Appeal Panel, having considered the submissions of both Parties notified the Parties that the Chair considered that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and 20 of the Rules of Procedure.

Main arguments of the Parties

14. The main arguments of the Parties are briefly summarised below. It is specified that the Appeal Panel considered every argument raised by the Parties, irrespective of the fact that a specific mention to each of them is not expressly reflected in this decision.

Appellant

15. The Appellant challenges the Confirmatory Decision claiming that the SRB has published the final cost related to the services rendered under the requested documents (five framework contracts and a service contract), but the refusal to disclose certain annexes of such documents would not allow a verification by the appellant that the economic content of the offers made by service provider is fully consistent with the aggregate amount of the final cost as publicly shown by the SRB.
16. The appellant further claims that the (partial) refusal to grant access to the requested documents is excessive, also in comparison with other documents to which access was granted by the Board, and that the SRB has not demonstrated that the reasons stated by the Board truly justify such partial refusal.

Board

17. The Board argues, first, that the Board provided a comprehensive overview on the legal assessment conducted and of the methodology applied in the specific case and, in particular, that it clearly explained to the Appellant for each contract separately why the contractors’ tender, and, where relevant, the price list or schedule could not be disclosed as they are covered by the exception of the first indent of Article 4(2) of Regulation 1049/2001.
18. More specifically, in the Board’s view, said annexes contain information on the methodologies and processes followed by the contractors and business-related information on their pricing and internal organization. Their disclosure would place the contractors in a

comparatively disadvantageous position vis-à-vis their competitors in future procurement procedures, thereby affecting their commercial interest.

19. The Board further claims that it also relied on a general presumption, according to settled case law, that their disclosure would undermine the protection of commercial interests and the Appellant did not put forward any argument to show that the documents requested were not covered by such presumption. The Board also notes, in this respect, that the fact that the SRB publishes contract values in its annual list of contracts in accordance with Regulation No 966/2012 has no bearing on the general presumption of confidentiality vis-à-vis the public of tenderers' bids and price list. Moreover, the Regulation No 966/2012 foresees that access to information is provided on a privileged basis only to specific parties and does not provide for the disclosure of the tenders submitted, specifically in order to maintain the confidentiality of that sensitive commercial information.
20. The Board further relies on Article 88 of the SRMR and Article 339 TFEU.
21. Finally, the Board submits that it is apparent from the Confirmatory Decision that the SRB has granted partial access to substantial parts of the public procurement contracts in line with Article 4(6) of Regulation 1049/2001, whilst protecting the contractors' commercial interests.

Findings of the Appeal Panel

22. The Appeal Panel carefully considered the reasons stated by the Board with the Confirmatory Decision to justify its conclusions as to the denial of access of certain annexes to the relevant framework agreements and service agreement, in light of a direct and confidential examination of such (non-disclosed) documents, following its two procedural orders to this effect (also pondering the context of a decision granting already wide access to the majority of the documents for which access was sought). Based on such a direct examination of the documents, the Appeal Panel ultimately finds, considering the actual content of the said documents, that the Board's statement of reasons with the Confirmatory Decision does not show any violation of applicable legal provisions of Regulation 1049/2001 nor any manifest error in assessment.
23. The Confirmatory Decision extensively clarifies, for each of the 5 framework contracts and for the service contract for which access is sought, the reasons why one or a limited number of annexes (namely (1) Annex III, contractor's tender, to framework contract BUDG/15/PO/02; (2) Annex II, list of services and Annex IV, contractor's tender, to framework contract DI/07622 ABC IV; (3) Annex II, contractor's tender, to framework contract BUDG/16/PO/01 – LOT 1; (4) Annex II, contractor's tender, to framework contract BUDG/16/PO/01 – LOT 2; (5) Annex II, contractor's tender, and Annex IV, price list, to framework contract SRB/NEG/1/2018 and (6) Annex II, contractor's tender, to service contract SRB/NEG/16/2018) could not be disclosed.

24. In particular, the Board assessed that the disclosure of such annexes would undermine the protection of commercial interests of the tenderers and is therefore exempted under Article 4(2) first indent of Regulation 1049/2001. The Board considered, more specifically, that the annexes mentioned above set forth the methodologies, know-how, specific pricing and other information carrying commercial value, which the tenderer could put forward to differentiate itself from other competitors in order to attain a procurement award and whose disclosure would undermine the tenderer's expertise, strategy and creativity and thus its commercial strength.
25. The Appeal Panel notes that Article 4(2) first indent of Regulation 1049/2001 foresees that access to a document can be refused where disclosure would undermine the protection of commercial interests and that, according to settled case law (judgment of 29 January 2013, *Cosepuri v EFSA*, T-339/10 and T-532/10, EU:T:2013:38, at paragraph 99 this is particularly the case for tenderers' offers containing details of the specific skills of the tenderers, or of relevant economic or technical information.
26. Accordingly, relying on its direct examination of the relevant annexes, the Appeal Panel finds that the (few) annexes whose disclosure has been refused actually contain information of this nature (information on the tenderer's competences and working methods; its know-how, its internal organisation; its costs and proposed prices) and that it may be reasonably inferred from such content that its disclosure could harm the commercial interest of the tenderer and possibly even jeopardise the objective of the rules on EU public procurement by making possible distortions of competition in subsequent procedures. Therefore, in the Appeal Panel's view, the Board's assessment does not violate Article 4(2) first indent of Regulation 1049/2001 nor shows any manifest error in its assessment.
27. Conversely, the Appeal Panel further notes, also in light of the content of the said documents, that the Appellant did not show, in the circumstances, any overriding public interest in the disclosure of the specific relevant annexes at stake, nor put forward any argument, in the appeal, to show why, in the instant case, the Board could not validly rely on the general presumption of confidentiality applicable, under settled case law (judgment of 21 September 2016, *Secolux v Commission*, T-363/14, EU:T:2016:521, paragraph 59, to offers submitted by tenderers in the performance of public contracts.
28. At the same time, the Appeal Panel shares the Board's view that, in the instant case, also Article 113 of Regulation (EU) No 966/2012, Article 88 of the SRM Regulation and Article 339 TFEU may support the careful approach followed by the Board, in order to respect undertakings' know-how and other confidential commercial information, their business relations and their cost components (see to this effect also judgment of 26 March 2020, *ViaSat v European Commission*, T-734/17, ECLI:EU:T:2020:123, paragraph 61).

On those grounds, the Appeal Panel hereby

Dismisses the appeal.

Helen Louri-Dendrinou

Kaarlo Jännäri

Luis Silva Morais
Vice-Chair

Marco Lamandini
Rapporteur

Christopher Pleister
Chair

For the Secretariat of the Appeal Panel: