

MEAT methodology examined in recent case: Proximus v Council [2019]

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12 February 2019

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The General Court (the court) has dismissed an [annulment application brought by Proximus SA/NV](#) (Proximus) in a case which has reaffirmed existing case law that the 'most economically advantageous requirement' does not necessarily relate solely to prices.

Background

The Council of the European Union (council) invited tenderers to participate in a negotiated procurement procedure for the award of a framework contract for cybersecurity services. The services to be provided were separated under 'service packages'.

According to the tender specifications, the contract was to be awarded to the tenderer who submitted the tender offering the best value for money. Specifically, the specification stated that the technical evaluation counted for 60% and the price offered countered for 40%.

In respect of the financial evaluation, a financial score was calculated for each service package by comparing the price calculated for one sub-criterion in a given tender with the sum of all tenders received for that sub-criterion, using a mathematical formula.

A weighting percentage was then applied to each service package and each tenderer given a financial score which corresponded to the weighted total of the scores assigned for each financial criterion.

Proximus was unsuccessful in its bid. In a letter to the council, it stated that the application of the price criterion appeared to be incorrect, in so far as it had obtained a lower score than that of the successful tenderer, although the latter's tender had a higher total price. The council decided not to sign the contract with the successful tenderer whilst it reconsidered the contested decision.

The council eventually responded to Proximus' letter, stating that it saw no reason either to reconsider its award decision or not to conclude the contract. The contract was signed with the successful tenderer in February 2017.

The proceedings

Proximus sought to challenge the award on the following grounds:

1. Infringement of Article 110(4) and Article 310 TFEU

Proximus argued that the formula set out in the tender specifications did not serve to select the most economically advantageous tender (and therefore was in breach of Article 110(4) TFEU), on the grounds that it reflected the relative price difference at the level of each service package, but failed to take into account differences in the total prices tendered. It also claimed that the formula discourages optimal financial tenders.

The court rejected all points of this argument, stating that the criteria adopted by a contracting authority to identify the most economically advantageous tender need not necessarily be quantitative or related solely to prices. It said that it is sufficient that such criteria can be applied objectively and uniformly in order to compare the tenders, and that they be clearly relevant for identifying the most economically

advantageous tender. Proximus failed to show that the council's formula was not capable of identifying the most economically advantageous tender.

Proximus also argued that the weighting system applied was arbitrary and that the council had breached Article 310 TFEU by not abiding to the principle of sound financial management. It was unsuccessful in both of these arguments.

2. Infringement of the general principles of transparency, non-discrimination and equal treatment

Proximus claimed that an evaluation method that does not give the best score to the tenderer offering the lowest price or cost infringes the general principles of transparency, non-discrimination and equal treatment.

The court disagreed, stating that it was apparent from the information put before it that the evaluation method and weightings of the service packages were clearly set out in the tender specifications.

Moreover, the information submitted did not indicate that the tenderers were not given the same information and treatment when the tenders were evaluated.

What does this mean for you?

In this case, the council had applied the correct methodology and was able to provide supporting evidence as proof. As such, it is essential that a contracting authority is comfortable that it has designed its evaluation method in a way that such criteria can be applied objectively and uniformly in order to compare the tenders, and that they be clearly relevant for identifying the most economically advantageous tender.

If you need help designing an evaluation methodology that is appropriate for your procurement of goods/services, please do get in touch.

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