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Judgment of the Court in Case C-415/23 P | OHB System v Commission

Galileo Programme: the judgment of the General Court dismissing OHB System's action against the award of the contract for transition satellites is set aside

The Court of Justice refers the case back to the General Court

In May 2018, the European Space Agency (ESA) launched a call for tenders for the supply of transition satellites for the Galileo programme. ¹ The European Commission acted as contracting authority in that procedure. ²

On the basis of the applications to participate received, the ESA selected three companies – OHB System (OHB), Airbus Defence and Space (ADS) and Thales Alenia Space Italia (TASI) – which were invited to submit their tenders.

At the end of that procedure, the Commission decided, first, to award the contract to TASI and to ADS and, second, not to accept OHB's tender, on the ground that it was not the most economically advantageous.

OHB challenged those decisions before the General Court of the European Union. During the tendering procedure, that company had informed the Commission that its former Chief Operating Officer who, at the time, had had extensive access to the project data for OHB's tender, had meanwhile joined ADS where he had been placed at the head of the department responsible for the tender submitted by ADS. Consequently, according to OHB, the sensitive information obtained by its former employee conferred an unfair advantage on ADS in the procedure in question.

However, the Commission took the view that there were not sufficient grounds to exclude ADS.

The General Court did not uphold the objections raised in that regard, and dismissed OHB's action seeking the annulment of the abovementioned Commission decisions. ³

On appeal, **the Court of Justice sets aside the judgment of the General Court and refers the case back to it.**

It notes that that **all contracts financed in whole or in part by the EU budget must comply, *inter alia*, with the principle of equal treatment** and must be put out to competition on the broadest possible basis. That principle requires that **all tenderers be afforded equality of opportunity when formulating their tenders, and that those tenders be subject to the same conditions.**

The contracting authority **must ensure compliance with the principle of equality at every stage of a tendering procedure.** This means that it must verify whether there are conflicts of interest and take appropriate measures to prevent, detect and remedy them.

It cannot be ruled out that the information obtained as a result of the recruitment of a former executive of the competitor gave an unjustified advantage to the tenderer that recruited him. Therefore, faced with doubts as to the autonomous and independent nature of the tender concerned, the Commission should have examined all the relevant circumstances which led to its submission.

Such an assessment should be triggered not only by direct evidence of an infringement of public procurement rules, but **also on the basis of objective and consistent indicia**.

According to the Court of Justice, in this instance, the General Court erred in law by failing to verify whether the Commission had complied with the principle of equal treatment. Since that verification is for the General Court to carry out, the case was referred back to it.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text and, as the case may be, an abstract](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355.

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¹ The aim of the Galileo programme is to create and operate a European satellite navigation and positioning system, specifically designed for civil purposes. This system consists of a constellation of satellites and a global network of ground stations.

² Under Article 15(1) of [Regulation \(EU\) No 1285/2013](#) of the European Parliament and of the Council of 11 December 2013 on the implementation and exploitation of European satellite navigation systems, the Commission had concluded a delegation agreement with ESA for the deployment phase of the Galileo programme.

³ Judgment of 26 April 2023, *OHB System v Commission*, [T-54/21](#) (see press release [No 66/23](#)).