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Judgment of the General Court in Case T-54/21 | OHB System v Commission

Galileo Programme: OHB System's action against award of transition satellite contract to Thales Alenia Space Italia and Airbus Defence & Space dismissed

According to the General Court, the Commission was not required to inquire more closely into OHB System's complaints against Airbus Defence & Space

By contract notice of 15 May 2018, [1] the European Space Agency (ESA), acting in the name and on behalf of the Commission, had launched a tendering procedure for the supply of transition satellites in the context of the Galileo programme, the aim of which is the implementation and exploitation of a European satellite navigation and positioning system for civil purposes. That procedure had been launched in the form of a competitive dialogue, since the Commission had already identified and defined its needs but had not yet determined the most appropriate specific means of meeting those needs. ESA was responsible for organising the tendering procedure, while the Commission remained the contracting authority. [2] It had been decided that two successful tenderers could be selected and that the award of the contract was to be based on the most economically advantageous tender.

At the end of the first phase of the competitive dialogue, inviting the submission of a request to participate, ESA selected three tenderers, namely OHB System AG (the applicant), Airbus Defence and Space GmbH (ADS), and Thales Alenia Space Italia (TASI). Following the second phase, which aimed to identify and determine the appropriate means of meeting the needs of the contracting authority, and the third phase, during which ESA invited the tenderers to submit their 'final offer', those final offers (tenders) were evaluated by an evaluation board which presented its results in an evaluation report. On the basis of that report, the Commission took the decision not to accept the applicant's tender and the decision to award the contract to TASI and ADS (together, 'the contested decisions'), which were communicated to the applicant by letter of 19 January 2021.

Prior to the adoption of the contested decisions, the applicant had, by letter of 23 December 2020, informed the Commission and ESA that one of the applicant's former employees (its former Chief Operating Officer), who had had extensive access to project data and had participated in the preparation of its tender, had been hired by ADS in December 2019. The applicant claimed that there were indications that this former employee had obtained sensitive information and that a national criminal investigation had been opened following a complaint filed by the former against the latter. Accordingly, it had asked the Commission to suspend the competitive dialogue at issue, to inquire into the matter and, if necessary, to exclude ADS from that dialogue. By letter of 20 January 2021, the Commission informed the applicant that there were insufficient grounds for such a suspension and that, as the allegations were the subject of an investigation by the national authorities, in the absence of a final judgment or a final administrative decision concerning those allegations, there was no ground for excluding ADS from the competitive dialogue at issue.

[1] Contract notice published in the Supplement to the Official Journal of the European Union of 15 May 2018 (OJ 2018/S 091-206089).

[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 and repealing Council Regulation (EC) No 876/2002 and Regulation (EC) No 683/2008 of the European Parliament and of the Council (OJ 2013 L 347, p. 1), the Commission had concluded a delegation agreement with ESA for the deployment phase of the Galileo programme.

Hearing an action for annulment – which it dismisses in its entirety – against the contested decisions, the General Court provides, in particular, explanations as regards (i) the application of the criteria for excluding a tenderer and (ii) referring the matter to a panel pursuant to the Financial Regulation of 2018. [3] It also does so with regard to the obligation to check the composition of a tender deemed to be abnormally low and the autonomy of the award decision in cases where the contracting authority merely endorses the reasoning set out in the evaluation report.

Findings of the General Court

In the first place, the General Court rejects the complaint based on an alleged breach of the criteria for excluding a tenderer which are laid down by the Financial Regulation of 2018.

Before doing so, it recalls that a contracting authority is to exclude a tenderer from participating in a tendering procedure when it finds itself in one or more of the situations corresponding to the three exclusion criteria which are laid down by the Financial Regulation of 2018.

In the present case, the General Court finds that, in the absence, at the time of the competitive dialogue, of a final judgment or a final administrative decision establishing serious professional misconduct on the part of the tenderer concerned or on the part of a natural or legal person who was a member of the administrative, management or supervisory body of, or had powers of representation, decision or control with regard to, that tenderer, the first two criteria are not applicable. Pursuant to the third exclusion criterion, which is the only criterion capable of being applied in the present case, in the absence of a final judgment or a final administrative decision, the contracting authority may take a decision to exclude a tenderer from a tendering procedure only on the basis of a preliminary classification, [4] and only after having obtained a recommendation from the panel referred to in Article 143 of the Financial Regulation of 2018, under which it is established, in view of the facts and findings, that there has been serious professional misconduct on the part of the tenderer.

To begin with, the General Court examines whether, by failing to refer the matter to that panel in the present case, the Commission failed to fulfil its obligations, in breach of the third exclusion criterion.

In this regard, it notes that the underlying purpose of referring a matter to a panel is the protection of the financial interests of the Union, and that the preliminary classification in law, which is only for the panel, necessarily concerns, first, the conduct of the tenderers themselves and, secondly, the facts or findings established, in essence, in the context of audits or investigations conducted by the competent authorities of the European Union or, where appropriate, of the Member States. The General Court concludes from this that the contracting authority must refer the matter to the panel only when the established facts available to it constitute evidence, and not mere suspicions, sufficient to support a presumption of guilt on the part of the tenderer. In the present case, however, it finds that, first, the letter of 23 December 2020 was the only evidence available to the Commission concerning an alleged instance of wrongful conduct on the part of ADS. Secondly, the allegations made by the applicant in that letter were not facts and findings established in the context of audits or investigations conducted by the competent authorities of the European Union or by the Member States. Thirdly, that letter was not accompanied by any evidence capable of supporting the allegations mentioned therein. Fourthly, the complaints made did not concern the conduct of ADS but the alleged behaviour of the applicant's former employee.

The General Court concludes from this that those allegations could not be regarded as facts or findings capable of constituting sufficient evidence to support a presumption of guilt on the part of ADS, justifying referring the matter to the panel.

Having reached that conclusion, the General Court ascertains whether the Commission was nevertheless required to inquire into those allegations. In that regard, it observes that **the only conduct of which ADS was accused was of having hired, during the tendering procedure at issue, one of the applicant's former employees. In principle, that fact does not, in itself, constitute evidence of behaviour capable of constituting serious professional misconduct**.

Likewise, **as regards the applicant's complaint that its former employee had breached business secrecy**

[3] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1), and more specifically Articles 136 and 145 thereof.

[4] Within the meaning of Article 136(2) of the Financial Regulation of 2018.

inasmuch as he had unlawfully obtained sensitive information concerning the applicant, which was likely to give ADS an unfair advantage during the competitive dialogue at issue, the General Court considers that such a breach would not, in any event, constitute evidence of conduct on the part of ADS itself and would therefore not be capable of establishing a presumption of guilt on the latter's part. **In addition**, in the absence of concrete arguments and evidence produced by the applicant in its letter of December 2020, the General Court finds that **the allegation as regards the obtaining of sensitive information which was likely to have given ADS an unfair advantage was vague and hypothetical**, with the result that it cannot constitute evidence. Moreover, the General Court notes that the former employee had left the applicant shortly after the submission of the latter's revised tender in the context of the second phase of the competitive dialogue, with the result that he was not, in any event, in a position to obtain information regarding either the dialogue which took place between the applicant and ESA during the third phase or the content of the applicant's final tender.

Consequently, since the allegations contained in the letter of December 2020 were not capable of constituting sufficient evidence to establish a presumption of guilt on the part of ADS, justifying referring the matter to the panel, the **Commission was not required to conduct an investigation** in respect of those allegations.

In the second place, the General Court rejects the complaint alleging failure to fulfil obligations relating to the examination of abnormally low tenders. It recalls that, under the provisions of the Financial Regulation of 2018, the assessment by the contracting authority of the existence of abnormally low tenders, a concept which is assessed in relation to the composition of the tender and the supply in question, takes place in two stages.[5] First, the contracting authority must assess whether the tenders submitted contain evidence likely to arouse the suspicion that they could be abnormally low. This is, in particular, the case if it appears uncertain (i) that the tender complies with the legislation in force and (ii) that the price proposed includes all the costs associated with the technical aspects of the tender. The same applies when the price proposed is considerably lower than that of other tenders or the usual market price. Secondly, if such evidence exists, the contracting authority must check the composition of the tender, giving the tenderer concerned the opportunity to justify its price. If, despite the explanations provided, the contracting authority determines that the tender is abnormally low, it must reject that tender.

In this instance, the General Court finds that the difference between the price of ADS' final tender and that of the other tenders cannot, in itself, constitute evidence of the abnormally low nature of that tender, in view of the specificities of the contract in question. First, the tendering procedure was launched in the form of a competitive dialogue, since the Commission had not yet determined the specific means of meeting its needs. Thus, the prices of the tenders depended on the different solutions and technical means proposed by each tenderer. Secondly, it follows from the specific characteristics of the satellites in question that they are not goods for which there is a standard price or a market price. Furthermore, beyond the price difference, the applicant has not put forward any concrete argument in support of its allegation that ADS' tender should have appeared to be abnormally low.

The General Court concludes that **it has not been established that there was evidence such as to arouse the Commission's suspicion that ADS' tender could be abnormally low**. Consequently, the Commission was not required to check the composition of ADS' tender in order to ensure that the tender was not abnormally low.

In the third place, the General Court rejects the complaint that, by merely confirming the findings set out in the evaluation report, the Commission failed to fulfil its obligation to adopt an independent decision as to the award of the contract.

First, it is true that the Commission has overall responsibility for the Galileo programme and, for the deployment phase of that programme, must conclude a delegation agreement with ESA specifying the latter's tasks, in particular as regards the award of contracts relating to the system. It is precisely within the framework of the delegation agreement which was concluded between the Commission and ESA that the latter, acting in the name and on behalf of the former, was responsible for organising the competitive dialogue at issue, whereas the Commission remained the contracting authority. However, responsibility for the Galileo programme cannot alter or add to the Commission's obligations as contracting authority.

Secondly, in cases where an evaluation committee has been appointed by the contracting authority, under the Financial Regulation of 2018, it is for that committee to evaluate the tenders in its evaluation report. Although the contracting authority is not bound by that report, it is entitled to rely on it to award the contract in question.

[5] First subparagraph of point 23.1, as well as point 23.2, of Section 2 of Chapter 1 of Annex I to the Financial Regulation of 2018.

Accordingly, **the fact that the contested decisions were reasoned by reference to the evaluation report, with the Commission endorsing the opinion of the evaluation board responsible for evaluating the tenders submitted, in no way detracts from the fact that those decisions were adopted independently**.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

The full text of the judgment is published on the CURIA website on the day of delivery.

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