



C/2023/1430

18.12.2023

Appeal brought on 5 July 2023 by OHB System AG against the judgment of the General Court (Sixth Chamber) delivered on 26 April 2023 in Case T-54/21, OHB System AG v European Commission

(Case C-415/23 P)

(C/2023/1430)

Language of the case: German

Parties

Appellant: OHB System AG (represented by: W. Würfel, Rechtsanwalt)

Other parties to the proceedings: European Commission, Italian Republic, Airbus Defence and Space GmbH

Form of order sought

The appellant claims that the Court should:

- set aside the judgment of the General Court of 26 April 2023 in Case T-54/21 *OHB System v Commission* as set out in the operative part of the decision and annul the decision of the European Commission, notified to the appellant on 19 January 2021, not to award public contract No 2018/S 091-206089 to the appellant and the decision of the European Commission, notified to the appellant by letter of 22 January 2021, to award that contract to Thales Alenia Space Italia (TASI) and Airbus Defence and Space GmbH (ADS);
- in the alternative, set aside the judgment of the General Court as set out in the operative part of the decision and refer the case back to the General Court;
- order the European Commission to pay the costs of the proceedings.

Grounds of appeal and main arguments

In support of its appeal, the appellant raises the following grounds of appeal:

1. Error of law in the interpretation and application of the principle of equal treatment

The General Court erred in its interpretation and application of the principle of equal treatment applicable to procurement procedures pursuant to Article 160(1) of Regulation (EU, Euratom) 2018/1046.⁽¹⁾ In particular, the General Court erroneously assumed that a tender could be excluded only if the exclusion criteria in Article 136 of Regulation 2018/1046 are satisfied. The General Court therefore omitted to examine whether the tender from ADS should have been excluded owing to a failure to observe the principle of equal treatment. The General Court did not examine whether the European Commission failed to observe the principle of equal treatment based on the standard of review applicable to the principle of equality, but applied the standard of review under Article 136 of Regulation 2018/1046.

In addition, the General Court failed to have regard to the principles established by the Court of Justice relating to the standard of proof in procurement procedures based on the principle of effectiveness.

2. Incomplete legal classification of the facts

The appellant further argues that the General Court's legal classification of the facts was incomplete since it failed to deal with the substance of the submissions in the appellant's second letter of complaint of 28 January 2021, even though they related to important facts which should have been taken into account when examining whether the European Commission had failed to observe the principle of equality. The General Court relied solely on the fact that the European Commission had received that letter subsequent to the award decision and did not examine whether the European Commission, after a due assessment, should have suspended the signing of the contract.

⁽¹⁾ 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).

3. No examination of whether there was a failure to state reasons

Lastly, the General Court failed to examine a breach of the duty to state reasons in the context of the second plea in law. An unsuccessful tenderer who so requests must be informed of the reasons why the contracting authority considers that the selected tender is not abnormally low. The General Court did not examine whether the European Commission should have informed the appellant, further to its request of 28 January 2021, why the tender from ADS was not abnormally low. The General Court therefore failed to comply with its duty to examine (of its own motion) whether there was a failure to state reasons.
