Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

26 April 2023*

(Public supply contracts – Tendering procedure – Competitive dialogue – Procurement of Galileo transition satellites – Rejection of a tenderer's tender – Exclusion criteria – Serious professional misconduct on the part of a tenderer – No final judgment or final administrative decision – Referral to the panel referred to in Article 143 of the Financial Regulation – Equal treatment – Abnormally low tender – Manifest error of assessment)

In Case T-54/21,

OHB System AG, established in Bremen (Germany), represented by W. Würfel and F. Hausmann, lawyers,

applicant,

v

European Commission, represented by G. Wilms, L. André, J. Estrada de Solà and L. Mantl, acting as Agents,

defendant,

supported by

Italian Republic, represented by G. Palmieri, acting as Agent, and by P. Gentili and G. Santini, lawyers,

and by

Airbus Defence and Space GmbH, established in Taufkirchen (Germany), represented by P.-E. Partsch, F. Dewald and C.-E. Seestädt, lawyers,

interveners,

THE GENERAL COURT (Sixth Chamber),

composed of M.J. Costeira (Rapporteur), President, M. Kancheva and P. Zilgalvis, Judges,

Registrar: P. Cullen, Administrator,

* Language of the case: German.

having regard to the order of 26 May 2021, *OHB System* v *Commission* (T-54/21 R, not published, EU:T:2021:292),

having regard to the written part of the procedure, in particular:

– the order of 30 June 2021, *OHB System* v *Commission* (T-54/21, not published),

– the order of 2 December 2021, *OHB System* v *Commission* (T-54/21, not published, EU:T:2021:878),

– the measures of organisation of procedure of 17 October 2022 and the Commission's reply lodged at the Court Registry on 29 October 2022,

further to the hearing on 17 November 2022,

gives the following

Judgment [1]

1 By its action under Article 263 TFEU, the applicant, OHB System AG, seeks annulment of the decisions of the European Commission, communicated to the applicant by letter of 19 January 2021 and by fax of 22 January 2021, not to accept its tender, submitted in the context of Call for Tenders in the form of a competitive dialogue 2018/S 091-206089 relating to the procurement of Galileo transition satellites, and to award the contract to two other tenderers ('the contested decisions').

Background to the dispute

2 The applicant is a company governed by German law whose object is the development and implementation of innovative space systems and projects and the marketing of specific aeronautic, space and telematic products, including low-altitude geostationary satellites.

3 Under recital 2 and Article 2(1) and (2) 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 aim of the Galileo programme is to establish and operate a European satellite navigation and positioning system specifically designed for civilian purposes, consisting of a constellation of satellites and a global network of ground stations.

4 Article 12(1) of Regulation No 1285/2013 provides that the Commission is to have overall responsibility for the Galileo programme and, in accordance with Article 15(1) of that regulation, for the deployment phase of that programme, it is to conclude a delegation agreement with the European Space Agency (ESA) specifying the latter's tasks, in particular as regards the award of contracts relating to the system.

[1] Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

5 Under the delegation agreement concluded between the Commission and ESA for the deployment phase of the Galileo programme, ESA is responsible for organising the public procurement procedures connected with that programme and the Commission remains the contracting authority.

6 By contract notice of 15 May 2018, published in the Supplement to the *Official Journal of the European Union* of 15 May 2018 (OJ 2018/S 091-206089) and on the website 'emits.esa.int', ESA, acting in the name and on behalf of the Commission, launched a tendering procedure for the supply of Galileo transition satellites, in the form of a competitive dialogue ('the competitive dialogue at issue'). The procedure was launched in that form, since the Commission had already identified and defined its needs but had not yet determined the most appropriate specific means of meeting those needs.

7 The competitive dialogue concerned the procurement of an initial number of four (and possibly up to 12) Galileo transition satellites with evolved specifications to ensure the transition from the first generation to the second generation of Galileo satellites. It was decided to pursue multiple sourcing, in accordance with Article 19(d) of Regulation No 1285/2013, under which two successful tenderers could be selected and two contracts could be signed for the parallel supply of a projected number of two satellites each.

8 The award of the contract was based on the most economically advantageous tender, according to two award criteria: price, weighted at 35%, and quality, weighted overall at 65%. The qualitative criterion was divided into five sub-criteria. The first sub-criterion, weighted at 10%, related to the adequacy and appropriateness of human and technical resources and facilities proposed by the tenderer with respect to the technical and programmatic solution described in the proposal. The second sub-criterion, weighted at 25%, related to understanding of the requirements and objectives, including security, maturity and qualification status of the proposed design, adequacy, soundness and robustness of the proposed design and compliance with technical requirements. The third sub-criterion, weighted at 30%, related to quality and suitability of the proposed programme of work and compliance with the statement of work, adequacy of engineering, testing and verification approach, identification of risks and proposals for risk mitigation, including technological diversification. The fourth sub-criterion, weighted at 25%, related to the adequacy of management, costing and planning for the execution of the work. The fifth sub-criterion, weighted at 10%, related to compliance with tender conditions and contract conditions.

9 The competitive dialogue at issue was conducted in three phases. The first and the second phases were conducted in accordance with the provisions of Regulation No 1285/2013 and of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1), and of Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation No 966/2012 (OJ 2012 L 362, p. 1). The third phase was conducted in accordance with the provisions of Regulation No 1285/2013 and 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 No 966/2012 (OJ 2018 L 193, p. 1, 'the Financial Regulation').

10 The first phase of the competitive dialogue at issue began in May 2018 with the publication by ESA of a 'notice inviting applications to participate'.

11 On the basis of the applications to participate received, ESA selected three tenderers, namely the applicant, Airbus Defence and Space GmbH ('ADS') and Thales Alenia Space Italia ('TASI') (together 'the tenderers').

12 The second phase began in July 2018 and aimed to identify and define the appropriate means of best meeting the needs of the contracting authority. First, ESA invited tenderers to submit a 'preliminary proposal' and sent them, inter alia, the 'special conditions of tender for invitation to submit a preliminary proposal'. Secondly, after a period of dialogue, ESA invited tenderers to submit a 'refined proposal' and sent them, inter alia, the 'conditions of tender for invitation to submit a refined proposal'. On 26 September 2018, the applicant submitted its preliminary proposal and, on 11 October 2019, it submitted its refined proposal.

13 The third phase began in August 2020 and, following another period of dialogue, ESA invited tenderers to submit their 'final offer' and sent them, inter alia, the 'conditions of tender for invitation to submit a final offer'. On 11 October 2020, the applicant submitted its final offer.

14 Between October and December 2020, the tenderers' final offers were evaluated by an evaluation committee, composed of representatives of ESA, the European Global Navigation Satellite Systems (GNSS) Agency (GSA) and the Commission, which presented the results of the evaluation in an evaluation report ('the evaluation report').

15 By letter of 23 December 2020 to the Commission and copied to, among others, ESA ('the letter of 23 December 2020'), the applicant, in essence, asked the Commission, first of all, to suspend the competitive dialogue at issue, on the ground of a 'suspicion of breach of its business secrets by an employee of ADS'; next, to investigate the matter; and, lastly, if appropriate, to exclude ADS from the competitive dialogue at issue.

16 In that letter, the applicant informed the Commission, in essence, as follows: first, Mr [*confidential*] [2] ('the former employee') had worked for the applicant from 22 December 2016 until the end of November 2019 and, as Chief Operating Officer, had had wide access to the project data and had participated in preparing the tender submitted by the applicant in the context of the competitive dialogue at issue. In particular, he had been involved in the 'strategy' of the technical part of its tender and also in the 'strategy' concerning price and the calculation of the price. Second, on 11 November 2019, following a request to that effect by the former employee, he and the applicant had signed an early termination of his contract of employment. Third, in December 2019, ADS had hired the former employee and during 2020 he had held a post at ADS which placed him at the head of the department responsible for the tender submitted by ADS in the context of the competitive dialogue at issue. In addition, there was evidence that the former employee had obtained sensitive information belonging to the applicant that might confer unfair advantages on ADS in the context of the competitive dialogue at issue. Fourth, the applicant had ordered an examination of the computer which the former employee had used on the applicant's premises, while employed by the latter, which had revealed documents showing that, first of all, he had intended to change employer since June 2019; then, in the course of the negotiations for his employment by ADS, he had informed ADS, inter alia, that by hiring him it would have advantages in projects in which it was in competition with the applicant; and, lastly, there was

[2] Confidential data omitted.

evidence that the former employee had copied confidential files belonging to the applicant. Fifth, the abovementioned circumstances were the subject of a criminal investigation by the competent prosecuting authority in Germany, following a complaint against the former employee lodged by the applicant in March 2020.

17 On the basis of the evaluation report, the Commission decided not to accept the applicant's offer and to accept the offers submitted by TASI and ADS. The contested decisions were communicated to the applicant by ESA by letter of 19 January 2021 and by fax of 22 January 2021.

18 By the letter of 19 January 2021, ESA informed the applicant of the decision not to accept its offer, on the ground that it was not the economically most advantageous offer. In an annex to that letter, it sent the applicant an extract from the evaluation, by the evaluation committee, of its final offer in the light of the five sub-criteria of the qualitative criterion.

19 Subsequently, by fax of 20 January 2021, the applicant asked ESA to communicate the information about the successful tenderers, the characteristics and the relative advantages of their offers, the total price used to establish the classification and the detailed evaluation of its own offer.

20 By letter of 20 January 2021, the Commission, referring to the letter of 23 December 2020, informed the applicant, first, that there were insufficient grounds for a suspension of the competitive dialogue at issue at that stage; second, that the allegations of unlawful appropriation of the applicant's business secrets were already the subject of an investigation by the national authorities, on the findings of which it might rely and take additional measures, if necessary; and, third, that those allegations were not established by a final judgment or a final administrative decision, within the meaning of Article 136(1) of the Financial Regulation, and that there was therefore no ground for excluding ADS from the competitive dialogue at issue.

21 By fax of 22 January 2021, ESA communicated to the applicant the names of the successful tenderers, namely TASI and ADS, the total price and final classification of their offers and the classification of their offers according to the five sub-criteria of the qualitative criterion. In an annex to that letter, ESA sent the applicant the detailed results of the assessment of its offer in the light of the five sub-criteria of the qualitative criterion.

22 The tenderers' offers were classified as follows: TASI's offer in first place, ADS's offer in second place and the applicant's offer in third place. The offers were evaluated by reference to the two award criteria mentioned in paragraph 8 above. As regards the qualitative criterion, TASI's, ADS's and the applicant's offers were classified, respectively, in first, second and third place. As regards the price criterion, ADS's offer, with a total price of EUR 707 679 174.75, TASI's offer, with a total price of EUR 804 127 000.00, and the applicant's offer, with a total price of EUR 822 786 000.00, were classified, respectively, in first, second and third place.

23 By letter of 28 January 2021, the applicant asked the Commission, first, to exclude ADS from the competitive dialogue at issue; second, to amend the contested decisions by awarding it the contract; third, to grant it access to the entire file relating to the competitive dialogue at issue and to the evaluation report; and, fourth, not to sign the contracts until a decision had been taken on the objections which it had raised. In that letter, the applicant maintained that ADS should be excluded, since it had breached the principle of the secrecy of the competition by involving the former employee in preparing its offer and, in addition, its offer was abnormally low.

Forms of order sought

24 The applicant claims that the Court should:

– annul the contested decisions;

– order the Commission to grant the applicant access to the file relating to the competitive dialogue at issue;

– order the Commission to pay the costs.

25 The Commission contends that the Court should:

– dismiss the action as inadmissible in part and as unfounded in part;

– order the applicant to pay the costs.

26 The Italian Republic and ADS submit that the Court should dismiss the action.

Law

…

Substance

…

The first plea in law: breach of the exclusion criteria laid down in Article 136 of the Financial Regulation and of the principles of equal treatment and 'secret competition'

…

– The first part of the first plea: breach of the exclusion criteria laid down in Article 136 of the Financial Regulation

53 In the first place, the applicant maintains that the decision to award part of the contract to ADS infringes Article 136 and Article 167(1)(b) of the Financial Regulation, in so far as ADS ought to have been excluded from the competitive dialogue at issue.

54 First of all, the applicant argues that ADS ought to have been excluded from the competitive dialogue at issue on the basis of Article 136(1)(c)(ii) and (v) of the Financial Regulation, on account of, first, the existence of a presumption of an anti-competitive agreement or tacit arrangement between ADS and the former employee with the aim of distorting competition with the applicant in the context of the competitive dialogue at issue and, second, the fact that, in hiring the former employee, ADS is presumed to have attempted to obtain confidential information belonging to the applicant that may confer upon it an unfair advantage in the competitive dialogue at issue.

55 Next, the applicant claims that, in the absence of a final judgment or a final administrative decision, ADS ought to have been excluded on the basis of a preliminary classification in law provided for in Article 136(2) of the Financial Regulation. In addition, it maintains that the Commission ought to have investigated the facts and obtained information from ADS.

56 Lastly, the applicant argues that ADS ought to have been excluded on the basis of Article 136(4)(a) of the Financial Regulation, since the former employee occupies a management post at ADS and is in one of the situations referred to in Article 136(1)(c) of the Financial Regulation.

57 The Commission and the interveners dispute those arguments.

58 As a preliminary point, it should be noted that Article 167(1)(b) of the Financial Regulation provides that contracts are to be awarded on the basis of award criteria provided that the contracting authority has verified that the candidate or tenderer is not excluded under Article 136 or rejected under Article 141 of that regulation.

59 As regards the exclusion criteria, it follows from Article 136(1) of the Financial Regulation that 'the authorising officer responsible shall exclude a person or entity referred to in Article 135(2) from participating in award procedures governed by this Regulation … where that person or entity is in one or more of the … exclusion situations' laid down in Article 136(1)(a) to (h) of that regulation. In particular, in the words of Article 136(1)(c)(ii) and (v) of that regulation, 'the authorising officer responsible shall exclude a person or entity referred to in Article 135(2) from participating in award procedures governed by this Regulation … where … (c) it has been established by a final judgment or a final administrative decision that the person or entity is in breach is guilty of grave professional misconduct … including, in particular, … (ii) entering into an agreement with other persons or entities with the aim of distorting competition [or] (v) attempting to obtain confidential information that may confer upon it undue advantages in the award procedure'.

60 Furthermore, under Article 136(4)(a) of the Financial Regulation, the authorising officer responsible is to exclude a person or entity referred to in Article 135(2) where 'a natural or legal person who is a member of the administrative, management or supervisory body of the person or entity referred to in Article 135(2), or who has powers of representation, decision or control with regard to that person or entity, is in one or more of the situations referred to in points (c) to (h) [of Article 136](1)'.

61 Furthermore, the first subparagraph of Article 136(2) of the Financial Regulation provides that, 'in the absence of a final judgment or, where applicable, a final administrative decision in the cases referred to in points (c), (d), (f), (g) and (h) of paragraph 1 [of this Article], the authorising officer responsible shall exclude a person or entity referred to in Article 135(2) on the basis of a preliminary classification in law of a conduct as referred to [in points (c), (d), (f), (g) and (h)], having regard to established facts or other findings contained in the recommendation of the panel referred to in Article 143 [of that regulation]'.

62 It follows, in particular, from the abovementioned provisions that a contracting authority is to exclude a tenderer from participating in a procurement procedure where that tenderer is in one or more of the situations corresponding to the three exclusion criteria referred to in paragraphs 59 to 61 above.

63 Thus, the first exclusion criterion, laid down in Article 136(1)(c)(ii) and (v), read in conjunction with Article 135(2)(a) of the Financial Regulation, corresponds to the situation in which it has been established by a final judgment or a final administrative decision that the tenderer is guilty of serious professional misconduct by having engaged in one of the conducts referred to in Article 136(1)(c)(ii) and (v) of the Financial Regulation, namely entering into agreement with other persons or entities with the aim of distorting competition or attempting to obtain confidential information that may confer upon it unfair advantages in the award procedure.

64 The second exclusion criterion, laid down in Article 136(4)(a), read in conjunction with Article 135(2)(a) and Article 136(1)(c)(ii) and (v) of the Financial Regulation, corresponds to situations in which it has been established by a final judgment or a final administrative decision that a natural or legal person who is a member of the administrative, management or supervisory body of the tenderer or who has powers of representation, decision or control with regard to the tenderer is guilty of serious professional misconduct, by engaging in one of the conducts referred to in Article 136(1)(c)(ii) and (v) of the Financial Regulation.

65 The third exclusion criterion, laid down in the first subparagraph of Article 136(2), read in conjunction with Article 135(2)(a), Article 136(1)(c)(ii) and (v) and Article 143(6(a) of the Financial Regulation, corresponds to the situation in which, in the absence of a final judgment or a final administrative decision, it has been established by a preliminary classification in law, contained in the recommendation of the panel referred to in Article 143 of the Financial Regulation ('the panel'), that the tenderer is guilty of serious professional misconduct, by engaging in one of the conducts referred to in Article 136(1)(c)(ii) and (v) of that regulation. In accordance with Article 135(4) of the Financial Regulation, the contracting authority can take a decision to exclude a tenderer on the basis of a preliminary classification referred to in Article 136(2) only after having obtained a recommendation of the panel.

66 In the present case, the conditions for the application of the first exclusion criterion, which are referred to in paragraph 63 above, are not satisfied. It is common ground that, at the time of the competitive dialogue at issue, there was no final judgment or final administrative decision, within the meaning of Article 136(1)(c) of the Financial Regulation, relating to ADS.

67 As regards the second exclusion criterion, it follows from the provisions of the Financial Regulation referred to in paragraph 64 above that the tenderer can be excluded only if the serious professional misconduct of the natural or legal person who is a member of its administrative, management or supervisory body has been established by a final judgment or a final administrative decision.

68 Even on the assumption that the former employee may be regarded as a member of ADS's administrative, management or supervisory body, for the purposes of Article 136(4)(a) of the Financial Regulation, the existence of a final decision or a final administrative decision with regard to the former employee is not apparent from the file, nor has it been alleged by the applicant. As regards the former employee's conduct, it is apparent from the file that the complaint, lodged by the applicant against the former employee before the competent prosecuting authority in Germany, was the subject of a decision of 10 December 2020 to take no further action and that the 'administrative complaint' which the applicant had lodged against that decision to take no further action was rejected by decision of the competent prosecuting authority on 1 March 2021.

69 Accordingly, a breach of the first and second exclusion criteria, referred to in paragraphs 63 and 64 above, has not been established in the present case.

70 As regards the third exclusion criterion, it should be borne in mind that, as is apparent from paragraph 65 above, a tenderer can be excluded from a procurement procedure only on the basis of a preliminary classification in law of its conduct, in the light of the facts or findings established in the recommendation issued by the panel.

71 In the present case, it is common ground that the Commission did not refer the matter to that panel. The question is therefore whether, in failing to do so, the Commission failed to fulfil its obligations under the first subparagraph of Article 136(2) and Article 143 of the Financial Regulation, in breach of the third exclusion criterion.

72 As a preliminary point, a few observations are called for as to the reference to the panel and the preliminary classification in law on the basis of which a tenderer may be excluded from a procurement procedure.

73 In the first place, the underlying objective of the reference to the panel in order to obtain a recommendation containing, where appropriate, a preliminary classification in law of the conduct of a tenderer on the basis of which the latter may be excluded from a tendering procedure is the protection of the financial interests of the European Union against conduct that poses a risk to those interests. The first subparagraph of Article 135(1) of the Financial Regulation provides that, 'in order to protect the financial interests of the Union, the Commission shall set up and operate an early detection and exclusion system'. According to the second subparagraph of Article 135(1) of the Financial Regulation, the purpose of that system is to facilitate, in particular, '(a) the early detection of persons or entities referred to in paragraph 2, which pose a risk to the financial interests of the Union' and '(b) the exclusion of persons or entities referred to in paragraph 2, which are in one of the exclusion situations referred to in Article 136(1)'.

74 In the second place, the preliminary classification in law is solely a matter for the panel, 'in order to ensure a centralised assessment of those situations' in the context of the early detection and exclusion system under Article 135(4) of the Financial Regulation.

75 In the third place, the preliminary classification in law necessarily relates to the conduct of the tenderers themselves. As is apparent from the provisions referred to in paragraphs 61 and 65 above, the preliminary classification in law can relate only to facts or findings referred to in Article 136(1)(c), (d), (f), (g) and (h) of that regulation and therefore solely to the conduct of the persons or entities referred to in Article 135(2) of that regulation.

76 In the fourth place, the preliminary classification in law relates to facts or findings established, in essence, in the course of audits or investigations carried out by the competent authorities of the European Union or, where appropriate, of the Member States. In that respect, it should be borne in mind that Article 142(2)(b) and (c) of the Financial Regulation provides that the early detection of the risks that threaten the financial interests of the European Union is to be based on the transmission of information to the Commission by, among others, an authorising officer of the Commission, of a European office set up by the Commission or of an executive agency (Article 142(2)(b) of the Financial Regulation) or by a European Union institution, a European office or an agency other than those referred to in Article 142(2)(b) of that regulation (Article 142(2)(c) of the Financial Regulation) (see, by analogy, judgment of 16 May 2019, *Transtec* v *Commission*, T-228/18, EU:T:2019:336, paragraph 52).

77 It should also be borne in mind that the fourth subparagraph of Article 136(2) of the Financial Regulation provides as follows:

'The facts and findings referred to in the first subparagraph shall include, in particular:

(a) facts established in the context of audits or investigations carried out by EPPO in respect of those Member States participating in enhanced cooperation pursuant to Regulation (EU) 2017/1939, the Court of Auditors, OLAF or the internal auditor, or any other check, audit or control performed under the responsibility of the authorising officer;

(b) non-final administrative decisions which may include disciplinary measures taken by the competent supervisory body responsible for the verification of the application of standards of professional ethics;

(c) facts referred to in decisions of persons and entities implementing Union funds pursuant to point (c) of the first subparagraph of Article 62(1);

(d) information transmitted in accordance with point (d) of Article 142(2) by entities implementing Union funds pursuant to point (b) of the first subparagraph of Article 62(1);

(e) decisions of the Commission relating to the infringement of Union competition law or of a national competent authority relating to the infringement of Union or national competition law.'

78 In the fifth place, the contracting authority is required to refer the matter to the panel referred to in Article 143 of the Financial Regulation only where the established facts available to it constitute sufficient evidence to establish a presumption of the tenderer's guilt. As this Court has already held, it follows from all of the abovementioned provisions that, in the absence of a final judgment or a final administrative decision regarding a tenderer, a contracting authority must, where it has sufficient evidence to establish a presumption that that tenderer is guilty, inter alia, of serious professional misconduct, refer the case to the panel in order for it to issue a recommendation containing, where appropriate, a preliminary classification in law of the facts at issue (see, by analogy, judgment of 16 May 2019, *Transtec* v *Commission*, T-228/18, EU:T:2019:336, paragraph 53).

79 In addition, first, it should be noted that the requirement to have sufficient evidence in order to refer the case to the panel is consistent with the objectives of a system aimed at the early detection and exclusion of tenderers whose conduct constitutes a risk for the financial interests of the European Union (see paragraph 73 above). Second, that requirement follows from the principle of sound financial management and performance (see Title II, Chapter 7, of the Financial Regulation), in that it avoids delaying a procurement procedure without valid reason. Third, that requirement is a consequence of the role played by the panel, which is not responsible for carrying out investigations, but must issue a recommendation containing, where appropriate, a preliminary classification in law, relating to facts and findings previously established in the course of audits or investigations carried out by the competent authorities, including those of the European Union (see paragraph 76 above). Fourth, the requirement to have sufficient evidence follows from the scope of the preliminary classification in law, in so far as that classification relates to the conduct of a tenderer in the absence of a final judgment or a final decision (see paragraph 65 above) and cannot therefore be based on mere suspicions.

80 In the light of all of the foregoing, it must be ascertained whether, in the present case, the Commission was required to refer the matter to the panel so that it might issue a recommendation containing, where appropriate, a preliminary classification in law concerning ADS's conduct. It must therefore be ascertained whether the Commission had sufficient evidence to give rise to a presumption that ADS was guilty of serious professional misconduct threatening the financial interests of the European Union, including, in particular, entering into an agreement with other persons or other entities with the aim of distorting competition or attempting to obtain confidential information that may confer on it unfair advantages in the competitive dialogue at issue.

81 In the present case, it is apparent from the case file and from the pleadings submitted by the main parties that the only evidence which the Commission had relating to alleged misconduct by ADS was the letter of 23 December 2020. By that letter, the applicant, in essence, asked the Commission, first of all, to suspend the competitive dialogue at issue, on the ground of 'suspicion of breach of its business secrets by an employee of ADS' which, in the applicant's submission, resulted from factual evidence which it brought to the Commission's knowledge; next, to investigate the matter; and, lastly, if appropriate, to exclude ADS from the competitive dialogue at issue (see paragraph 15 above).

82 In that regard, first, it should be noted that the allegations which the applicant set out in the letter of 23 December 2020, and which are referred to in paragraph 16 above, are not among the facts and findings referred to in Article 136(2)(a) to (e) of the Financial Regulation.

83 Second, it should be observed that, although the applicant referred to an investigation procedure pending before the competent national authorities concerning the facts in question, that procedure followed a complaint by the applicant concerning the alleged breach by its former employee, and not by ADS, of the legislation of the Federal Republic of Germany on business secrets (see paragraph 16 above).

84 However, as is apparent from paragraph 75 above, the preliminary classification in law provided for in Article 136(2) of the Financial Regulation, and therefore the referral of the matter to the panel, can relate only to the conduct of the tenderers themselves. The alleged conduct of the former employee referred to in the letter of 23 December 2020 cannot therefore constitute sufficient evidence for the purpose of referring the matter to the panel.

85 Third, it should be observed that the letter of 23 December 2020 was not accompanied by any evidence capable of substantiating the allegations referred to in that letter.

86 It follows that the allegations referred to in the letter of 23 December 2020 could not be regarded as facts or findings capable of constituting sufficient evidence to support a presumption of ADS's guilt that justified referring the matter to the panel.

87 In that context, it must be ascertained whether the Commission was nonetheless required to investigate the allegations referred to in the letter of 23 December 2020.

88 In that regard, first, it should be observed that, in the letter of 23 December 2020, the applicant did not mention any specific conduct on ADS's part except the fact that it had hired the applicant's former employee (see paragraph 16 above). In principle, the fact that, in the course of a procurement procedure, a tenderer has hired the former employee of another tenderer does not in itself constitute conduct on the part of the first tenderer capable of constituting serious

professional misconduct. Conversely, participation in a procurement procedure cannot amount to preventing the exercise, during that procedure, of the rights of tenderers (and their employees or former employees) to enter into contracts of employment or to carry out acts covered by employment law.

89 Furthermore, it should be noted that, in the letter of 23 December 2020, the applicant referred to certain conduct not on the part of ADS but on the part of the applicant's former employee. More precisely, it referred to the fact that it had found on its former employee's computer a letter of intent dated 21 June 2019, addressed to the deputy chief executive officer of ADS, in which the former employee stated, in particular, that his move from the applicant to ADS 'm[ight] also change [the applicant's] prospects and competitive position against [ADS] in future acquisition objectives'. The applicant also maintained, in the letter of 23 December 2020, that examination of the former employee's computer showed that he might have copied the relevant data which he had received in the course of preparing the applicant's offer for the competitive dialogue at issue, namely details and technical concepts, strategies of offers, assessment of competitiveness, pricing strategies and details of prices. In that letter, the applicant also maintained that, in April 2020, or some months after hiring him, ADS had appointed the former employee as head of the entity involved in the competitive dialogue at issue, namely 'Head of Space Systems Germany', within which he performed the same duties as those which he had previously carried out with the applicant.

90 It must be stated that, by those allegations, the applicant claimed, in essence, that its former employee had breached business secrecy in that he had unlawfully obtained sensitive information belonging to the applicant, that may confer on ADS unfair advantages in the competitive dialogue at issue (see paragraph 16 above).

91 However, even on the assumption that it were substantiated, such a breach would not in any event constitute evidence of conduct on the part of ADS itself and would not therefore be capable of establishing a presumption of the latter's guilt.

92 Furthermore, it must be stated that, in the letter of 23 December 2020, the applicant put forward no specific argument aimed at showing that ADS had obtained, notably via the former employee, any sensitive information and had used that information in the context of the competitive dialogue at issue. Conversely, in that letter, the applicant merely claimed that ADS might have obtained sensitive information belonging to the applicant, that may confer on it unfair advantages in the context of the competitive dialogue at issue (see paragraph 16 above). That vague and hypothetical allegation cannot constitute sufficient evidence, within the meaning of the case-law referred to in paragraph 78 above.

93 The letter of 23 December 2020 contained no specific evidence enabling the identification of allegedly sensitive information belonging to the applicant, capable of having been obtained by the former employee, communicated to ADS and used by ADS in the context of the competitive dialogue at issue, thus conferring unfair advantages on it. In that letter, the applicant merely stated that the former employee had been involved in the 'strategy' of the technical part and in the 'strategy' concerning the price and the calculation of the price of its offer. Those over-general allegations do not provide any actual evidence permitting the identification of the supposed sensitive information that might be at issue.

94 In particular, at no point in the letter of 23 December 2020 does the applicant refer to any technical aspect of its tender that was allegedly communicated to ADS by its former employee and improperly used by ADS in the competitive dialogue at issue. Likewise, the 'strategy' of the price of the applicant's offer of which the former employee was supposedly aware is not specified in that letter.

95 In addition, it should be noted that it followed from the letter of 23 December 2020 that the former employee had left the applicant shortly after the applicant lodged its refined proposal in the context of the second phase of the competitive dialogue at issue. Thus, the former employee was not in any event in a position to have information about the dialogue which had taken place between the applicant and ESA during the third phase, or about the content of the applicant's final offer, which was submitted in October 2020, namely almost one year after the former employee had left the applicant (see paragraphs 13 and 16 above). Likewise, as is apparent from the case file and from the Commission's answers to questions put to it by the Court at the hearing, the 'conditions of tender for invitation to submit a final offer', which were sent to the tenderers in August 2020 (see paragraph 13 above), contained amendments by comparison with the preceding 'conditions of tender for invitation to submit a refined proposal'. In particular, the deadline for delivery of the satellites was brought forward by almost one year, the period within which the contracting authority could exercise the option to acquire other satellites in addition to the initial number (see paragraph 7 above) was extended by 14 months and the classification of certain satellites for single launch or double launch was amended. Such amendments cannot, by their nature, fail to have an impact on the technical and financial conditions submitted by the tenderers in their final offers.

96 It follows from the foregoing that the Commission was not required to investigate the allegations contained in the letter of 23 December 2020 in so far as, even on the assumption that they were substantiated, they were not of such a kind as to constitute sufficient evidence to establish a presumption of guilt on the part of ADS that would justify referring the matter to the panel.

97 Those findings are not called into question by the applicant's argument that ESA did not ask ADS for information about the former employee until 29 January 2021, namely after the contested decisions had been taken. Apart from the fact that that request was made following a second letter from the applicant, dated 28 January 2021 (see paragraph 23 above) and therefore itself subsequent to the contested decisions, the fact that information was requested from ADS after the contested decisions had been taken has no impact on the lawfulness of the contested decisions, since there was no obligation to refer the matter to the panel (see paragraph 86 above) and the applicant's allegations did not relate to an area subject to the investigative powers of the EU institutions, agencies or bodies (see paragraph 96 above).

98 Furthermore, it must be stated, as the Commission observes, that the applicant informed the Commission about its suspicions only in the letter of 23 December 2020, although it had ordered the examination of the former employee's computer in November 2019, as acknowledged in the application, and had lodged a complaint with the competent German authorities against the former employee in March 2020 (see paragraph 16 above). During that period, namely from November 2019 to December 2020, the competitive dialogue at issue proceeded from the second phase to the third phase, which began in August 2020, and the applicant submitted its final offer in October 2020 (see paragraph 13 above). That conduct on its part indicates that the applicant itself did not consider, at least during a long period and even when submitting its final offer, that the suspected conduct of the former employee was capable of conferring an unfair advantage on ADS in the context of the competitive dialogue at issue.

99 It follows from all of the foregoing that the Commission did not breach its obligation to refer the matter to the panel or, *a fortiori*, the third exclusion criterion referred to in paragraph 65 above.

100 The first part of the first plea must therefore be rejected as unfounded.

…

The second plea in law: breach of the obligation to examine abnormally low offers

113 The applicant maintains, in essence, that the Commission infringed paragraphs 23.1 and 23.2 of Section 2, Chapter 1, of Annex I to the Financial Regulation, in that it did not follow the two stages laid down therein in order to ensure that ADS's final offer was not abnormally low, although there was evidence to that effect. According to the applicant, the price of ADS's final offer was considerably lower than the prices of TASI's and the applicant's final offers, and, accordingly, the Commission could not merely state that that offer did not seem to it to be abnormally low.

114 The Commission and the interveners dispute those arguments.

115 The first subparagraph of paragraph 23.1 of Section 2, Chapter 1, of Annex I to the Financial Regulation provides that, if, for a given contract, the price or costs proposed in a tender appears to be abnormally low, the contracting authority is to request in writing details of the constituent elements of the price or costs which it considers relevant and is to give the tenderer the opportunity to present its observations. Paragraph 23.2 of Section 2, Chapter 1, of Annex 1 to that regulation provides that the contracting authority is to reject the tender only where the evidence supplied does not satisfactorily account for the low price or costs proposed.

116 It follows from those provisions that the assessment by the contracting authority of the existence of abnormally low tenders is made in two stages (see, by analogy, judgment of 4 July 2017, *European Dynamics Luxembourg and Others* v *European Union Agency for Railways*, T-392/15, EU:T:2017:462, paragraph 87).

117 In the first stage, the contracting authority must determine whether the tenders submitted 'appear' to be abnormally low (see paragraph 23.1 of Section 2, Chapter 1, of Annex I to the Financial Regulation). The use of the verb 'appear' in the Financial Regulation requires the contracting authority to carry out a prima facie assessment of the abnormally low nature of the tender. Therefore, the Financial Regulation does not require the contracting authority to carry out, on its own initiative, a detailed analysis of the composition of each tender in order to establish that it is not an abnormally low tender. Thus, in the first stage, the contracting authority need only determine whether the tenders submitted contain evidence likely to arouse suspicion that they might be abnormally low (see, by analogy, judgment of 4 July 2017, *European Dynamics Luxembourg and Others* v *European Union Agency for Railways*, T-392/15, EU:T:2017:462, paragraph 88).

118 In the second stage, if there is evidence which arouses suspicion that a tender may be abnormally low, the contracting authority must check the composition of the tender in order to ensure that it is not abnormally low. Where it carries out that check, the contracting authority must give the tenderer which submitted that bid the opportunity to set out the reasons why it considers that its tender is not abnormally low. Then, the contracting authority must assess the explanations

provided and determine whether the tender concerned is abnormally low, in which case it must be rejected (see, by analogy, judgment of 4 July 2017, *European Dynamics Luxembourg and Others* v *European Union Agency for Railways*, T-392/15, EU:T:2017:462, paragraph 89).

119 The concept of 'abnormally low tender' is not defined in the Financial Regulation. However, it has been held that the abnormally low nature of a tender must be assessed by reference to the composition of the tender and the services at issue (see, by analogy, judgment of 16 May 2019, *Transtec* v *Commission*, T-228/18, EU:T:2019:336, paragraph 69 (not published and the case-law cited)).

120 In addition, it follows from the case-law that evidence capable of arousing suspicion that a tender might be abnormally law may exist, inter alia, if it appears to be uncertain, first, that a tender complies with the legislation of the country in which the services should be provided, in terms of the remuneration of the staff, contributions to the social security scheme, compliance with health and safety at work standards and sales at a loss, and, second, that the price proposed incorporates all the costs involved in the technical aspects of the tender. The same applies where the price proposed in a tender which has been submitted is considerably lower than the price of the other tenders submitted or than the normal market price (see judgment of 16 May 2019, *Transtec* v *Commission*, T-228/18, EU:T:2019:336, paragraph 72 (not published) and the case-law cited).

121 The applicant claims that the difference between the price of ADS's final offer and the prices of the other tenderers' final offers constituted evidence likely to arouse suspicion that ADS's tender might be abnormally low, which should have led the Commission to check the composition of that tender in order to ensure that it was not abnormally low.

122 In the present case, it is apparent from the case file that the Commission accepted ADS's tender on the basis of the classification of the tenders by the evaluation committee (see paragraph 17 above). Thus, as ADS's tender was accepted, it follows implicitly, but necessarily, that the Commission, like the evaluation committee, considered that there was no evidence that that tender was abnormally low and that, consequently, there was no need to ask for details about the composition of that tender. That assessment is not called into question by the applicant's arguments.

123 In the first place, it is indeed true that there is a difference between the price of ADS's tender and the prices of TASI's and the applicant's tenders, a difference of 11.99% and 13.9% respectively, namely the difference between EUR 707 679 174.75 and, respectively, EUR 804 127 000 and EUR 822 786 000. However, it has already been held that the mere fact that the price of the successful tenderer's bid is lower than that of the bid of another tenderer was not in itself capable of showing that the successful tenderer's bid was abnormally low. A tender may be less expensive than another tender without being abnormally low (see judgment of 26 January 2017, *TV1* v *Commission*, T-700/14, not published, EU:T:2017:35, paragraph 58 and the case-law cited).

124 That is precisely the case here. The difference between the price of ADS's final offer and that of the other tenders submitted cannot in itself constitute evidence of the abnormally low nature of ADS's tender, having regard to the particular features of the contract in question.

125 First, it must be borne in mind that the tendering procedure was launched in the form of a competitive dialogue, since the Commission had already identified and defined its needs, but had not yet defined the most appropriate precise means of meeting them (see paragraph 6 above). Consequently, the prices of the tenders were largely dependent on the different solutions and technical means proposed by each tenderer and therefore on the respective costs.

126 Second, the aim of the competitive dialogue at issue was the purchase of goods for which no market price existed. As the main parties acknowledged at the hearing in answer to a question put to them by the Court, it follows from the particular characteristics of the satellites that the latter are not goods for which a standard price or a market price can be found. Furthermore, in the present case the competitive dialogue concerned the supply of satellites with evolved characteristics to ensure the transition from the first generation to the second generation of Galileo satellites (see paragraph 7 above) and therefore of satellites for which a market price could not yet exist.

127 In the second place, it should be stated that, beyond the difference in price, the applicant puts forward no specific argument to support its assertion that ADS's tender should have appeared to be abnormally low. In particular, it does not rely on any failure to comply with the legislation of the country in which the services were to be carried out or the non-inclusion in the price proposed by ADS of all the costs involved in the technical aspects of its tender. In any event, it should be observed that the evidence that emerges from the case file does not support the applicant's allegation.

128 It should be borne in mind that the award of the contract was based on the economically most advantageous tender, of which the price criterion was weighted at 35%, while the qualitative criterion was weighted at 65% (see paragraph 8 above). ADS's final offer was classified as better than the applicant's, with respect to both the price criterion and the qualitative criterion (see paragraph 22 above).

129 In addition, it is apparent from the documents describing the competitive dialogue at issue, containing the conditions applicable in each of the three phases (see paragraphs 10, 12 and 13 above), that the tenders were to contain a financial proposal corresponding to the technical proposal and detailed financial elements, in particular separate financial estimates.

130 In that regard, it is apparent from the case file that no doubt was raised, within the evaluation committee, concerning the evaluation of ADS's bid with regard to the fourth sub-criterion of the qualitative criterion, relating to the appropriateness of the management, the costing and the planning for the execution of the proposed work (see paragraph 8 above). On the contrary, it follows from the letter of 19 January 2021 and the fax of 22 January 2021, referred to in paragraphs 18 and 21 above, that, with regard to that sub-criterion, ADS's bid was classified in second place.

131 In addition, it follows from the Commission's written answer of 29 October 2022 to a question put by the Court in the context of the measures of organisation of procedure of 17 October 2022 and from the document annexed to that answer, on which the applicant submitted its observations at the hearing, that the financial elements of the tenderers' bids were submitted by the tenderers in the form of standard files. First of all, those files were examined, within the evaluation committee, with the help of software called 'ESA Costing Software (ECOS)', designed for the overall assessment of the price elements in the bids. Next, as regards, in particular, ADS's final offer, a summary table was drawn up on the basis of the analysis carried out by that software; that table

contained 21 sub-categories of price elements, in particular the costs of the workforce and of various technical elements, and a profit margin. Lastly, the financial elements of the tenders submitted, including those of ADS's final offer, were evaluated by a sub-panel of the evaluation committee, consisting of 14 members, which was entrusted with evaluating the fourth sub-criterion referred to above.

132 Accordingly, in the present case it has not been established that there was any evidence capable of arousing the Commission's suspicion that ADS's tender might be abnormally low. Consequently, the Commission was not required to check, within the meaning of the case-law referred to in paragraph 118 above, the composition of ADS's tender in order to ensure that it was not abnormally low.

133 Thus, contrary to the applicant's contention, the Commission did not breach its obligations relating to the examination of abnormally low tenders.

134 Furthermore, at the hearing, the applicant stated that, by its argument that the Commission could not merely state that ADS's tender did not seem to the Commission to be abnormally low, it intended to rely on a failure to state reasons.

135 However, it must be stated that the applicant does not develop any independent argument to substantiate that alleged failure to state reasons, but merely takes issue with the Commission for not having checked the existence of abnormally low tenders, a question which does not fall within the scope of a complaint alleging breach of essential procedural requirements, in particular failure to state in the contested decisions the reasons on which they were based, but which goes to the substance of those decisions. As is apparent from paragraph 132 above, that complaint, alleging breach by the Commission of its obligations relating to the examination of abnormally low tenders, cannot succeed.

136 The second plea must therefore be rejected as unfounded.

…

The fourth plea in law: breach of the Commission's obligation to adopt an autonomous decision on the award of the contract

216 The applicant maintains, in essence, that the Commission breached its obligation to adopt an autonomous decision on the award of the contract, by merely confirming the results set out in the evaluation report. Responsibility for the Galileo programme, conferred on the Commission by Article 12(1) of Regulation No 1285/2013, gives rise to an obligation on its part to adopt an autonomous decision on the award of the contract in the context of the competitive dialogue at issue. Furthermore, the delegation agreements entered into between the Commission and ESA pursuant to Article 15 of that regulation cannot limit or alter that responsibility of the Commission. Nor is the Commission bound by the proposal set out in the evaluation report and it is supposed to examine the tenderers' bids itself, especially since, in the present case, there is evidence of an incorrect assessment by the evaluation committee, which ought to have led the Commission to carry out a careful scrutiny of that report.

217 The Commission, supported by ADS, and the Italian Republic dispute those arguments.

218 In the first place, the applicant's argument based on the Commission's responsibilities in the context of the Galileo programme must be rejected.

219 It is true that the Commission has overall responsibility for the Galileo programme and, for the deployment phase of that programme, it 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 of and on behalf of the former, was responsible for organising the competitive dialogue at issue, whereas the Commission remained the contracting authority (see paragraphs 4 and 5 above).

220 However, contrary to what the applicant appears to claim, responsibility for the Galileo programme cannot alter, or indeed add to, the Commission's obligations as contracting authority, which remain those laid down, generally, in Title VII of the Financial Regulation and, especially as regards the public contracts entered into in the context of the execution of the Galileo programme, in Chapter V of Regulation No 1285/2013.

221 In the second place, and in any event, the applicant's argument alleging breach of an obligation on the Commission's part to adopt an autonomous decision concerning the award of the contract must be rejected.

222 It should be observed, first of all, that, under Article 150(1) and (2) of the Financial Regulation, the tenders submitted in the context of a call for tenders are to be evaluated by an evaluation committee appointed by the contracting authority. Furthermore, the contracting authority may waive the appointment of an evaluation committee only in the cases provided for in Article 168(5) of that regulation. Next, it follows from paragraph 30.1 of Section 2, Chapter 1, of Annex I to that regulation that the results of the evaluation carried out by the evaluation committee are to be presented in an evaluation report containing the proposal to award the contract. Lastly, the contracting authority is to take its decision either by approving the evaluation report or, where relevant, by providing the reasons why it did not follow the recommendation given in the evaluation report, or, where relevant, by providing the reasons why it decided not to award the contract, in accordance with paragraph 30.3 of Chapter 1, Section 2 of Annex I to that regulation.

223 It follows that, on the one hand, in cases where an evaluation committee has been appointed by the contracting authority, it is for that committee to evaluate the tenders submitted. On the other hand, while it is indeed true that the contracting authority is not bound by the evaluation report, the fact nonetheless remains that, in cases where the contracting authority decides to follow the award proposal set out in that report, its award decision may be based on that report.

224 In the present case, it must be stated that the tenderers' final offers were evaluated by an evaluation committee, composed of representatives of ESA, of the GSA and of the Commission, which presented the results of its evaluation in an evaluation report, on the basis of which the Commission adopted the contested decisions (see paragraphs 14 and 17 above). Likewise, as stated by the Commission, without being challenged on that point by the applicant, that committee was composed of a group of around 70 individuals with appropriate experience and qualifications by reference to the subject matter of the contract.

225 Accordingly, the fact that the contested decisions stated that they were based on the reference to the evaluation report, as the Commission adopted the opinion of the evaluation committee responsible for evaluating the tenders submitted, does not alter the fact that they were adopted autonomously by the Commission in its capacity as contracting authority.

…

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders OHB System AG to bear its own costs and to pay those incurred by the European Commission, including those relating to the proceedings for interim relief;**

3. **Orders the Italian Republic and Airbus Defence and Space GmbH to bear their own costs.**

Costeira Kancheva Zilgalvis

Delivered in open court in Luxembourg on 26 April 2023.

[Signatures]