Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

11 May 2023 *

(Appeal – Rules of Procedure of the Court of Justice – Article 169 – Appeal against the operative part of the decision of the General Court – Public service contracts – Tendering procedure – Regulation (EU, Euratom) 2018/1046 – Article 170(3) – Paragraph 23 of Annex I – Unsuccessful tenderer bringing to the European Commission's attention evidence of the abnormally low nature of the successful tender – Scope of the contracting authority's obligation to state reasons)

In Case C-101/22 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 10 February 2022,

European Commission, represented by L. André, M. Ilkova and O. Verheecke, acting as Agents,

appellant,

the other parties to the proceedings being:

Sopra Steria Benelux, established in Brussels (Belgium),

Unisys Belgium, established in Brussels,

represented by L. Masson and G. Tilman, avocats,

applicants at first instance,

THE COURT (Eighth Chamber),

composed of M. Safjan, President of the Chamber, N. Piçarra and M. Gavalec (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: French.

gives the following

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 1 December 2021, *Sopra Steria Benelux and Unisys Belgium* v *Commission* (T-546/20, EU:T:2021:846; 'the judgment under appeal'), by which the General Court annulled its decision of 2 July 2020 which, first, rejected the joint tender submitted by Sopra Steria Benelux and Unisys Belgium (together, 'the S2U companies') for Lot A in the tendering procedure bearing reference TAXUD/2019/OP/0006 for services for the specification, development, maintenance and third level support of the IT platforms of the Directorate-General for 'Taxation and Customs Union' and, second, awarded the contract to the other consortium that submitted a tender ('the decision at issue').

Legal context

The Rules of Procedure of the Court of Justice

2 Article 169 of the Rules of Procedure of the Court of Justice, entitled 'Form of order sought, pleas in law and arguments of the appeal', provides:

'1. An appeal shall seek to have set aside, in whole or in part, the decision of the General Court as set out in the operative part of that decision.

2. The pleas in law and legal arguments relied on shall identify precisely those points in the grounds of the decision of the General Court which are contested.'

3 Article 170 of those Rules of Procedure, entitled 'Form of order sought in the event that the appeal is allowed', provides, in paragraph 1 thereof:

'An appeal shall seek, in the event that it is declared well founded, the same form of order, in whole or in part, as that sought at first instance and shall not seek a different form of order. The subject matter of the proceedings before the General Court may not be changed in the appeal.'

The Financial Regulation

4 Article 161 of 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; 'the Financial Regulation'), entitled 'Annex on procurement and delegation of powers', provides:

'Detailed rules on procurement are laid down in Annex I to this Regulation. To ensure that Union institutions, when awarding contracts on their own account, apply the same standards as those imposed on contracting authorities covered by Directives 2014/23/EU [of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1)]

and 2014/24/EU [of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65)], the Commission is empowered to adopt delegated acts in accordance with Article 269 of this Regulation to amend Annex I to this Regulation, in order to align that Annex to amendments to those Directives and to introduce related technical adjustments.'

5 Article 170 of that regulation, entitled 'Award decision and information to candidates or tenderers', provides, in paragraphs 2 and 3 thereof:

'2. The contracting authority shall notify all candidates or tenderers, whose requests to participate or tenders are rejected, of the grounds on which the decision was taken, as well as the duration of the standstill periods referred to in Articles 175(2) and 178(1).

…

3. The contracting authority shall inform each tenderer who is not in an exclusion situation referred to in Article 136(1), who is not rejected under Article 141, whose tender is compliant with the procurement documents and who makes a request in writing, of any of the following:

(a) the name of the tenderer, or tenderers in the case of a framework contract, to whom the contract is awarded and, except in the case of a specific contract under a framework contract with reopening of competition, the characteristics and relative advantages of the successful tender, the price paid or contract value, whichever is appropriate;

…

However, the contracting authority may decide to withhold certain information where its release would impede law enforcement, would be contrary to the public interest or would prejudice the legitimate commercial interests of economic operators or might distort fair competition between them.'

6 Paragraph 23 of Annex I to that regulation, entitled 'Abnormally low tenders', is worded as follows:

'23.1. If, for a given contract, the price or costs proposed in a tender appears to be abnormally low, the contracting authority shall request in writing details of the constituent elements of the price or costs which it considers relevant and shall give the tenderer the opportunity to present its observations.

The contracting authority may, in particular, take into consideration observations relating to:

(a) the economics of the manufacturing process, of the provision of services or of the construction method;

(b) the technical solutions chosen or the exceptionally favourable conditions available to the tenderer;

(c) the originality of the tender;

(d) compliance of the tenderer with applicable obligations in the fields of environmental, social and labour law;

(e) compliance of subcontractors with applicable obligations in the fields of environmental, social and labour law;

(f) the possibility of the tenderer obtaining State aid in compliance with applicable rules.

23.2. The contracting authority shall only reject the tender where the evidence supplied does not satisfactorily account for the low price or costs proposed.

The contracting authority shall reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations in the fields of environmental, social and labour law.

…'

Background to the dispute

7 The background to the dispute is set out as follows in paragraphs 1 to 8 of the judgment under appeal:

'1 On 6 December 2019, the European Commission published in the supplement to the *Official Journal of the European Union* (OJ 2019/S 236-577462) a contract notice concerning a tendering procedure bearing the reference TAXUD/2019/OP/0006 for the procurement of services for the specification, development, maintenance and third level support of the IT platforms of the Directorate-General for 'Taxation and Customs Union'. The contract was divided into two lots, namely Lot A, entitled "Evolution Services for the CCN/CSI Platform", and Lot B, entitled "Evolution Services for the CCN2(ng), SPEED2(ng), CDCO/TSOAP and SSV Platforms", in respect of which the award criterion was the best quality/price ratio, with technical quality weighted against price on a 70/30 basis in the evaluation of the tenders submitted. For each of the two lots, the Commission had to conclude a 36-month framework contract, renewable three times for 12-month periods, with the tenderer offering the best quality/price ratio, on the condition that the tenderer satisfies certain minimum criteria relating to eligibility, non-exclusion, capacity and conformity of the tender.

2 On 27 February 2020, [the S2U companies] submitted a joint tender as a consortium led by Sopra. The only other bid submitted for Lot A within the time limit was that of the ARHS-IBM consortium, formed by ARHS Developments SA and International Business Machines of Belgium SA.

3 By letter of 2 July 2020, the Commission informed [the S2U companies] of the rejection of their tender submitted for Lot A, on the ground that it was not the most economically advantageous tender, and of the award of the contract to another tenderer …. It attached an extract from the evaluation report of their tender indicating the scores awarded to it, accompanied by explanations, and informed them that the characteristics and relative advantages of the selected tender, the value of the contract and that the name of the successful tenderer could be sent to them upon written request. The [S2U companies] submitted such a request on the same day.

4 It is apparent from the extract from the evaluation report that the … tender [submitted by the S2U companies] received a total score of 90.81 points …

…

5 By letter of 3 July 2020, the Commission informed the [S2U companies] that the contract had been awarded to the ARHS-IBM consortium and sent them an extract from the evaluation report of the successful tender indicating the scores awarded to it, accompanied by explanations.

6 It is apparent from that extract from the evaluation report that the successful tender received a total score of 98.53 points …

…

7 By letter of 10 July 2020 [("the request of 10 July 2020")], the [S2U companies] disputed the outcome of the tendering procedure and, with regard to the price set out in the selected tender, they expressed doubts that a price much lower than the price they proposed, which they described as reasonable and in line with market conditions, could be viable without the risk of "social dumping". They accordingly invited the contracting authority, inter alia, to confirm that it had verified that the successful tender did not pose any risks to that effect.

8 By letter of 20 July 2020 [("the reply of 20 July 2020")], the Commission replied, inter alia, that a detailed financial analysis of the selected bid had found it to be in line with the market conditions in the countries from which the contractors and their subcontractors would perform the requested services.'

The action before the General Court and the judgment under appeal

8 By application lodged at the Registry of the General Court on 2 September 2020, the S2U companies brought an action for annulment of the decision at issue.

9 In support of their action, the S2U companies relied on two pleas in law. The first alleged infringement of paragraph 23 of Annex I to the Financial Regulation and a manifest error of assessment, the second alleged a failure to state reasons in the decision at issue concerning the possible abnormally low nature of the successful tender.

10 By the judgment under appeal, the General Court upheld the second plea, which it had decided to examine first.

11 In paragraphs 38 to 54 of the judgment under appeal, the General Court summarised the rules relating to the contracting authority's obligation to state reasons in EU public procurement procedures, as set out principally in Article 170 of the Financial Regulation and paragraph 23 of Annex I thereto, and in the related case-law.

12 It follows, more specifically, from paragraphs 47 to 49 of that judgment that the assessment, by the contracting authority, of the existence of abnormally low tenders is made in two stages. In the first stage, the contracting authority determines prima facie, and not on the basis of a detailed analysis of the composition of each tender, whether the price or costs proposed in the tender 'appear' to be abnormally low. In the absence of evidence to arouse suspicion that the tender might be

abnormally low, the contracting authority may continue its evaluation and the award procedure for the contract. By contrast, where such evidence exists, the contracting authority must, in the second stage, check the constituent elements of the tender in greater detail in order to satisfy itself that it is not abnormally low. To that end, the contracting authority must give the tenderer which submitted that tender the opportunity to set out the reasons why it considers that its tender is not abnormally low. The contracting authority must then assess the explanations provided and determine whether the tender concerned is abnormally low, in which case it must be rejected.

13 In paragraphs 51 to 53 of that judgment, the General Court noted that the obligation to state reasons on the part of the contracting authority, where it considers that the successful tender does not appear to be abnormally low, is limited in scope. In particular, where that authority accepts a tender, it is not required to state explicitly in response to any request for a statement of reasons submitted to it in accordance with Article 170(3) of the Financial Regulation, the reasons for which that tender does not appear to it to be abnormally low. The fact that a tender was accepted suggests, implicitly but necessarily, that there was no evidence that the tender was abnormally low. By contrast, explicit reasoning must be disclosed to an unsuccessful tenderer who makes an express request to that effect, in order to provide it with important information regarding the characteristics and relative advantages of the successful tender, within the meaning of Article 170(3) of that regulation. In that regard, the General Court considered, in paragraph 54 of that judgment, that it is not sufficient for the contracting authority merely to state that the tender selected in the context of the award of the contract is not abnormally low.

14 In paragraph 55 of the judgment under appeal, the General Court noted that, in the present case, the Commission, first, in accordance with Article 170 of the Financial Regulation and paragraph 31 of Annex I to that regulation, merely informed the S2U companies that their tender had been rejected and attached an extract from the evaluation committee's report relating to their tender. Second, following a written request from those companies, the Commission merely informed them of the name of the successful tenderer, the price of the successful tender, its financial score and its quality/price ratio as expressed by its final score. For the General Court, the details thus provided did not in any way relate to the examination of the price proposed by the successful tender with regard to the possible abnormally low nature of it.

15 In paragraph 59 of that judgment, the General Court observed that it was because of the significant difference between the prices offered by the S2U companies and by the successful tenderer that the latter was awarded the contract. It was in that context that the S2U companies asked the Commission, as indicated in paragraph 56 of that judgment, to confirm, inter alia, that it had verified that, in terms of the price proposed, the successful tender did not pose any risk of 'social dumping' nor risks involved in performing the contract.

16 In paragraphs 57 and 66 of the judgment under appeal, the General Court noted that, although the S2U companies had not expressly invoked the concept of 'abnormally low tender', they had clearly referred to the potential consequences inherent in submitting such a tender, namely a risk of social dumping and a risk for the continuity of service provision.

17 In paragraph 58 of that judgment, the General Court held that the Commission had merely claimed, in its reply of 20 July 2020, that a detailed financial analysis of the successful tenderer's tender had found it to be in line with the market conditions in the countries from which the contractors and their subcontractors would perform the requested services.

18 In paragraphs 60 and 61 of that judgment, the General Court held that such a finding was insufficient, having regard to the fact that only two tenders had been submitted for Lot A and that therefore there was only one point of comparison on the basis of which to establish whether there was any indication that the price proposed by the successful tender could be considered to be abnormally low. Given that the price criterion was decisive in the ranking of the tenders and that the price of the successful tender constituted its only advantage, the Commission should at the very least have provided information relating to the percentage corresponding to the share of the contract that would be performed under a subcontracting arrangement and the countries from which the services in question would be performed.

19 If the Commission had, moreover, provided that information, as it did in its defence and at the hearing before the General Court, the S2U companies would have been better able to understand the reasons for the price difference between the two tenders. That information also would also have enabled them to have sufficient information to know the reasons for which the Commission had considered that the successful tender did not appear to be abnormally low and, therefore, to challenge, if necessary, the merits of that assessment.

20 In paragraph 68 of that judgment, the General Court held that it could not be accepted that a contracting authority could merely invoke paragraph 23.1 of Annex I to the Financial Regulation and thereby avoid the obligation, provided for in Article 170(3) of that regulation, to inform the unsuccessful tenderer who has made a request in writing of the characteristics and advantages of the successful tender, in particular the reasons for which that tender did not appear abnormally low. According to the General Court, the Commission could not therefore limit itself to stating that it had not considered that the successful tender appeared abnormally low, without specifying to the S2U companies, who had made an express request to that effect, the reasons for that finding.

21 Lastly, in paragraph 69 of the judgment under appeal, the General Court held that the explanations provided by the Commission in the course of the proceedings – that a large part of the services provided by the successful tender would be performed under a subcontracting arrangement, the majority of them in Greece and Romania, so that the wage differences existing in the places of performance explain the substantial difference in price between the tenders submitted – were out of time. The General Court noted that account can only be taken of information received by the S2U companies before the action was brought it, since the reasoning cannot, in principle, be explained for the first time and a posteriori before the court.

22 Having regard to the foregoing considerations, the General Court held, in paragraphs 70 and 71 of that judgment, that, in the light of the information provided by the Commission, the S2U companies could not have had knowledge of all the information relating to the composition of the successful tenderer's tender which enabled the Commission to consider that that tender did not appear abnormally low. The General Court therefore upheld the second plea in law relied on by the S2U companies and annulled the decision at issue, without considering it necessary to examine the first plea in law.

Forms of order sought

23 By its appeal, the Commission submits that the Court should:

– set aside paragraphs 52 to 57, 60, 61, 66, 68 and 69 of the judgment under appeal;

– dismiss the action for annulment; and

– order the S2U companies to pay the costs of the present proceedings before the Court of Justice and of the proceedings before the General Court.

24 In its reply, the Commission also claims that the Court should:

– declare the appeal admissible in its entirety, and

– set aside the judgment under appeal.

25 The S2U companies claim that the Court should:

– primarily, dismiss the appeal in its entirety and order the Commission to pay all the costs of the proceedings, and

– in the alternative, in the event that the appeal is declared well founded, refer the case back to the General Court.

The appeal

The plea of inadmissibility raised by the S2U companies

Arguments of the parties

26 The S2U companies argue that the appeal is inadmissible on the ground that the Commission failed to comply with Articles 169 and 170 of the Rules of Procedure of the Court of Justice. The Commission seeks only the annulment of paragraphs 52 to 57, 60, 61, 66, 68 and 69 of the judgment under appeal, without therefore seeking the annulment, in whole or in part, of the decision as set out in the operative part of that judgment, within the meaning of Article 169(1) of that regulation.

27 Nor, according to the S2U companies, does the Commission challenge paragraphs 70 and 71 of the judgment under appeal and it should therefore be deemed to have accepted them. Those paragraphs contain the conclusion of the reasoning which led, in essence, the General Court to find, first, that the S2U companies did not have knowledge of the information relating to the composition of the successful tenderer's tender on the basis of which the Commission considered that that tender did not appear abnormally low and, second, that the Commission had given insufficient reasons to justify that conclusion, so that the decision at issue had to be annulled without it being necessary to examine the first plea in law.

28 The S2U companies also submit that the new claim, made by the Commission in its reply, seeking, first, that the appeal should be declared admissible in its entirety and, second, that that judgment should be set aside, is inadmissible.

29 The Commission contends that that plea of inadmissibility should be dismissed.

Findings of the Court

30 As a preliminary point, it should be noted, as the Commission submits in its reply, that the S2U companies do not put forward any argument to substantiate an infringement of Article 170 of the Rules of Procedure of the Court of Justice. It follows that the plea of inadmissibility must be examined only in the light of Article 169 thereof.

31 In that regard, the fundamental principle that the appeal must be directed against the operative part of the General Court's decision, and may not merely seek the amendment of some of the grounds of that decision, follows from paragraph 1 of that provision (see, to that effect, judgments of 15 November 2012, *Al-Aqsa* v *Council and Netherlands* v *Al-Aqsa*, C-539/10 P and C-550/10 P, EU:C:2012:711, paragraphs 43 to 45, and of 16 July 2020, *Inclusion Alliance for Europe* v *Commission*, C-378/16 P, EU:C:2020:575, paragraph 57). However, the Court has also stated that excessive formalism in the application of that rule would be contrary to that case-law (see, to that effect, judgment of 16 July 2020, *Inclusion Alliance for Europe* v *Commission*, C-378/16 P, EU:C:2020:575, paragraphs 59 and 60).

32 In the present case, in the part of its appeal entitled '*Conclusions*' (Form of order sought), the Commission merely asked the Court to set aside paragraphs 52 to 57, 60, 61, 66, 68 and 69 of the judgment under appeal, to dismiss the action for annulment brought by the S2U companies before the General Court and to order those companies to pay all the costs.

33 However, it is clear from the cover page of the appeal lodged by the Commission that the latter formally seeks to have the judgment under appeal set aside. In addition, although the Commission had not expressly requested that that judgment be set aside in the concluding paragraph of its appeal, it, at the end of the arguments relating to each of the three grounds put forward in support of its appeal, identified the paragraphs of that judgment which seemed to it to be vitiated by an error of law and expressly inferred from this that point 1 of the operative part of that judgment also had to be set aside in so far as the paragraphs in question constituted the basis for it.

34 In those circumstances, even though the form of order sought in the appeal *stricto sensu* does not expressly seek to have point 1 of the operative part of the judgment under appeal set aside, it cannot be regarded as anything other than seeking, in essence, the same result. In that regard, it is clear, on reading the reply and rejoinder lodged by the S2U companies, that the latter fully understood the reasoning developed by the Commission in its appeal and its implications for point 1 of the operative part of the judgment under appeal.

35 The argument that the Commission failed to challenge paragraphs 70 and 71 of that judgment cannot succeed. Those two paragraphs are merely declaratory and simply draw the appropriate conclusions from the paragraphs expressly contested by the Commission. Therefore, even if it would have been preferable for the Commission also to call them into question, that omission cannot be of any consequence.

36 The plea of inadmissibility raised by the S2U companies must therefore be rejected.

Substance

37 In support of its appeal, the Commission puts forward three grounds of appeal. By its first ground of appeal, it alleges that the General Court erred in law in classifying the request of 10 July 2020 as an 'express request' seeking to obtain the statement of reasons which led the contracting authority not to consider the successful tender to be abnormally low. By the second ground of appeal, the Commission alleges that the General Court distorted the content of the reply of 20 July 2020. By its third ground of appeal, the Commission alleges that the General Court failed to have regard to the scope of the contracting authority's obligation to state reasons under Article 296 TFEU and Article 170(3) of the Financial Regulation.

The first ground of appeal, alleging that the General Court erred in law in classifying the request of 10 July 2020 as an 'express request' seeking to obtain the statement of reasons why the contracting authority did not consider the successful tender to be abnormally low

– *Arguments of the parties*

38 By its first ground of appeal, the Commission submits that paragraphs 52 to 57 of the judgment under appeal are vitiated by a contradiction which led, in paragraphs 66 and 68 thereof, to an incorrect legal characterisation of the facts by the General Court.

39 It is apparent from the judgment of 4 July 2017, *European Dynamics Luxembourg and Others* v *European Union Agency for Railways* (T-392/15, EU:T:2017:462, paragraph 93) that it is only where an express request has been made by a tenderer, that is to say, a request which expressly claims that the tender accepted by the contracting authority is abnormally low, that the contracting authority must explain why it considers that the tender which it accepted does not appear to it to be abnormally low.

40 According to the Commission, that requirement of an express request, which is emphasised in paragraphs 52 and 63 to 65 of the judgment under appeal, is lacking in the present case, since the General Court found, in paragraph 57 of that judgment, that, in the request of 10 July 2020, 'the [S2U companies] did not expressly invoke the concept of "abnormally low tender"'.

41 According to the Commission, the fact that a tenderer alludes to 'the potential consequences of an abnormally low tender, … namely a risk of social dumping and a risk for the continuity of service provision' cannot be equated with an express request nor is it sufficient to give rise to an obligation on the part of the contracting authority to state the reasons for which the tender did not appear to it to be abnormally low. The two risks referred to are neither comparable nor equivalent to the concept of abnormally low tender.

42 In that regard, the concept of 'social dumping', which is not defined in EU law, is not referred to in paragraph 23.1 of Annex I to the Financial Regulation, which lists the factors to be taken into consideration in order to assess whether a tender is abnormally low. In addition, although the S2U companies had referred, in their request of 10 July 2020, to the risk of continuity of service provision, that risk is also not mentioned in paragraph 23.1 of Annex I to the Financial Regulation. Moreover, the S2U companies asked the contracting authority only about the existence of a risk of social dumping.

43 The Commission claims that the General Court therefore requires the contracting authority, even when dealing with a non-explicit request, to engage in a teleological interpretation of the questions asked by the tenderer instead of following a literal interpretation of those questions, the approach which follows from the judgment of 26 April 2018, *European Dynamics Luxembourg and Evropaïki Dynamiki* v *Commission* (T-752/15, not published, EU:T:2018:233, paragraphs 78 to 81). Moreover, that new interpretation gives rise to legal uncertainty, since the contracting authorities will not know whether they must treat any request which refers to one of the 'potential consequences of an abnormally low tender' as an express request to ascertain the reasons for which the contracting authority had no doubt as to the abnormally low nature of the successful tender.

44 Moreover, the Commission did not accept the classification of the request of 10 July 2020 as an express request relating to the abnormally low nature of a tender, as is apparent from paragraphs 66 and 68 of the judgment under appeal.

45 The S2U companies submit that the first ground of appeal is inadmissible in that it requests the Court to make a factual assessment of the concept of 'express request'. In the alternative, this ground of appeal should be dismissed as unfounded.

– *Findings of the Court*

46 By its first ground of appeal, which is directed against paragraphs 52 to 57, 66 and 68 of the judgment under appeal, the Commission complains, in essence, that the General Court erred in law in treating the request of 10 July 2020 as a request expressly seeking to obtain from the contracting authority the statement of reasons for which the successful tender did not appear to it to be abnormally low.

47 In that regard, in so far as the S2U companies submit that the first ground of appeal is inadmissible because it requests the Court to make a factual assessment of the concept of an 'express request', it should be borne in mind that the classification for legal purposes of an act or a measure by the General Court is a question of law which may be raised in an appeal (judgments of 19 October 1995, *Rendo and Others* v *Commission*, C-19/93 P, EU:C:1995:339, paragraph 26, and of 12 May 2022, *Klein* v *Commission*, C-430/20 P, EU:C:2022:377, paragraph 41). It follows that the question whether the request of 10 July 2020 constitutes an 'express' request, that is to say, a request seeking to ascertain the reasons for which the contracting authority did not consider the successful tender to be abnormally low, for the purposes of Article 170(3)(a) of the Financial Regulation, read in conjunction with paragraph 23 of Annex I to that regulation, is a question of law which may be examined on appeal. This ground of appeal is therefore admissible.

48 As regards the substance, it should be noted that Article 170(3)(a) of the Financial Regulation enables any tenderer who is not in an exclusion situation, who is not rejected and whose tender has been found to be compliant with the procurement documents, to make a request in writing to the contracting authority for information such as the name of the tenderer to whom the contract has been awarded and the characteristics and relative advantages of the successful tender, the price paid or contract value, whichever is appropriate.

49 An unsuccessful tenderer may thus make use of the option available under that provision to invite the contracting authority to justify its decision not to consider the successful tender as an abnormally low tender, within the meaning of paragraph 23 of Annex I to that regulation. Such a question may be useful in so far as, in accepting a tender, the contracting authority is deemed to have considered, at least implicitly, that there was no evidence that the tender was abnormally low.

50 The option thus made available in Article 170(3)(a) of the Financial Regulation, read in conjunction with paragraph 23 of Annex I to that regulation, is intended to protect all unsuccessful tenderers, at the final stage of a procurement procedure, from arbitrariness on the part of the contracting authority and to ensure healthy competition between tenderers (see, by analogy, judgment of 27 November 2001, *Lombardini and Mantovani*, C-285/99 and C-286/99, EU:C:2001:640, paragraphs 44 and 57).

51 The General Court was therefore right to hold, in paragraph 52 of the judgment under appeal, that a contracting authority is required to state expressly the reasons why the tender which it accepted did not appear to it to be abnormally low only if an unsuccessful tenderer has made an express request to that effect.

52 In that regard, although it is preferable for such a tenderer to refer literally to the concept of 'abnormally low tender', within the meaning of paragraph 23 of Annex I to the Financial Regulation, when it intends to question the contracting authority on that point, an express reference to that concept does not appear indispensable. First, an 'express request' for the purposes of Article 170(3)(a) of that regulation must not be confused with the explicit use of the expression 'abnormally low tender'. Second, since Article 170(3)(a) of that regulation does not make direct use of that expression, but refers in general terms to the 'characteristics and relative advantages of the successful tender', it is sufficient that the express request mentions such characteristics and advantages with sufficient precision and clarity without necessarily reproducing the exact terminology of other provisions of that regulation.

53 Nevertheless, it is crucial that the unsuccessful tenderer's request is formulated in such a way that it leaves no doubt as to its intention to induce the contracting authority to justify its decision not to consider the successful tender to be abnormally low. That is the case where, as in the present case, an unsuccessful tenderer informs the contracting authority of two well-known potential consequences of the choice of an abnormally low tender, such as the risk of social dumping and the risk of jeopardising the continuity of services.

54 The link between such risks and the concept of 'abnormally low tender' is clear from paragraph 23.1(a), (b), (d) and (e) of Annex I to the Financial Regulation, which provides, in that regard, that the contracting authority may, in order to determine whether a tender is not abnormally low, take into consideration, inter alia, the economics of the manufacturing process, of the provision of services or of the construction method; the technical solutions chosen or the exceptionally favourable conditions available to the tenderer; and compliance of the tenderer, or its subcontractors, with applicable obligations in the fields of environmental, social and labour law.

55 Therefore, the General Court was fully entitled to hold, in paragraphs 56 and 57 of the judgment under appeal, that the S2U companies had clearly referred to the potential consequences inherent in submitting an abnormally low tender. In reaching that conclusion, the General Court noted that the S2U companies had relied on the realistic and competitive price proposed in their own

tender, taking account of market conditions, their experience as contracting parties with the Commission and the risks involved in performing a contract for which the price proposed in the selected tender was considerably lower than the price proposed in their own tender.

56 In addition, the General Court pointed out that the S2U companies had invited the Commission to confirm, inter alia, that it had verified that, in the light of its price, the successful tender did not involve a risk of 'social dumping'. The General Court rightly held that, in so doing, the S2U companies intended to highlight that the successful tender was likely to fail to comply with the legislation of the countries in which the services were to be carried out in terms of remuneration of staff, contribution to the social security scheme and compliance with occupational safety and health standards, with the result that that tender could also present a risk for the continuity of service provision.

57 Therefore, the General Court did not err in law in classifying, in paragraphs 66 and 68 of the judgment under appeal, the request of 10 July 2020 as an 'express request' seeking to ascertain the reasons why the contracting authority had not considered the successful tender to be abnormally low.

58 The first ground of appeal must therefore be rejected as being unfounded.

The third ground of appeal, alleging that the General Court failed to have regard to the scope of the contracting authority's obligation to state reasons under Article 296 TFEU and Article 170(3) of the Financial Regulation

– *Arguments of the parties*

59 The Commission complains that the General Court erred in law by disregarding the scope of the contracting authority's obligation to state reasons under Article 296 TFEU and Article 170(3) of the Financial Regulation.

60 In the first place, the Commission submits that the reasoning developed by the General Court, on the one hand, in paragraphs 51 and 52 of that judgment and, on the other, in paragraphs 53, 54, 60, 61 and 68 thereof, contains contradictions as regards the scope of the obligation to state reasons and amounts to disregarding the two-stage evaluation by the contracting authority of tenders which appear to be abnormally low, as provided for in paragraph 23 of Annex I to the Financial Regulation. Furthermore, by establishing such a broad obligation to state reasons, the General Court goes beyond the requirements of Article 170(3) of that regulation, which does not mention the abnormally low nature of a tender as a factor in the statement of reasons.

61 According to the Commission, in paragraph 51 of that judgment, the General Court confirmed that, at the first stage of the examination, namely where the contracting authority considered that a tender did not appear to be abnormally low, the obligation to state reasons is limited in scope. Broadening the scope of the obligation to state reasons, at this stage of the examination, which is based on a prima facie assessment, would be tantamount to imposing a *probatio diabolica* on the contracting authority.

62 Therefore, in the Commission's submission, it is only where there is doubt as to the abnormally low nature of the tender that the contracting authority is required to consult the tenderer concerned, in order to have more information concerning the composition of the price and costs.

At that second stage of the examination, since the contracting authority was able to carry out a detailed examination of the tender, that authority must provide a full statement of reasons, as the General Court held in its judgment of 4 July 2017, *European Dynamics Luxembourg and Others* v *European Union Agency for Railways* (T-392/15, EU:T:2017:462, paragraph 91).

63 However, in contradiction with the limited scope of the obligation to state reasons, noted in paragraph 51 of the judgment under appeal, the General Court concluded, in the last sentence of paragraph 52 of that judgment, that, where the tender does not appear to be abnormally low, the reasons justifying that finding must be disclosed if an express request is addressed to the contracting authority and that those reasons, and the reasoning underlying them, constitute characteristics and advantages within the meaning of Article 170(3) of the Financial Regulation. According to the Commission, the General Court's reasoning is contradictory since it implies that the mere express request of an unsuccessful tenderer, concerning the abnormally low nature of a tender, leads to the removal of any distinction between the scope of the obligation to state reasons at the first stage, which is allegedly limited, and at the second stage of the examination, where the reasons and reasoning must be provided.

64 That contradiction led the General Court to conclude, wrongly, in paragraphs 60 and 61 of the judgment under appeal, that the statement of reasons provided by the Commission was inadequate and, therefore, that the Commission 'in order to respond adequately to the … request [submitted by the S2U companies], should have provided, at the very least, information relating to the percentage corresponding to the share of the contract that would be performed under a subcontracting arrangement and the countries from which the requested services would be performed'.

65 In the second place, the Commission submits that, in paragraph 69 of the judgment under appeal, the General Court criticises it for having provided the S2U companies with additional explanations on the substantial difference in price between the tenders only in the course of the proceedings. The Commission argues that, in so doing, the General Court confuses the obligation to state reasons in the administrative phase of the procurement procedure with the obligation for the Commission, as a defendant, to provide explanations and information in the context of judicial review, thereby increasing the Commission's obligation to state reasons without any legal basis.

66 The Court of Justice has, however, already held, in the judgment of 14 October 2020, *Close and Cegelec* v *Parliament* (C-447/19 P, not published, EU:C:2020:826, paragraphs 43 and 44), that, 'having regard to the respective roles of the tenderers and the review bodies, it cannot be required that the information which a contracting authority must provide to an unsuccessful tenderer in accordance with its obligation to state reasons and the information which that contracting authority must provide to the judicial bodies in the context of their review of the legality of the decision to award a contract be exactly the same. Furthermore, the fact that the documents sent to the Court in the context of a measure of inquiry are subsequently also sent to the applicant, where appropriate in a non-confidential version, is covered by the adversarial principle and does not mean that the contracting authority should have provided those documents already in the context of the statement of reasons under the provisions of EU law'.

67 The S2U companies contend that the third ground of appeal is unfounded.

– *Findings of the Court*

68 The Court considers it appropriate to examine the third ground of appeal before the second ground of appeal.

69 In the first place, it is necessary to examine the Commission's argument that the General Court's reasoning in paragraphs 51 and 52 of the judgment under appeal, on the one hand, and in paragraphs 53, 54, 60, 61 and 68 thereof, on the other, contains contradictions concerning the scope of the obligation to state reasons and infringes both Article 170(3) of the Financial Regulation and paragraph 23 of Annex I thereto.

70 As a preliminary point, it should be noted that, in paragraphs 51 to 54 of the judgment under appeal, the General Court summarised its own case-law relating to the contracting authority's obligation to state reasons for its decision not to consider a successful tender to be abnormally low.

71 However, those paragraphs must be read in the light of paragraphs 47 to 50 of that judgment which they merely give concrete expression to and which are not disputed by the Commission. The General Court pointed out in those paragraphs that the assessment by the contracting authority of the existence of abnormally low tenders is carried out in two stages. In the first stage, the contracting authority determines whether the price or costs proposed in a tender 'appear' to be abnormally low. The use of the verb 'appear' in paragraph 23.1 of Annex I to the Financial Regulation requires the contracting authority to carry out a prima facie assessment of the abnormally low nature of a tender and not to carry out, on its own initiative, a detailed analysis of the composition of each tender in order to establish that it does not constitute an abnormally low tender.

72 Thus, during that first stage, the contracting authority need only determine whether the tenders submitted contain evidence that they might be abnormally low. That is the case, in particular, where the price proposed in a tender is considerably lower than that of the other tenders or the normal market price. If there is no such evidence in the tenders submitted and they therefore do not appear to be abnormally low, the contracting authority may continue the evaluation and the award procedure for the contract.

73 In the second stage, if there is evidence that a tender might be abnormally low, the contracting authority must check the composition of that tender in order to ensure that it is not abnormally low. To that end, it must allow the tenderer concerned to state the reasons why it considers that its tender is not abnormally low.

74 The contracting authority must then assess the explanations provided and determine whether the tender concerned is abnormally low, in which case it must be rejected. In order to provide an adequate statement of reasons for the fact that, after an in-depth analysis, the successful tender is not abnormally low, the contracting authority must set out the reasoning on the basis of which, first, it concluded that, on account primarily of its financial characteristics, that tender complies, inter alia, with the legislation of the country in which the services are to be carried out in respect of the remuneration of staff, contribution to the social security scheme and compliance with occupational safety and health standards, and, second, that it has verified that the proposed price included all the costs arising from the technical aspects of that tender.

75 Paragraph 51 of the judgment under appeal relates to the first stage of the review, as referred to in paragraph 48 of that judgment. In that regard, the General Court stated that, in so far as only a prima facie review, in other words, an examination based on appearances, is required by the contracting authority, the latter is subject only to an obligation to state reasons which is limited in scope, which may even accommodate implicit reasoning. As is apparent from paragraph 52 of that judgment, the mere fact that a contracting authority accepts a tender means, implicitly but necessarily, according to the General Court, that there was no evidence that the tender was abnormally low.

76 It is true that the last sentence of paragraph 52 is not unambiguous. In that paragraph, the General Court states, in essence, that the contracting authority must inform an unsuccessful tenderer who makes an express request in that regard of the reasons for which the successful tender did not appear to the contracting authority to be abnormally low. That wording does not specify whether those reasons refer to the reasons which led the contracting authority to consider the successful tender to not be abnormally low prima facie or, on the contrary, following a detailed analysis.

77 The Commission submits that the General Court erred in law by requiring, in paragraphs 60, 61 and 68 of the judgment under appeal, that the Commission provide, already at the first stage of the examination, detailed reasoning to the unsuccessful tenderer which had expressly requested it as to why it had not considered that the successful tender was abnormally low.

78 That interpretation of the last sentence of paragraph 52 of the judgment under appeal must, however, be rejected.

79 While it is true, as the General Court pointed out in paragraph 48 of that judgment, that a contracting authority may carry out a simple prima facie assessment of the abnormally low nature of a tender, that summary review is for internal use only and cannot be relied on against an unsuccessful tenderer which substantiates its doubts regarding that assessment.

80 It follows that, where an unsuccessful tenderer, who is not in an exclusion situation and satisfies the selection criteria, asks the contracting authority, in a written reasoned request, to set out the reasons why it did not consider the successful tender to be abnormally low, that authority is required to provide a detailed response.

81 Paragraph 23.1 of Annex I to the Financial Regulation provides that if, for a given contract, the price or costs proposed in the tender appear 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 give the tenderer the opportunity to submit its observations. The wording of that provision does not rule out the possibility that doubts as to the abnormally low nature of the successful tender may have been raised by an unsuccessful tenderer. The fact that such an unsuccessful tenderer refers, in a substantiated manner, to the existence of doubts as to the abnormally low nature of the successful tender thus causes the contracting authority to enter the second stage of the review.

82 Apart from a situation in which the arguments put forward by the unsuccessful tenderer are irrelevant or devoid of any reasoning, the contracting authority is therefore required, first, to carry out a detailed analysis of the successful tender in order to determine that it is not in fact abnormally low and, second, to inform the unsuccessful tenderer which expressly questioned the authority on that point of the broad outlines of that analysis.

83 Any other interpretation would deprive the unsuccessful tenderer of its right to an effective remedy guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). It would be impossible for a tenderer to assess the merits of the contracting authority's decision that the successful tender is not abnormally low, if that contracting authority could merely state peremptorily and without putting forward any justification to that effect that that tender appeared to it to comply with the market conditions of the countries from which the services in question are to be carried out by the contractors and their subcontractors or that the price of the successful tender was not abnormally low.

84 In the present case and as the General Court pointed out in paragraph 60 of the judgment under appeal, that is all the more so since only two tenders had been submitted to the contracting authority, the price criterion was decisive in the ranking of the tenders and the price of the successful tender was the only relative advantage characterising that tender. In addition, as is apparent from paragraph 56 of that judgment, the experience of the S2U companies as contracting parties with the Commission should also have led the Commission to lend credit to the fears expressed by those companies that the successful tender entails a risk of 'social dumping', as well as risks concerning the performance of the contract in so far as the price proposed in the selected tender was considerably lower than the price proposed in their own tender.

85 The General Court was therefore right to hold, in paragraph 68 of the judgment under appeal, that the Commission could not merely find that the successful tender did not appear to it to be abnormally low, without specifying to the S2U companies, who had expressly requested it to do so, the reasons which led it to that conclusion.

86 In the second place, the Commission complains that the General Court confused, in paragraphs 60 and 69 of the judgment under appeal, the obligation to state reasons incumbent on the contracting authority and the latter's prerogative, as a defendant, to rely on its rights of defence, as enshrined in Article 47(2) of the Charter.

87 That argument is manifestly unfounded.

88 The fact that the Commission provided the reasons for the decision at issue in the course of the proceedings cannot compensate for the inadequacy of the initial statement of reasons for that decision. The reasons for a decision may not be explained for the first time *ex post facto* before the Court, save in exceptional circumstances which, failing any urgency, are not present in this case (see, to that effect, judgments of 26 November 1981, *Michel* v *Parliament*, 195/80, EU:C:1981:284, paragraph 22; of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 463; and of 11 June 2020, *Commission* v *Di Bernardo*, C-114/19 P, EU:C:2020:457, paragraph 51).

89 To allow the institution concerned to defer its duty to state reasons for its decision finding that the successful tender is not abnormally low would affect the right of unsuccessful tenderers to effective judicial protection, in so far as they must know the reasons for a measure, not only in order to defend their rights in the best possible conditions, but also in order to decide in full knowledge of the circumstances whether it is worthwhile to bring an action before the competent court (see, to that effect, judgments of 15 October 1987, *Heylens and Others*, 222/86, EU:C:1987:442, paragraph 15, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 120).

90 Moreover, the General Court did not in any way require the Commission to ensure that the information it must provide, on the one hand, to an unsuccessful tenderer and, on the other hand, to the EU Courts is completely identical. Accordingly, the argument by analogy based on the judgment of 14 October 2020, *Close and Cegelec* v *Parliament* (C-447/19 P, not published, EU:C:2020:826, paragraph 43) is irrelevant.

91 The third ground of appeal must therefore be rejected in its entirety as unfounded.

The second ground of appeal, alleging that the General Court distorted the facts by incorrectly assessing the content of the reply of 20 July 2020

– *Arguments of the parties*

92 By its second ground of appeal, the Commission submits that the General Court distorted the content of the reply of 20 July 2020, which led it to conclude, wrongly, that the Commission had infringed its obligation to state reasons under Article 170(3) of the Financial Regulation. After observing, correctly, in paragraph 8 of the judgment under appeal, that the Commission had stated, in that reply, 'that a detailed financial analysis of the selected bid had found it to be in line with the market conditions in the countries from which the contractors and their subcontractors would perform the requested services', the General Court wrongly held, in paragraphs 61 and 68 of that judgment, that, in that reply, the Commission merely found or justified by a simple assertion that the price of the successful tender was not abnormally low. In so doing, it did not specify to the S2U companies, who had expressly requested it to do so, the reasons which led it to that conclusion.

93 The Commission contends that, in the reply of 20 July 2020, it did not take a position on whether or not the successful tender was abnormally low. It merely answered the question raised by the S2U companies on social dumping, stating that a detailed analysis of the financial offer which it accepted had revealed that the winning tender is in line with the market conditions of the countries from which the contractors and their subcontractors will carry out the requested services.

94 According to the Commission, that distortion of the content of the reply of 20 July 2020, combined with the error made in the classification of the request of 10 July 2020, led the General Court to conclude incorrectly, in paragraph 68 of the judgment under appeal, that the Commission had failed to fulfil its duty to state reasons.

95 The S2U companies contend that this ground of appeal must be rejected as unfounded.

– *Findings of the Court*

96 By its second ground of appeal, the Commission submits, in essence, that, since it had not received a request from the S2U companies expressly seeking disclosure of the reasons why it had considered that the successful tender was not abnormally low, it merely responded to the request submitted by the S2U companies regarding the existence of a risk of social dumping. Therefore, according to the Commission, the General Court wrongly considered that the reply of 20 July 2020 stated that the price of the successful tender was not abnormally low, and thus distorted the content of that reply.

97 Since it is clear from the examination of the first ground of appeal that the S2U companies did in fact submit to the Commission an 'express request' relating to the abnormally low nature of the successful tender, the Commission had to comply with the particular requirements to state reasons laid down in Article 170(3) of the Financial Regulation and paragraph 23 of Annex I thereto. Accordingly, in order to ensure the right to an effective remedy guaranteed in Article 47 of the Charter to an unsuccessful tenderer, the Commission, in its capacity as a contracting authority, could not merely claim, in peremptory terms and without putting forward the slightest justification to that effect, that the successful tender did not present a risk of social dumping.

98 In that regard, it must be recalled that the right to an effective remedy guaranteed in Article 47 is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such (judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 78, and of 14 July 2022, *EPIC Financial Consulting*, C-274/21 and C-275/21, EU:C:2022:565, paragraph 83).

99 In those circumstances, even if the General Court, by taking the view that the reply of 20 July 2020 merely stated that the price of the successful tender was not abnormally low, had distorted the content of that reply, such a distortion could not call into question the finding in paragraph 97 of the present judgment that the Commission had to comply with the particular requirements to state reasons resulting from Article 170(3) of the Financial Regulation and paragraph 23 of Annex I thereto, and that it could not merely state, without the slightest justification, that the successful tender did not present a risk of social dumping.

100 The second ground of appeal must therefore be rejected as ineffective.

101 Since none of the three grounds relied on by the Commission in support of its appeal has been upheld, that appeal must be dismissed in its entirety.

Costs

102 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.

103 Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the S2U companies have requested that the Commission be ordered to pay the costs and the latter has been unsuccessful in its appeal, it must be ordered to pay the costs.

On those grounds, the Court (Eighth Chamber) hereby:

1. Dismisses the appeal;

2. Orders the European Commission to pay the costs.

[Signatures]