Draft recommendation of the European Ombudsman in his inquiry into complaint 2573/2007/VIK against the European Commission

Recommendation
Case 2573/2007/VIK - **Opened on** 04/12/2007 - **Recommendation on** 25/01/2012 - **Decision on** 13/12/2012

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

The background to the complaint

1. The present complaint concerns a contested tender procedure. The complainant, a company doing business in the IT field, disagreed with the appraisal of its bid and alleged that the evaluation committee wrongly accepted a bid with variants, whereas variants were not allowed under the call for tenders.

2. On 19 August 2006, the European Commission's then Directorate-General (DG) "Justice, Freedom and Security" ('DG Justice') launched a call for tenders for the creation of a " *Website on Integration* " [2] . On 27 September 2006, the complainant submitted its bid.

3. On 23 November 2006, the Commission awarded the contract to another company. On the same day, it sent letters to all bidders informing them about the outcome of the evaluation. The evaluation committee concluded that the complainant's bid failed to meet the qualitative award criteria. It received 53.5 points, whereas the threshold was 60 points and the best offer obtained 83.5 points.

4. On 29 November 2006, the complainant appealed against the award decision and asked for a copy of the evaluation report, as well as information concerning the name of the successful tenderer, its partners and subcontractors, the scores awarded to its own offer and to the winning bid and the financial offer made by the successful tenderer.

5. By letters of 5 and 13 December 2006, the Commission provided the requested information. As regards the evaluation report, however, it disclosed only those parts which concerned the evaluation of the complainant's offer.

6. On 8 December 2006, the complainant sent to the Commission a detailed analysis of each comment made by the evaluation committee concerning its offer, in particular as regards the qualitative criteria. It argued in essence that the evaluation of its tender was inaccurate. The complainant, therefore, requested the institution not to proceed with the award of the contract and to re-evaluate its offer instead.

7. On 14 December 2006, the Commission signed the service contract in question with the tenderer it had selected. It took the view that the evaluation of the award criteria had been carried out for all tenderers in a non-discriminatory way and that it had fully complied with the tender specifications. It also found that it had already given sufficient reasons for its rejection of the complainant's bid.

8. Several months later, on 4 June 2007, the complainant sent a further letter to the Commission, in which it submitted that, despite the numerous letters exchanged concerning the said tender procedure, the Commission had not yet given sufficient reasons for rejecting its bid. The complainant added that the Commission had not properly replied to the arguments set out in its letter of 8 December 2006. The complainant finally asked to be given a copy of the full evaluation report.

9. In its reply of 18 June 2007, the Commission provided a copy of the full report from which certain data, such as the names of the members of the Evaluation Committee and information that could affect the commercial interests of other tenderers, had been removed. The Commission reiterated its view that it had transmitted to the complainant all the necessary information concerning the tender procedure in question and that if the complainant were not satisfied, it could turn to the Court of Justice or to the European Ombudsman.

10. After having examined the copy of the evaluation report received from the Commission, the complainant noted that the successful tenderer had in fact submitted two financial offers for Phase I of the project. The complainant considered that the second offer constituted a variant and that variants were clearly forbidden. It pointed out that the tender specifications provided the following: *"Tenderers may not submit bids for only part of the services required. Variants are not allowed"* [3] .

11. On 11 July 2007, the Commission explained that the selected bid included an offer that was in conformity with the tender specifications. The bid could therefore not be rejected.

12. On 9 October 2007, the complainant filed the present complaint with the Ombudsman.

The subject matter of the inquiry

13. The Ombudsman opened an inquiry into the following allegation and the following claims:

Allegation:

The complainant alleged that the Commission's evaluation committee had violated, in the framework of the call for tenders JLS/B4/2006/002, the public procurement legislation and Article 4 of the European Code of Good Administrative Behaviour [4] ('ECGAB'). More specifically, the complainant argued that the committee had accepted a bid with variants, whereas variants were not allowed under the tender specifications.

Claims:

(1) The complainant claimed that it should be recognized that in this case, the Commission had infringed the ECGAB.

(2) The Commission should further acknowledge the irregularities that had taken place in the framework of the tender in question and offer the complainant suitable compensation for the losses it had suffered or may suffer in the future.

14. In its complaint to the Ombudsman, the complainant also alleged that the Commission was in breach of Article 17 of the ECGAB [5] , since it failed to give timely access to all the relevant information concerning the tender in question. In the complainant's view, this had prevented it from duly exercising its rights.

15. The Ombudsman noted that, following the complainant's initial request to receive a copy of the evaluation report, the Commission provided it with certain extracts from the report. However, nothing in the evidence enclosed with the complaint suggested that the complainant had made it clear to the Commission that it did not consider the access thus granted to be satisfactory, before it reiterated its request for access in June 2007. The Ombudsman further noted that the Commission had rapidly dealt with this further request and granted access to the evaluation report in its entirety, with the exception of certain data it considered to be confidential. In these circumstances, the Ombudsman concluded that there were insufficient grounds for him to investigate the alleged failure to give timely access to the relevant information.

16. The Ombudsman further notes that in the present complaint, the complainant argued, as it did in other cases submitted to the Ombudsman, that it was deliberately targeted by the Commission and that it was black-listed, abused or harassed by the institution. The complainant asked the Ombudsman to launch an own-initiative inquiry into these issues. The Ombudsman has already informed the complainant that he considers that so far, he has not been provided with pertinent and convincing evidence that would warrant an inquiry into the said issues. The Ombudsman will, therefore, continue to analyse and address the relevant grievances on a case-by-case basis [6] .

The inquiry

17. By letter of 4 December 2007, the Ombudsman opened an inquiry into the allegation and

the claims set out in point 13 above and requested the Commission to submit an opinion. The institution sent its opinion on 29 April 2008. The opinion was forwarded to the complainant with an invitation to make observations, which it provided on 27 June 2008.

18. On 2 December 2008, the Ombudsman asked the Commission to specify the respective meaning of the terms " *variant* " and " *option* " and how they could be distinguished from each other. He also asked the institution to clarify why it considered that one of the proposals of the winning tenderer was non-compliant with the tender specifications. The Ombudsman finally requested the Commission to address the submissions that the complainant had made in its letter to the Commission of 8 December 2006 regarding the evaluation of its tender.

19. The Commission provided its reply on 30 March 2009. This reply was forwarded to the complainant, which sent observations on 26 June 2009.

20. On 31 March 2010, the Ombudsman requested the Commission to explain why it felt entitled to award the contract to a tenderer, even though the latter had submitted two offers, which were referred to as options. The Ombudsman also reiterated his request to the institution - made in the framework of his initial set of further inquiries - to address the arguments put forward by the complainant in its letter of 8 December 2006.

21. The institution's reply was received on 13 July 2010 and the complainant's observations on 25 August 2010.

22. On 12 January 2011, the Ombudsman's representatives inspected the Commission's file. On 17 February 2011, the Ombudsman sent a copy of the inspection report to the parties and invited the complainant to make comments, which it did on 30 March 2011.

The Ombudsman's analysis and conclusions

Preliminary remarks

23. The present complaint encompasses two main arguments: (i) the question of the allegedly wrong acceptance of a bid containing a variant, whereas no variants were allowed; and (ii) the allegedly wrong appraisal of the complainant's bid. The Ombudsman will address these two issues below.

A. As regards the complainant's allegation and its related first claim

Arguments presented to the Ombudsman

Concerning the acceptance of a bid containing a variant (point (i) above)

24. The complainant provided a copy of the report of the evaluation committee, which indicated that the successful tenderer had proposed " *an option* " relating to the implementation of Phase I of the project. According to the report, the evaluation committee concluded that only the proposed " *option* " could guarantee compliance with the IT requirements set out in tender specifications. It further noted that the Commission's DG Budget was consulted on whether the option could be retained as the only acceptable offer from this tenderer.

25. The report of the evaluation committee reflected the discussion, which took place among its members on whether the proposed " *option* " constituted a variant. The relevant section of the report reads as follows:

"... if variants are not allowed and the Tenderer submits only a variant offer, this must be rejected as being not in conformity with the Tender Specifications. On the other hand, if the Tenderer submits two offers, one of which is in conformity and the other not, then only the one of the offers which [is] not in conformity need[s] to be rejected. The Tender should not be automatically rejected just because the Tenderer has presented a basic offer (complying with the tender specifications) along with a separate alternative bid ("variant solution") to this basic offer. Ignoring one of the offers ("variant solution") and proceeding with [the] evaluation of the other offer ("basic offer") is possible, provided that the basic offer is entirely independent from the variant solution and perfectly identifiable. On the contrary, if it is not clear and unambiguous which of the two solutions shall be evaluated by the evaluation committee as the basic offer, by proceeding with [the] evaluation of one of the offers the authorizing officer would make a decision which does not fall into his/her competence".

26. In its complaint to the Ombudsman, the complainant argued that, by putting forward two financial alternatives, the successful tenderer had in fact submitted a variant. Considering that variants were clearly forbidden under the tender specifications, it submitted that the evaluation committee's approach was wrong and not in conformity with the applicable public procurement legislation.

27. In its opinion, the Commission's stated that its " *decision regarding the options provided by one of the tenderers* [was] *clearly justified in the evaluation committee report. The bid concerned did include an offer in conformity with the tender specifications and could not therefore be rejected on this basis* ".

28. In support of its position, the institution explained that the winning bid contained two " *options* ", which concerned only a very specific part of the tender, namely, the proposed software. Option 1 was the open source solution and Option 2 was based on Oracle/Coldfusion. The evaluation committee considered whether Option 1 should be qualified as a " *variant* " within the meaning of the tender specifications, in which case it could not have been accepted. It concluded that Option 1 could not be taken into consideration, because it did not fully comply

with the IT requirements set out in the tender specifications. Option 2, however, did comply with the tender specifications and had to be considered further. According to the Commission, the rules applicable to the award of public contracts were fully complied with. Rejecting this tender would have constituted a violation of the principles governing the award of public contracts.

29. In its observations, the complainant strongly disagreed with the above view. It stated that, in public procurement procedures where variants are not allowed, the tenderers that ignore this rule are automatically rejected. This approach is applied all over the world and no exceptions are allowed. The tenderers tend to offer a variant or an option precisely with a view to being able to submit two distinct financial proposals. If certain members of the evaluation committee have a preference for the tenderer submitting alternative options, they could use one of the two options to ensure that the contract goes to this tenderer. The variant or the availability of two options constitutes the equivalence of a second offer. This is known in the jargon of public procurement as a " *safety net* ".

30. The complainant observed that all tenderers would like to be allowed to submit two or three offers with different financial figures, because by doing so they would increase their chances of winning, especially if the company could rely on the support of the evaluation committee. In the present case, the winning tenderer submitted two financial offers with a difference in price of 20%.

31. The complainant remarked that the successful tenderer was one of the traditional suppliers of services for DG Justice. It also found it strange that all other tenderers had been found inadequate to carry out the work in question.

32. The complainant was also puzzled as to why one of the two options was found not to be compliant with the tender specifications. It noted in this regard that the only information given by the Commission was that this offer was based on open source software. However, this fact did not necessarily imply that such an offer would be at variance with the relevant technical specifications. The complainant surmised that, in reality, both options provided by the successful tenderer were valid and that the evaluation committee deliberately disqualified the cheaper one, so as to ensure that its preferred tenderer would get the maximum amount offered.

33. The complainant finally argued that, even if one of the two " *variants* " was not valid, the Commission should have rejected the entire tender on the ground that some of its parts did not comply with the tender specifications.

The Ombudsman's initial set of further inquiries

34. After having analysed the Commission's opinion and the complainant's observations, the Ombudsman concluded that further inquiries concerning this aspect of the complaint were necessary. He, therefore, requested the Commission to address the following further questions:
- " *Could the Commission please specify the respective meaning of the terms 'variant' and*

'option' and how one could be distinguished from the other? Could the Commission please also specify why in the present case the two alternative proposals (Open Source solution and Oracle/Coldfusion solution) were considered to be options and not variants? In this context, the Commission may wish to take into consideration the 'Explanatory Note on Variants', issued by DG Budget (Central Financial Service, Procurements, contracts and grants) on 27 February 2007, which is available on the Internet.
- Could the Commission please also provide information as to why it felt able to disregard one of the options and explain why it considered this option to be non-compliant with the tender specifications? "

35. In its reply, the Commission pointed out that a variant is a " *technical solution proposed by the tenderer which is different from the specific description of the good to be delivered or the service to be rendered included in the contract documentation as described by its technical specifications* ".

36. As explained in the minutes of the evaluation committee, if variants are not allowed and if a tenderer nevertheless submits a variant, the variant must be rejected as not being in conformity with the conditions of the tender. If the tenderer, however, submits two offers - one of which is in conformity with the technical specifications whilst the other is not - then only the one which is not in conformity with the technical specifications should be rejected. The Commission reiterated its view that a tender should not automatically be rejected just because it had presented a basic offer (complying with the tender specifications) along with a separate alternative bid to the basic offer. Ignoring one of the offers and proceeding with the evaluation of the other one was possible, provided that the basic offer was " *entirely independent from the alternative bid and perfectly identifiable* ".

37. In the present case, the winning tender contained two bids, incorrectly labelled " *options* " by the tenderer. The institution acknowledged that " *the bid called Option 1 could be considered as a variant* ". It could not be taken into consideration, since it did not fully comply with the requirements laid down in Annex 7 ('Information System Hosting Services of the Data Centre'), referred to in point 4.5.2 [7] of the tender specifications. The bid entitled " *Option 2* " was not a variant, since it fully complied with the tender specifications and consequently could be taken into consideration for the award.

38. In view of the foregoing, the Commission reiterated its view that rejecting this tender would have constituted a violation of the rules on the award of public contracts.

39. As for the Explanatory Note on Variants, the Commission explained that this note could not be taken into account in the present case, because the evaluation took place in 2006, whereas the note was issued in 2007. Nevertheless, the conclusions of the evaluation committee were fully in line with the said note. The interpretation was moreover consistent with the clarifications provided by the Court of Justice in Case C-421/01 [8] in relation to variants in public procurement.

40. In its further observations, the complainant considered that the interpretation of the term

variant put forward by the Commission was " *absolutely arbitrary* ", since it was not based on any legislative provision or judgment. The complainant observed that regardless of how the terms " *variant* " or " *option* " were to be interpreted, both variants and options were prohibited in accordance with Articles II.1.9 [9] and Article II.2.2 [10] of the contract notice. The complainant further remarked that, in its decision in Case C-421/01 *Traunfellner GmbH* , the Court of Justice did not actually provide any definition of the term variant.

41. Considering that it was undisputable that the selected tenderer had provided two options in its offer and that options were forbidden under Article II.2.2 of the contract notice, the complainant concluded that the Commission's position was clearly wrong.

42. The complainant added that, when a tenderer presents two options, which have an impact on the price, this allows the evaluation committee to consider two different prices, referring to two different technical solutions. This situation could allow evaluators to manipulate the process and, by using various arguments, to select the option that results in the relevant tenderer being ranked first. Consequently, the presentation of the two options implied, in the complainant's view, that there was automatically a variant.

43. The complainant noted that the Commission had suggested that a variant existed only when the proposed tender constituted a deviation from what was requested by the tender specifications. The complainant pointed out that, even if one could assume that such an interpretation were correct, the Commission did not publish it in the tender specifications or any other document so as to ensure that it was available to all the tenderers in good time. Moreover, the Commission argued in the present case that one of the two options was not in compliance with the tender specifications. Therefore, this option certainly constituted a variant.

The Ombudsman's second set of further inquiries

44. On the basis of the above new arguments advanced by the complainant, the Ombudsman considered it necessary to request the Commission to reply to the following further question:

" *In its further observations, the complainant referred to the contract notice, which provides that neither variants nor options were allowed (Point II.1.9 and Point II.2.2). At first sight, this would seem to mean that tenderers were supposed to submit one single offer. Could the Commission, therefore, please explain, why it felt entitled to award the contract to a tenderer even though the latter had submitted two offers and even though these offers were referred to as 'options'?* "

45. In its reply, the Commission explained that excluding options or variants did not mean that a tenderer could not submit more than one offer. The tender specifications and the contract notice did not rule out the possibility of multiple offers. Both the Financial Regulation [11] and Directive 2004/18/EC [12] provide a closed list of exclusions from the tender, and the situation which arose in the present case, where the tenderer submitted more than one offer, was not among them. The Commission considered that economic operators were allowed to submit a number of offers or participate in a number of groupings submitting joint offers and the

contracting authorities had neither grounds nor means to restrict this practice.

46. The Commission provided the following further explanations:

" *The Contract notice excluded variants or options on the service to be provided. Therefore, only offers for the specific service (in this case the creation of a Web Site on Integration) were considered eligible.*

In fact, a variant, as the term is used in public procurement, refers to a difference, from a technical or economic point of view, between the solution proposed in the offer and the one envisaged in the technical specifications, not between or within offers submitted by one tenderer (e.g. if [the] *subject of the tender was defined only by results). Without requirements towards the implementation method, different solutions proposed are not variants because they have nothing to differ from. Thus, variant refers to the substance of the offer and not to its form or number* ".

47. The Commission pointed out that this understanding was also confirmed by the Court of Justice's decision in Case C-421/01. The Commission referred to the operative part of the ruling, which stated the following:

" *Article 19 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts is to be interpreted as meaning that the obligation to set out the minimum specifications required by a contracting authority in order to take variants into consideration is not satisfied where the contract documents merely refer to a provision of national legislation requiring an alternative tender to ensure the performance of work which is qualitatively equivalent to that for which tenders are invited* ".

48. The Commission maintained its view that when a tenderer submits two offers, one of which is in conformity with the technical specifications whilst the other one is not, then only the offer that is in conformity with the technical specifications can and must be admitted. In any case, both offers should be assessed. A tenderer cannot automatically be rejected just because it presented an offer complying with the tender specifications along with another offer. Furthermore, rejecting a valid offer because there was a second offer from the same tenderer - be it valid or invalid - would breach the equality of treatment between tenderers, as every valid offer must be evaluated.

49. The Commission finally noted that accepting such an offer was fully in line with the case-law on public procurement and the principle that the contracting authorities must ensure the widest possible participation and competition in procurement procedures.

50. As for the term " *option* ", the Commission explained that " *options are qualitative (or quantitative) extras ancillary to the service that is the subject of the procurement (something additional to the main subject of the contract which nevertheless is priced and the contracting authority may, in the course of implementation of the contract, decide to buy it)* ". The institution noted that the winning tenderer wrongly used the term option, since it did not apply to the

present case.

51. In this procurement procedure, the winning tenderer had made two distinct offers, one of which was valid and corresponded to the relevant specifications while the other one was invalid, as it did not comply with the said specifications. In the Commission's view, rejecting a valid tender and thus the tenderer that had submitted it, would be a violation of the rules on the award of public contracts. The institution submitted, therefore, that it had acted fully in compliance with these rules.

52. In its further observations, the complainant rejected the arguments of the Commission and firmly maintained its position.

53. The complainant considered that the Commission's statement that " *excluding options and variants* [did] *not mean that a tenderer cannot submit more than one offer* " contradicted basic common sense and most importantly the cornerstone of public procurement as it is known in the EU and internationally. It reiterated its position that options and variants were offered through the submission by tenderers of alternative (more than one) offers and alternative offers inevitably constituted either options or variants.

54. As a general rule, options and variants annulled free and fair competition, since they allowed certain tenderers to provide multiple offers and to obtain different quality/price scores, thus increasing their chances to win. This was especially the case when - as in the present case - only one tenderer could submit more than one offer.

55. In the complainant's view, the contracting authorities have an interest in allowing options only in cases of: (a) complex calls for tenders, where certain decisions need to be taken during the implementation of the contract; (b) when the available budget of the contracting authority is unknown at the time of the call for tenders; (c) when the delivery of the services depends on environmental factors beyond the contracting authority's control. However, the present call for tenders did not fall within any of the above-mentioned categories.

56. To the best of the complainant's knowledge, the Commission " *never* " allowed options, variants or alternative offers, not only in cases, such as the present one, concerning the development of a website but in all its calls for tenders. When the Commission deviates from this rule, it is clearly specified in the tender specifications. This was obviously not done in the contested procedure.

57. The complainant illustrated the implications of the Commission's statement that tenderers could submit more than one tender by using the following hypothetical example. In the context of an examination, a student was asked by his/her teacher to give the value of pi (p). Assuming that multiple offers were allowed, the student could write down as many as, for example, 300 figures, hoping that one of them would be close to 3.14 and thus expect to pass the examination. The complainant questioned how one could evaluate such a student through such an approach, particularly in view of the fact that all the other students were allowed to give one answer only.

58. The complainant further contested the Commission's reasoning that, if a tenderer had submitted two or more offers and one of them happened to be compliant with the tender specifications, the institution had to ignore the non-compliant one and to evaluate the one that was valid. Using the same example, the complainant suggesting that if the student gives 300 answers to the above question he or she may still pass the examination, provided that one of its answers is 3.14 or a value close to it, while others who gave only one answer could fail.

59. The complainant understood the Commission's interpretation of the terms " *option* " and " *variant* " to be that tenderers would not be allowed to offer, in the context of a specific call for tenders, services other than those which are specified in the tender specifications, such as providing catering to the Commission's cafeteria instead of developing a website. The Commission failed to explain, however, how this could possibly be covered by a reference to options and variants, when it is clear that, in case the tenderer attempts to offer something that does not comply with the tender specifications, its tender is automatically rejected due to such non-compliance.

60. The complainant underlined the fact that the Commission did not explain to tenderers that they were allowed to submit multiple offers. As for the Commission's argument that multiple offers were not included in the list of " *exclusion situations* " and must thus be considered as allowed, the complainant pointed out that it had never argued that multiple offers were illegal. Such offers could indeed be accepted, unless there is a specific reference in the tender specifications stating that options and variants are not allowed. The Commission's comment that it wished to ensure the widest possible participation was totally insincere, since, in this case, the Commission rejected all the other tenderers and considered only one tenderer in the award phase.

61. The complainant stated that the institution decided of its own accord to alter the content of the tender and to take an arbitrary decision that the options which were offered by the tenderer in question were not options, but rather " *different offers* ", which, in the Commission's view, were acceptable, even though this was a privilege offered only to the winning tenderer.

62. The complainant reiterated its understanding that the winning tenderer had submitted only one offer and that this offer contained two different technical solutions, which constituted two options of a single tender. Given that options were clearly prohibited by the tender specifications, this should have led the Commission to disqualify this tenderer immediately.

63. Even if one were to assume that the winning tenderer had made two different offers, this was not allowed by the tender specifications. According to the complainant, the Commission failed to realise that it created a very dangerous precedent, following which all tenderers would from now on be in a position to submit different " *offers* " and as many as they like, in order to increase their chances of winning. This would have a domino effect on the EU's public procurement, with tremendous implications.

The inspection of the Commission's file

64. Having analysed the position of the parties, the Ombudsman considered it necessary to inspect the Commission's file. After the inspection, and following a question raised at that inspection, the Commission provided the Ombudsman with copies of two internal e-mails of 26 October 2006, in which the eligibility of the winning tenderer's suggestion to use open source software was discussed. These e-mails confirmed that, if the system was to be hosted in the Commission's Data Centre, it had to respect the Data Centre hosting guidelines, regardless of whether the product was based on an open source software or not. However, certain open source solutions - including the one covered by the first proposal of the winning tenderer - were not considered by the Data Centre hosting guidelines at the time. The results of the inspection and the contents of the above e-mails were set out in a report drawn up by the Ombudsman's services.

65. In its observations on the report on the inspection, the complainant submitted that the Commission's Data Centre installs and supports all the software that is necessary for its DGs. If a particular DG selects a specific IT solution, comprising open source software compliant with the tender specifications, then the Data Centre has to install it. According to the complainant, it would be very insincere for the Commission to claim that the Data Centre could refuse to do so. Such an approach would imply that certain products were discriminated against and would itself constitute a serious infringement of EU law. The complainant concluded that the Commission could not use an e-mail from the Data Centre (which indicated that, at a certain moment in time, it did not have in place a specific product) as an argument that one of the two options offered was not valid.

66. The complainant pointed out that an offer should be considered invalid only when it infringes a provision of the law or a provision of the tender specifications. This was not the case with the said option proposed by the winning tenderer. The complainant furthermore reiterated its understanding that, even if one of the options were invalid, this could not possibly allow the evaluation committee to consider that there was " *only one valid offer* " and use this to downplay a blatant infringement of the tender specifications and the Financial Regulation.

Concerning the appraisal of the complainant's bid (point (ii) above)

67. In its letter to the Commission of 8 December 2006, the complainant contested most of the comments made by the evaluation committee concerning the qualitative assessment of its bid and argued that these comments were presented in a telegraphic form and that they were " *vague and not substantiated and consequently arbitrary, wrong and unfair* ".

68. The complainant considered that the low score given to its tender resulted from certain manifest errors of assessment on the part of the evaluation committee. It referred, for example, to the statement made in the report that there was " *... a confusing mix of different notions: stakeholders, users, target groups, client, customer...* " in its tender proposal. The complainant strongly disagreed with this conclusion and pointed out that, in different sections of the report, it

had identified the key actors and target groups, the national focal points, the coordinator and sub-contractor and even provided a 255-page list of organizations dealing with migration and integration all over Europe. The complainant could thus not understand how any confusion could arise as to who was a stakeholder, user or a target group. The complainant explained in this context that the expressions " *client* " and " *customer* " were ordinarily used when referring to the contracting authority.

69. The complainant further disagreed with the evaluation committee's statement that the " *source code itself* [was] *not described as an output artefact of the whole process* ". It found the comment to be manifestly wrong, as it had explained in detail all its standards and procedures for writing the code.

70. According to the complainant, the evaluation committee's comment that " *the part on project management in the chapter named project organization* [was] *not relevant there* " also constituted a manifest error of assessment, since it was difficult to understand how the Committee could argue that project management was not relevant to the project organisation.

71. In its opinion, the Commission pointed out that, following the assessment of the complainant's bid on the basis of the award criteria, the evaluation committee arrived at the conclusion that it did not pass the threshold of 60 points for quality award criteria as required under the tender specifications. It did not obtain the minimum points as regards the quality and clarity of the approach, methodology and working methods proposed for the assignment, including information collection, analysis and processing techniques. In particular, for the part of the bid relating to the information systems, the evaluation committee concluded that it lacked clarity, conciseness, structure and consistency.

72. In view of the specific arguments raised by the complainant in this context, both in the complaint and in its observations, the Ombudsman considered it appropriate and necessary to request the Commission to address the following question:

"In its complaint, the complainant argued that the Commission's evaluation of its tender was unfair, arbitrary and tainted with manifest errors of assessment. Could the Commission please address the arguments put forward by the complainant in this regard in the complaint and in its letter to the Commission of 8 December 2006?"

73. In its reply, the Commission reiterated that only the winning tenderer reached the minimum " *qualitative* " score required by the specifications and that sufficient reasons had already been provided to the complainant as to why its offer had not been accepted. The relevant information was provided in accordance with the rules applicable for each step of the tendering procedure. The call for tenders followed the Financial Regulation and its Implementing Rules. The Commission remarked that the Ombudsman had already rejected the complainant's allegation regarding the lack of access to the relevant information on the side of the Commission.

74. In its further observations, the complainant maintained its view that the Commission had failed to address the substantive arguments raised in its letter of 8 December 2006 and that it

had, therefore, failed to offer adequate explanations for its decision. It pointed out that the simple affirmation that the tendering procedure was in line with the relevant rules could not constitute a valid justification or adequate explanation. The complainant referred to Article 100(2) of the Financial Regulation and other provisions, reiterating that it had to be informed about the grounds for taking the decision and the relative advantages of the successful tender. It considered that no detailed explanation and justifications were provided by the Commission and this was in violation of the applicable public procurement legislation.

75. In view of the above, the Ombudsman concluded that it was necessary to address a second request for further information to the Commission. In his letter, the Ombudsman recalled that the complainant had argued that the evaluation of its tender was unfair, arbitrary and tainted with manifest errors of assessment. The Ombudsman, therefore, reiterated his request that the Commission address the arguments put forward by the complainant in this regard, both in the complaint and in its letter to the Commission of 8 December 2006.

76. In its reply, the Commission pointed out that it had explained on several occasions why the complainant's offer had been rejected. On 23 November 2006, it informed the complainant that its bid was not selected, because it did not obtain the minimum points for the qualitative award criteria (the threshold of 60 points as required in the tender specifications). The Commission had also promptly provided the complainant with an extract of the evaluation report containing the reasons why its offer had not been accepted. On 17 June 2007, the Commission had sent the complainant the complete evaluation report.

77. The Commission recalled that for two out of three criteria, the complainant's offer reached the minimum points required. It was only in relation to one of the criteria that its offer did not obtain the minimum points. This was the criterion concerning the quality and clarity of the approach, the methodology and working methods proposed for the assignment, including information collection, analysis and processing techniques. The evaluation committee concluded in particular that part of the complainant's offer relating to the information systems lacked clarity, conciseness, structure and consistency.

78. The Commission noted that the contested assessment did recognise the strong points of the complainant's proposal. In comparison, other tenderers evaluated in the context of the same procurement procedure did not even reach the minimum points required for any of the three criteria.

79. The Commission pointed out that, when analysing each tender, the evaluation committee carried out an in-depth assessment which was reflected in the report. As an illustration, the Commission referred to the assessment concerning criterion (a), which stated that " *the way the Tenderer* [was] *going to tackle the language, translation and international issues* [was] *not well described (and* [was] *one of project's risks and critical success factors)* ". For criterion (b), it was noted, for example, that the complainant did not show evidence of clear, efficient and workable integration of the two methodologies (RUP and the complainant's home made web development methodology). Though the complainant had described the RUP methodology, the integration of the two methods was not addressed and described in sufficient clarity so as to warrant a higher

evaluation grade.

80. In the Commission's view, the report of the evaluation committee explained in detail why the complainant's offer was rejected. When comparing the points given and the comments made concerning the different tenderers, one could easily understand the difference. Given that the same award criteria were applied to all the valid offers following unanimous agreement of four experts in the field, the evaluation could clearly not be regarded as unfair or arbitrary.

81. The Commission finally remarked that, in accordance with firmly established case-law [13] , the contracting authority was not obliged to reply to each and every question submitted by an unsuccessful tenderer on the basic concepts of the evaluation.

82. In its observations, the complainant maintained its view that the information provided by the Commission was not sufficient for it to understand the low score given to its offer. In any event, the information provided did not justify its exclusion and did not show in which respects the winning tenderer was offering something more or better than itself. The complainant maintained its view that the evaluators did not analyse its proposal properly and had committed serious and manifest errors of assessment during the evaluation.

83. The complainant pointed out, for example, that, in accordance with the tender specifications, the winning tenderer had to offer a mixture of expertise and skills, including the coverage of as many European languages as possible. The complainant considered that the Commission's evaluators failed to take this clear requirement into consideration.

84. As regards criterion (a), the complainant argued that the Commission's evaluators failed to consider the information provided by the complainant concerning international issues (" *Links to other EU activities and avoiding possible overlaps* ") in its tender. The complainant further pointed out that the functional and technical requirements of its offer were presented in the section of the tender called " *Approach, Methodology and Working Methods Proposed* ". This part of its offer contained a detailed description of how the complainant proposed to tackle the language, translation and international issues.

85. As regards criterion (b), the complainant submitted that there were no two different methodologies that needed to be integrated and that there was one global methodology covering the entire project and a vertical one dealing with the software development tasks. The complainant pointed out that, in Chapter 2.1 of its proposal, it described how the RUP principles were applied for the development work of the website and, in Chapter 2.2, it described the overall methodology used for the development of web-based software projects.

86. Finally, the case-law of the General Court to which the Commission referred concerned situations in which the contracting authority had fulfilled its obligation to explain what motivated its decision and provided full transparency to the rejected tenderers, illustrating, by means of comparison, the ways in which the winning tenderer's bid was superior to the bids submitted by the other tenderers. In these cases, the contracting authority was not supposed to continue a permanent dialogue. In the complainant's view, the present case was, however, different.

The Ombudsman's assessment

As regards the allegedly wrong acceptance of a bid with a variant

87. In order to assess whether the Commission was right in accepting and analysing an offer that proposed two alternative solutions, whereas no variants and no options were allowed under the tender specifications, the Ombudsman considers it important to establish first of all what the winning tenderer actually submitted in the present case. In this context, the Ombudsman will also address the issue of the compatibility of the alternative proposal with the tender specifications.

88. The Ombudsman notes that a number of different terms were used and applied, not always consistently, by the relevant actors involved. The report of the evaluation committee used words such as " *option* ", " *basic proposal* ", " *variant solution/offer* " or " *alternative bid* ". In its tender proposal, the winning tenderer had suggested " *Option 1* " and " *Option 2* ". In its opinions, the Commission discussed the terms " *options* ", " *variants* " and separate " *bids* " or " *offers* " and concluded that the tenderer in question had in fact submitted two different offers. The complainant in essence took the view that no matter whether the chosen bid contained an option or a variant, both were clearly prohibited under the tender documentation.

89. Against this variety of terminological references, the Ombudsman understands that what the winning tenderer submitted were two alternative technical solutions (an open source solution and a proprietary software solution) for the development of the web portal in question.

90. The Ombudsman notes that the Commission defined options as " *qualitative (or quantitative) extras ancillary to the service that is the subject of the procurement* " [14] . In the Ombudsman's view, the complainant has not put forward any convincing arguments to show that this definition should be considered to be incorrect. Given that the two technical solutions proposed were alternative and were not aimed at complementing one another by adding qualitative or quantitative extras, the Ombudsman is of the view that neither of these proposals could be regarded as an option. This also appears to be the Commission's view, which stated that the successful tenderer had wrongly called the two alternative solutions " *options* ".

91. The Commission further explained that a variant is a " *technical solution proposed by the tenderer which is different from the specific description of the ... service to be rendered* ". The Commission Vade-Mecum on Public Procurement provides as follows: " *Variant means a solution technically or economically equivalent to a model solution known to the contracting authority. Variants may relate to the whole contract or to certain parts or aspects of it. Variants must be submitted separately and identified as variants.* " In the course of the Ombudsman's inquiry, the Commission acknowledged that one of the proposed alternatives (the open source solution) " *could be considered as a variant* " [15] , since it did not fully comply with the requirements laid down in Annex 7 of the tender specifications.

92. The complainant suspected that the proposed alternative did actually comply with the tender requirements. In support of its own view, the Commission referred to point 4.5.2 of the technical specifications, which required that the " *IT system's architecture must be in compliance with what is supported by the Information System Hosting Services of the Data Centre* ". Therefore, in order for the proposal to be eligible, it had to be compliant with the Data Centre hosting guidelines, regardless of whether the product was based on an open source software or not.

93. Following the inspection of the Commission's file, it has been established that the open source solution proposed by the winning tenderer was not at the time considered by the Data Centre hosting guidelines. The Commission's view that it did not, therefore, comply with point 4.5.2 of the technical specifications would thus appear to be reasonable.

94. In its submissions, the complainant argued that the Data Centre must install and support all types of software, if needed. The Ombudsman notes that nothing in the documents inspected and the material provided in the context of the present complaint substantiates such a view. In fact, if this were indeed the case, point 4.5.2 of the technical specifications would hardly make sense and would not need to be included in the tender documentation.

95. In view of the above, the Ombudsman found no elements that would put into question the conclusion of the evaluation committee that the open source solution proposed by the successful tenderer did not comply with the Data Centre hosting guidelines and, therefore, with the tender specifications.

96. Taking into consideration all of the above elements, the Ombudsman concludes that the open source solution was a " *technical solution ….different from the specific description of the … service to be rendered* ". Consequently, the said open source solution was a variant and should have been identified as such by the evaluation committee.

97. The Ombudsman recalls in this context that point 18 of the tender specifications provided the following: *"Tenderers may not submit bids for only part of the services required. Variants are not allowed."* Given that the tender documentation (both the technical specifications and the contract notice) clearly indicated that no variants were allowed, the Commission had to disregard any variant included in the offer. Given that the open source solution had to be considered as a variant, or was a variant, the Commission clearly had to disregard it. The Ombudsman notes that this is what the Commission did in the present case.

98. The question, however, that still remains to be addressed is whether the Commission was, in these circumstances, entitled to retain the remaining offer, that is, the proprietary software solution submitted by the winning tenderer and whether it was right to conclude that only part of the tender, that is, the open source solution was inadmissible, and not the entire bid.

99. The Ombudsman is not aware of any rule which specifically obliges the administration, in situations such as the present one, to disregard the entire tender due to the fact that a variant

was proposed, whereas variants were not allowed under the tender documentation.

100. In the Ombudsman's view, the Commission's approach was thus possible. The tender documentation did not indicate that if a variant were to be submitted together with a valid offer, the entire tender must necessarily be rejected. Point 14.2 of the tender specifications laid down two conditions for the exclusion of the tenderer during the procurement procedure. None of them, however, covered the present situation [16] . The Ombudsman notes that, in order to challenge the Commission's approach, the complainant has put forward the example of a student who has to give the value of pi (p). It appears obvious that this example concerns an entirely different subject matter. It is therefore difficult to see how it could be relevant in the present context.

101. The Ombudsman does not consider the reference to Case C-421/01 Traunfellner GmbH to be relevant for the present dispute, either, since this judgment discusses a case in which variants were allowed under the tender, but where no minimum technical requirements to be satisfied by the variant in order to be accepted were laid down. The complainant's case refers to a situation in which variants were not allowed, so there was no way whatsoever for a variant to be accepted.

102. In view of the foregoing, the Ombudsman is unable to conclude that, by accepting a tender, after having disregarded the variant it contained, the evaluation committee violated the public procurement legislation and the principle of lawfulness, laid down in Article 4 of the ECGAB. The Ombudsman, therefore, finds no maladministration as regards this aspect of the case.

As regards the appraisal of the complainant's bid

103. The Ombudsman has continuously taken the view that it is for the administration organising a call for tenders to assess whether the applicants fulfil the conditions laid down in this call. The Ombudsman must not substitute his own assessment for that of the institution and should only check whether the relevant procedures have been respected and if the assessment made is not vitiated by a manifest error. The Ombudsman notes that, in the present case, in addition to the alleged manifest errors of assessment, the complainant argued that the assessment of its proposal was also " *unfair* " and " *arbitrary* ". The Ombudsman will, therefore, consider these aspects below.

104. The Ombudsman recalls at the outset that it is established case-law that the Union institutions and bodies enjoy a wide margin of discretion with regard to the factors to be taken into account for the purposes of deciding to award a contract following an invitation to tender.

105. Notwithstanding the wide discretion given to the relevant administration, an unsuccessful tenderer has a right to receive information as to why its bid was rejected. This right is an expression of the obligation of the administration to give reasons for its decisions in any administrative procedure which could adversely affect an individual [17] .

106. Article 100 (2) of the Financial Regulation provides that "the contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded."

107. In the present case, following the complainant's request, the Commission immediately disclosed to the complainant those parts of the evaluation report which concerned its bid. In the Ombudsman's view, the relevant parts of the report contained specific and pertinent comments on the assessment made. On the basis of this information, the complainant was in a position to identify which parts of its proposal were appreciated by the evaluators and which were considered less satisfactory. Further to that, the institution informed the complainant of the characteristics and the relative advantages of the successful tender and of the name of the tenderer to whom the contract was awarded.

108. Against this background, the Ombudsman considers that the Commission complied with its duty to state reasons and with the formal requirements concerning the right of the unsuccessful tenderer to receive information, laid down in Article 100(2) of the Financial Regulation and Article 149 of its Implementing Rules.

109. The Ombudsman notes, however, that the complainant contested the reasoning provided by the Commission. In its letter of 8 December 2006, the complainant advanced a number of comments in support of its view and argued in essence that the Commission's substantive assessment of its bid was " *unfair* ", " *arbitrary* ", and tainted by " *manifest errors of assessment* ".

110. When opening the present inquiry, the Ombudsman asked the Commission for an opinion on the complaint. When doing so, he expected the Commission to address the comments made in the complainant's letter of 8 December 2006. In fact, these comments contain specific arguments to support the complainant's view that the Commission's assessment of its bid was incorrect. However, the Commission refrained from addressing these comments in its opinion. During the course of the present inquiry, the Ombudsman therefore explicitly requested the Commission to address the comments made in the complainant's letter of 8 December 2006. He did so twice, in his further inquiries on 2 December 2008 and 31 March 2010. Despite these requests, the Commission did not address the complainant's above-mentioned arguments, but essentially maintained that it was not obliged by law to provide explanations to the complainant that went beyond the ones it had already given to it. In this context, the Commission referred to the case-law of the General Court and in particular to Case T-211/07 *AWWW v. Eurofound* , in which the Court ruled that the contracting authority is not obliged, on the basis of its duty to state reasons for a decision rejecting a bid, to enter into a debate with the complainant on the merits of its offer as compared with the successful bid.

111. The Ombudsman considers it important to underline that he did not ask the Commission to address the comments the complainant had made in its letter of 8 December 2006 on the basis

of the legal obligations flowing from the rules on public procurement. Instead, the Ombudsman's requests of 8 December 2006 and 31 March 2010 were made on the basis of the notion of good administration. The Ombudsman has consistently taken the view that a citizen-friendly administration is one that is ready to explain its position. The Ombudsman's above requests were also made with a view to enabling him to proceed with the assessment of the complaint that had been submitted to him by the complainant, to the extent that this complaint concerned the assessment of the complainant's bid by the Commission. The Commission's decision not to respond to the Ombudsman's requests failed to take these considerations into account. The Commission's approach is therefore not only highly regrettable but it also prevented the Ombudsman from completing the said assessment. Such an approach constitutes a failure on the part of the Commission to comply with its duty of loyal cooperation with the Ombudsman. This is an instance of maladministration and the Ombudsman therefore makes the draft recommendation below.

B. As regards the claim for compensation

112. The Commission did not provide any specific comments concerning the complainant's claim for compensation. However, it denied having committed irregularities in the framework of the procurement procedure in question. The Ombudsman, therefore, requested the Commission in his further inquiries to comment on the claim for compensation as well.

113. In reply, the Commission reiterated that it had fully complied with the rules relating to the award of public contracts and access to all the relevant information. Therefore, the institution considered that there was no ground for compensation in the present case, since no violation of the applicable law had taken place.

114. In its observations, the complainant maintained its claim and considered that the Commission should pay damages to it, since it would, if the Commission had properly handled the matter, have been the winning tenderer in this procurement procedure.

115. The complainant added that it was facing a systemic plan to exclude it from all the Commission's contracts and that it was forced to rely on the Ombudsman and the General Court in order to defend its rights. However, this process was long, painful, time- and effort-consuming and very expensive for the complainant. For the time being, the Commission was only condemned to pay the legal fees of the complainant. Under these circumstances, the only solution for the complainant was to be paid compensation for the damage it had suffered in the past and that it would suffer in the future. The complainant expected that the Commission should thus admit that it was wrong and immediately start discussing measures to compensate it accordingly.

The Ombudsman's assessment

116. The Ombudsman found no instance of maladministration on the part of the Commission

for having accepted the valid proposal of the winning tenderer [18] . To the extent that the complainant's claim for compensation is based on this aspect of the complaint, it must fail.

117. As noted above, due to the Commission's failure to address the complainant's arguments pertaining to the assessment its bid, the Ombudsman has so far been unable to ascertain whether the Commission committed any maladministration as regards this assessment. As a consequence, the Ombudsman is, at present, also unable to decide whether the complainant is entitled to claim any compensation in this context.

C. The draft recommendation

On the basis of his inquiries into this complaint, the Ombudsman makes the following draft recommendation to the Commission:

The Commission should respond to the Ombudsman's repeated requests to address the complainant's arguments, as set out in its letter of 8 December 2006, that the disputed assessment was tainted by unfairness, arbitrariness and manifest errors of assessment. The Commission's response should be such so as to enable the Ombudsman to complete his assessment of the relevant allegation and claim raised by the complainant.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 30 April 2012. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos Diamandouros

Done in Strasbourg on 25 January 2012

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] Reference number: JLB/B4/2006/02.

[3] Point 18 of the tender specifications.

[4] Article 4 (Lawfulness) of the ECGAB reads: " *The official shall act according to law and apply the rules and procedures laid down in Community legislation. The official shall in particular take care that decisions which affect the rights or interests of individuals have a basis in law and that their content complies with the law* ".

[5] Article 17 (Reasonable time-limit for taking decisions) of the ECGAB reads: " *The official shall ensure that a decision on every request or complaint to the Institution is taken within a reasonable time limit, without delay, and in any case no later than two months from the date of receipt. (...)* "

[6] The Ombudsman's letters to the complainant of 30 June 2011 and 27 October 2011.

[7] Point 4.5.2 of the tender specifications is entitled "Compliance with the IT policy of the European Commission".

[8] Case C-421/01 *Traunfellner GmbH* [2003] ECR I-11941.

[9] Articles II.1.9 of the contract notice reads as follows: "Variants will be accepted: No".

[10] Articles II.2.2 of the contract notice reads as follows: " *Options: No* ".

[11] Council Regulation No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248, p. 1.

[12] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134, p. 114.

[13] The Commission referred to Case T-50/05 *Evropaïki Dynamiki v. Commission* , [2010] ECR II-1071 and Case T-211/07 *AWWW v. Eurofound* , [2008] ECR II-106.

[14] See paragraph 50 above.

[15] See paragraph 37 above.

[16] The provision of the tender specifications (point 14.2) concerning exclusions during the procurement procedure read as follows: " *Contracts will not be awarded to tenderers who, during the procurement procedure: (a) are subject to a conflict of interest; (b) are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the contract procedure or fail to supply this information* ".

[17] Article 41 of the EU Charter of Fundamental Rights and Article 18 of the ECGAB.

[18] See paragraph 102 above.