

Decision in case 2199/2017/AMF on how the EU Delegation in Bolivia handled a procurement procedure

Decision

Case 2199/2017/AMF - Opened on 24/07/2018 - Decision on 18/06/2019 - Institutions concerned European Commission (No maladministration found) | European Commission (Settled by the institution) |

The case concerned a procurement procedure for an EU funded contract, managed by the EU Delegation in Bolivia. The Delegation informed the complainant that it had been awarded the contract. The complainant was also told that, if information received during the mandatory seven-day standstill period justified a more detailed examination of the tenders, the complainant would be immediately notified. Almost one month later, the Delegation informed the complainant that it had decided to award the contract to another tenderer.

The Ombudsman found that the Delegation had not committed maladministration in evaluating a tender that had originally been rejected. However, the Delegation had failed to comply with its obligation to inform the complainant immediately that it had received information during the standstill period that could have an impact on the award of the contract. She therefore proposed to the Commission that the Delegation apologise to the complainant and compensate it for time and resources spent, after the standstill period, on preparing supporting documents.

The Commission accepted the Ombudsman's proposal for a solution. The Ombudsman therefore closed the inquiry.

Background to the complaint

1. The complainant is a German consultancy firm that participated in a call for tenders [1] published by the EU Delegation in Bolivia (the Delegation). The call for tenders was for an EU funded contract with a value of approximately 5.5 million euro.
2. On 8 November 2017, the Delegation informed the complainant that it had been awarded the contract, but that the contract could be signed only after a standstill period of seven days. During the standstill period, the Delegation reserved the right to suspend the signature of the contract for longer if the comments received from non-selected tenderers or any other relevant information justified a more detailed examination of the tenders. The complainant would be



immediately notified if this were the case. The estimated date for the entry into force of the contract was 1 December 2017.

3. In the award letter, the Delegation asked the complainant to provide an updated financial identification form and a declaration confirming the availability of the experts. The Delegation also asked for declarations signed by the complainant's partners, the name of the proposed auditor and a confirmation that the complainant would request pre-financing. The complainant provided the requested documents and information.

4. On 4 December 2017, the Delegation informed the complainant that it had evaluated a tender from another tenderer that had initially been rejected and that it had decided to award the contract to the other tenderer. The complainant was informed of a new standstill period of seven days during which it could make comments.

5. The complainant disagreed with the Delegation's decision to award the contract to another tenderer and asked for the contract not to be signed with the other tenderer.

6. The European Commission, which is responsible for implementing EU development aid [2], replied to the complainant, confirming its decision to award the contract to another tenderer. It had found no substantial irregularity in the procedure (as defined by the applicable rules [3]), that would justify cancelling the contract.

7. Dissatisfied with the Commission's reply, the complainant turned to the Ombudsman in December 2017.

The inquiry

8. The Ombudsman inquired into the following aspects of the complaint:

1) The Delegation was wrong to evaluate a tender that had initially been rejected after receiving comments from the rejected tenderer during the standstill period. The Delegation should therefore annul the decision to award the contract to the tenderer that was initially rejected.

2) The Delegation did not comply with its obligation to notify the complainant that it had received observations from another tenderer that had led it to evaluate a tender that was initially rejected.

9. In the course of the inquiry, the Ombudsman received the reply of the Commission to the complaint and, subsequently, the comments of the complainant in response to the Commission's reply.

On whether the Delegation was wrong to evaluate a tender that had initially been rejected



Arguments presented to the Ombudsman

10. The complainant considered that, by re-evaluating a tender, the Delegation acted contrary to the rules applicable to contracting procedures in EU external actions [4] as well as the provisions of the 2012 Financial Regulation [5] .

11. The Commission argued that the Delegation did not *re-evaluate* a tender. It did a first *evaluation* of a tender that had initially been rejected because it was considered not to comply with the technical award criteria set out in the tender documents [6] . In accordance with the applicable rules [7] , the Delegation examined the comments made by the rejected tenderer during the standstill period. These comments proved that the initially rejected tender did comply with the technical award criteria. The Delegation therefore did a technical evaluation of the initially rejected tender, followed by the opening of the financial offer, in line with the applicable rules [8] . The award of the contract was based on the best quality-price ratio [9] . As the originally rejected tender had the best quality-price ratio, the contract was awarded to that tenderer.

The Ombudsman's assessment

12. The Delegation was obliged to respect a standstill period before signing the contract [10] . The purpose of the standstill period is to safeguard the procedural rights of all tenderers and to guarantee the impartiality of tender procedures [11] . As the Commission correctly points out in its reply to the complainant, the Delegation was entitled to suspend the signing of the contract to allow for an examination of the comments made by unsuccessful tenderers during the standstill period.

13. The information provided to the Ombudsman shows that the Delegation had initially rejected a tender because the Delegation considered that one of the experts did not comply with the requirement to have “ *a university degree in economics, public administration or similar*”. The rejected tenderer pointed out, in the comments submitted during the standstill period, that the expert in question had a university degree in Sociology and a postgraduate degree in Management of Local Administration.

14. Based on the above, the Ombudsman considers reasonable the Delegation’s decision to evaluate the initially rejected tender. The Delegation followed the applicable rules by first evaluating the technical part of the tender and subsequently opening the financial offer. The Ombudsman thus finds no maladministration regarding this aspect of the complaint. Accordingly, the complainant’s claim that the Delegation should annul its decision to award the contract to the initially rejected tenderer cannot be upheld.

15. In the course of the inquiry, the Ombudsman noted that, according to the Financial Regulation, the Delegation should have given unsuccessful tenderers a standstill period of **ten days** (and not seven) to make their comments (see footnote 11). The Commission explained that it has recently introduced changes to the applicable rules that provide clearer templates



and guidance to Delegations [12] . The Ombudsman welcomes the steps taken by the Commission in this regard.

On whether the Delegation complied with its obligation to notify the complainant

Arguments presented to the Ombudsman

16. The complainant considered that, on the basis of the information set out in the initial award letter (see paragraph 2 above), the Delegation should have immediately notified it about the fact that the comments received during the standstill period had triggered an additional evaluation. The Delegation informed the complainant only after 26 days. During this period, the complainant spent time and effort preparing a number of documents that it was required to provide for the signature of the contract.

17. The Commission argued that it is not a procedural obligation to suspend the signing of a contract. It is merely a possibility foreseen by the applicable rules [13] . In this case, the Delegation did not have to suspend the signing of the contract because all the comments received during the standstill period were examined while the tenders were still valid [14] . As the signing of the contract was not suspended, the Delegation was not obliged to notify the complainant. Such a notification would in any case have been “*merely informative*”, as it would not have had any impact on the Delegation’s decision to evaluate the initially rejected tender. When the Delegation notified the complainant of its decision to award the contract to another tenderer, it granted a new standstill period during which the complainant could submit its comments.

The Ombudsman's proposal for a solution

18. According to the rules applicable at the time, the contract could not be signed until a short standstill period had elapsed [15] . The relevant provision continued as follows:

“ If necessary, the contracting authority may suspend the signature of the contract for additional examination if this is justified by the requests or comments made by unsuccessful or aggrieved candidates or tenderers or by any other relevant information received during the [standstill period] . In the case of suspension all the candidates or tenderers shall be informed within three working days following the suspension decision . [16] ”

19. During the standstill period, the successful tenderer cannot yet be certain to sign the contract. The purpose of the provision quoted above must logically be to limit this state of uncertainty by setting short deadlines and an obligation to inform tenderers if an additional period of uncertainty is justified .

20. Neither the formulation, nor the context, of the above provision supports the Commission’s



argument that it did not have to suspend the signing of the contract after the standstill period because the tenders were still valid. In fact, the applicable provisions regarding the validity of the tenders [17] set out that *only the successful tenderer* has to maintain the validity of its tender for 60 days after the notification of the award decision.

21. The only reasonable interpretation of the provision on the standstill period and the suspension of the contract signature is that a suspension decision must be taken immediately after the standstill period . This is also what the complainant was told in the award letter. The award letter stated that if, following the standstill period, the signature of the contract had to be suspended, the complainant would be immediately informed.

22. The Commission was entirely right that a notification about the suspension would have been “*merely informative*”. Nevertheless, the Commission had an obligation to notify the complainant.

23. On the basis of the above, the Ombudsman found that the Commission failed to comply with its obligation to inform the complainant that it had received observations from another tenderer that had led it to evaluate a tender that was initially rejected. The matter was further aggravated by the fact that the complainant provided the documents requested in the award letter within the given deadlines and without the Delegation telling it to wait, which reasonably led the complainant to believe that the contract would be signed as foreseen.

24. The Ombudsman thus **proposed to the Commission that the EU Delegation in Bolivia (i) apologize to the complainant for the failure to notify it that it was assessing comments received during the standstill period; and (ii) contact the complainant to determine an appropriate amount of compensation for the time and resources invested in preparing the documents and certificates requested in the initial award letter.**

25. The Delegation apologised to the complainant in May 2019. The Delegation also invited the complainant to provide it with information on the time and resources invested in preparing the documents and certificates requested in the initial award letter, so that the Delegation could calculate the amount of compensation. The complainant informed the Ombudsman that it had replied to the Delegation’s invitation.

The Ombudsman's assessment after the proposal for a solution

26. The Ombudsman welcomes the fact that the Commission has accepted her proposal for a solution.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:



There was no maladministration by the EU Delegation in Bolivia in the evaluation of a tender that had initially been rejected.

The Delegation has settled the aspect of the complaint that concerned the failure to notify the complainant that it had received information during the standstill period that could have an impact on the award of the contract.

The complainant and the Commission will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 18/06/2019

[1] EuropeAid/138320/IH/SER/BO. “ *Strengthening institutional capacity within the sectors of the integrated development for coca, illicit drug trafficking and food security in order to efficiently manage sector-based budget support in Bolivia*”

<https://webgate.ec.europa.eu/europeaid/online-services/index.cfm?ADSSChck=1530786985478&do=publi.detPUB&>
[Link]

[2] The European Commission’s Directorate-General for International Cooperation and Development. See:

https://ec.europa.eu/europeaid/relations-eeas-eu-institutions-and-member-states_en [Link]

[3] Article 116 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (**the 2012 Financial Regulation, no longer in force**).

https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/financial-regulation_2017_en.pdf
[Link]

[4] See the ‘Contract Procedures for European Union External Action- A practical guide



(PRAG)'. Sections 3.4.10.4 and 3.4.10.5: *" Upon completion of the technical evaluation, the envelopes containing the financial offers for tenders that were not eliminated [...] are opened. [...]The tender evaluation shall be concluded step by step to reach a conclusion. The principle behind requesting the technical and financial offer in separate envelopes is to ensure that the evaluators do not know the financial offer and thus cannot be influenced by the price when assessing the technical quality of a tender. Any deviation from the sequence of the evaluation would lead to the cancelation of the tender. For instance, the technical proposals cannot be re-scored once the financial envelopes are open"*

<https://ec.europa.eu/europeaid/node/119705/> [Link]

[5] See footnote 3. Article 102(1) *" All public contracts financed in whole or in part by the budget shall respect the principles of transparency, proportionality, equal treatment and non-discrimination".*

[6] Section 3.4.10.3 of the PRAG. *" Where the content of a tender is incomplete or deviates substantially from one or more of the technical award criteria laid down in the tender dossier (e.g. if an expert does not meet the requirements in the profile), the tender will be automatically rejected, without being given a score, but this must be justified in the evaluation report ."*

[7] See Article 171 of the Rules of Application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (**the Rules of Application of the 2012 Financial Regulation**). No longer in force.

https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/financial-regulation_2017_en.pdf [Link]

*" If necessary, the contracting authority **may suspend** the signature of the contract for additional examination if this is justified by the requests or comments made by unsuccessful or aggrieved candidates or tenderers or by any other relevant information received during the period set in Article 118(3) of the Financial Regulation. In the case of suspension all the candidates or tenderers shall be informed within three working days following the suspension decision "* (emphasis added).

[8] See footnote 4.

[9] See point 22 of the Contract Notice

<https://webgate.ec.europa.eu/europeaid/online-services/index.cfm?ADSSChck=1530786985478&do=publi.detPUB8> [Link]

[10] See article 118 of the 2012 Financial Regulation *"2.[...]the contracting authority **shall not sign the contract or framework contract with the successful tenderer until a standstill period has elapsed** . 3. The standstill period shall have a duration of **10 days** when using electronic means of communication and 15 days when using other means "* (emphasis added).



[11] See judgement of the General Court of 20 September 2011, *Europaiki Dynamiki v EIB*, T-461/08, paragraphs 130 and 131.

<http://curia.europa.eu/juris/liste.jsf?language=en&num=T-461/08> [Link]

[12] See Annex C8b to the PRAG (letter to unsuccessful tenderers) “ *The contract can be signed only after a period of [10 calendar days when using electronic means] [calendar 15 days when using other means] starting from the day following the date on which this notification was sent. During this period you may submit any observations concerning the procurement procedure to the contracting authority. If it is not possible to conclude the contract as envisaged, we reserve the right to review our decision and to award the contract to another tenderer or to cancel the procedure*”.

[13] See footnote 7.

https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/financial-regulation_2017_en.pdf [Link]

[14] Point 6 of the *Instrucciones para los Licitadores* (Tender Specifications) of the contract foresees that the successful tenderer is obliged to maintain the validity of its tender during a period of 60 days after the notification of the award decision (document not available online).

[15] See footnote 10.

[16] See footnote 7.

[17] See footnote 14.