Recommendation of the European Ombudsman in case 723/2018/AMF on how the European Union Agency for Network and Information Security handled a public tender procedure

Recommendation
Case 723/2018/AMF - **Opened on** 06/07/2018 - **Recommendation on** 01/07/2019 - **Decision on** 04/10/2019 - **Institution concerned** European Union Agency for Cybersecurity (Settled by the institution) |

The case concerned a public tender procedure by the European Union Agency for Network and Information Security for the organization of an event. The Agency failed to reply to the questions submitted by the complainant during the preparation of its tender. However, the Agency did reply to the questions from another tenderer.

The Ombudsman inquired into the issue and found that the failure to reply to the complainant´s questions was contrary to the principle of equal treatment and constituted maladministration. She therefore makes a recommendation that ENISA compensate the complainant for the time and resources invested in preparing its tender.

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

Background to the complaint

1. The complainant, a Spanish company, is the leader of a consortium that participated in a public tender procedure launched by the European Union Agency for Network and Information Security (ENISA) for the organisation of an event [2] .

2. The complainant informed ENISA of its intention to participate in the tender procedure and asked to receive the tender documents. ENISA sent the documents to the complainant in January 2018. The complainant then asked ENISA for clarifications on a series of technical aspects of the tender procedure.

3. ENISA did not reply to the complainant´s questions. It did, however, forward to the complainant the replies that it had already provided to questions asked by another tenderer. These questions were different from the questions asked by the complainant.

4. In February 2018, ENISA informed the complainant that the contract had been awarded to another tenderer. It stated that the complainant´s offer " *did not provide the best value for money for the proposals which were submitted* ".

5. The complainant asked ENISA to cancel the tender procedure as ENISA had discriminated against it by not replying to its questions. ENISA replied to the complainant in May 2018. It stated that " *indeed your email requesting clarifications was located [...] It is unclear why it was not properly identified as a request for clarification at the time and marked for immediate action; nonetheless, it is acknowledged that your questions remained unanswered."* ENISA stated that it had done a " *close inspection* " of the complainant's questions and it had reached the conclusion that even if the complainant had received a reply to its questions, this would not have " *affected the stated reasons for the offer by* [the successful tenderer] *being deemed to be of better quality".*

6. Dissatisfied with ENISA´s reply, the complainant turned to the Ombudsman in April 2018. The Ombudsman opened an inquiry into how ENISA handled the public tender procedure and the complainant's wish to be compensated for the costs it incurred in preparing the tender.

The Ombudsman's proposal for a solution

7. The applicable rules [3] provide that " *[b]efore the closing date for receipt of requests to participate or tenders, the contracting authority may communicate the additional information [...] at the instance of candidates or tenderers, solely for the purpose of clarifying procurement documents".* In addition, the contracting authority is obliged to " *provide additional information linked to the procurement documents simultaneously and in writing to all interested economic operators as soon as possible".* Accordingly, the contracting authority may provide clarifications, which should be communicated to all. Principles of good administration would require the contracting authority to treat all requests for clarifications in an equal manner by replying to all of them.

8. ENISA replied to questions asked by another tenderer, and shared the replies with the rest of the tenderers in accordance with the above mentioned rules. However, it did not reply to the questions asked by the complainant, which is at variance with the principle of equal treatment. The Ombudsman therefore considered the complainant's claim to be compensated for the costs incurred in preparing the tender to be a request worth serious consideration by ENISA. The Ombudsman therefore **proposed that ENISA communicate directly with the complainant to determine the amount that the complainant should be compensated for the time and resources invested in preparing its tender.**

9. ENISA replied that, in its view, the lack of reply to the questions asked by the complainant did not have any fundamental impact on the outcome of the tender procedure. According to ENISA, many of the complainant's questions were already addressed in the tender documents, and the rest were a " *few questions of limited significance* ". ENISA also argued that the difference

between the scores awarded to the complainant and those awarded to the winning tenderer was such that the additional information would not have changed the result.

10. ENISA pointed out that the EU Courts have established that *"[...] the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute damage which is capable of being remedied by an award of damages* [4] *".* According to ENISA, the complainant has failed to prove the link between the lack of reply to its questions and the costs incurred in preparing the tender. The complainant's claim for compensation is therefore not founded.

11. ENISA stated that, following the Ombudsman´s proposal for a solution, it had had a " *meaningful engagement* " with the complainant on how to improve future tender procedures, which is a much wider issue than the present complaint. ENISA is therefore of the view that it is no longer necessary to pursue this case.

12. The complainant considers that ENISA is disregarding its obligations under the EU Financial Regulation. The complainant finds it offensive that ENISA refers to its unanswered questions as " *a few questions of limited significance* ". The fact that it engaged with ENISA in discussions on how to improve future tender procedures does not mean that it has waived its claim for financial compensation.

The Ombudsman's assessment after the proposal for a solution

13. Regardless of the value of a contract, all public contracts financed in whole or in part by the EU budget must comply with the principles of transparency, proportionality, equal treatment and non-discrimination [5] . The EU Courts have established that, in a public procurement procedure, " *all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions* [6] ". In this case, ENISA replied to the questions submitted by one of the tenderers while the questions asked by the complainant remained unanswered.

14. According to the EU Courts [7] , " *a procedural defect can lead to the annulment of the decision* [to award a contract] *only if it is shown that, but for that defect, the administrative procedure could have had a different outcome if the applicant had had access to the information in question from the beginning of that procedure and if there was* **even a small chance** *that the applicant could have brought about a different outcome to the administrative procedure* " (emphasis added).

15. Despite ENISA´s attitude towards the relevance of the complainant´s questions, the Ombudsman does not find the requested information to lack significance. If the complainant had received answers to questions such as " *How many working hours are estimated per day?* " and " *How many people are estimated to participate per event?* ", there may have been *even a small chance* for it to produce a better tender, which could have brought about a different outcome to

the procurement procedure. This is all the more so considering that the successful tenderer had organised the event the previous year. The successful tenderer could therefore rely on its previous experience and thus knew the information requested by the complainant. This is illustrated by the fact that the complainant was awarded 18/30 points under *"Project management and proposed members of the team dedicated to the services to be performed"* due to the " *unrealistic number of* [team members] *allocated to the project* " . The winning tenderer was awarded 30/30 points under the same criterion.

16. Based on the above, it is even possible to argue that ENISA should have cancelled and published the tender procedure again when it discovered, in March 2018, that the questions asked by one of the tenderers had not been replied to. Given this context, and although it is certainly positive that ENISA has engaged with the complainant in discussions about the improvement of future tender procedures, the Ombudsman finds it regrettable that ENISA has not responded adequately to her solution proposal.

17. The Ombudsman considers that ENISA´s failure to reply to the complainant´s questions in the context of the tender procedure constituted maladministration. She therefore makes a corresponding recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman. The suggested compensation should not be seen as damages in the strict legal sense, but as a means of remedying the maladministration that has been identified, namely the fact that the tender procedure was not properly handled. This could be done by means of an "ex-gratia" payment [8] .

Recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendation to ENISA:

The European Union Agency for Network and Information Security should compensate the complainant for the time and resources invested in preparing its tender.

ENISA and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, ENISA shall send a detailed opinion by 30 September 2019.

Emily O'Reilly

European Ombudsman

Strasbourg, 01/07/2019

[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] *Supporting ENISA in organising the European Cyber Security Challenge* (2018) ENISA D-COD-18-T10 https://www.enisa.europa.eu/procurement/supporting-enisa-in-organising-the-european-cyber-security-challenge [Link] The European Cyber Security Challenge is an initiative by the European Union Agency for Network and Information Security (ENISA) and aims at enhancing cyber security talent across Europe and connecting high potentials with industry leading organizations. For more information see: https://www.europeancybersecuritychallenge.eu/#home1 [Link]

[3] Articles 153.2 and 160.2 of the Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on 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 to the 2012 Financial Regulation, no longer in force).

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R1268 [Link]

[4] Judgement of the Court of First Instance (Fourth Chamber) of 29 October 1998 in case T-13/96, *TEAM v Commission* , paragraph 71

http://curia.europa.eu/juris/liste.jsf?language=en&num=T-13/96 [Link]

[5] Article 112 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://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R0966 [Link] and

and Recitals 41 and 61 of the Rules of Application to the 2012 Financial Regulation (no longer in force).

[6] Judgement of the Court (Fifth Chamber) of 18 October 2001, *Siac Construction Ltd v County Council of the County of Mayo* , C¤19/00, paragraph 34;

http://curia.europa.eu/juris/liste.jsf?language=en&num=C-19/00 [Link]

and Judgement of the Court (Sixth Chamber) of 12 December 2002, *Universale-Bau and Others v Entsorgungsbetriebe Simmering GmbH* , C¤470/99, paragraph 93

http://curia.europa.eu/juris/liste.jsf?language=en&num=C-470/99 [Link]

[7] Judgement of the Court of First Instance of 12 March 2008, *Europaiki Dynamiki v Commission* , T-345/03, paragraph 147

http://curia.europa.eu/juris/liste.jsf?language=en&num=T-345/03 [Link]

[8] See, for example, the Ombudsman´s decision in case 2199/2017/AMF on how the EU Delegation in Bolivia handled a procurement procedure. The Ombudsman found that the Delegation had failed to comply with its obligations and proposed to the Commission that the Delegation compensate the complainant for the time and resources spent, in this case after the standstill period, on preparing the supporting documents required for the signature of the contract. The Commission accepted the Ombudsman´s proposal for a solution and the Ombudsman therefore closed the inquiry.
https://www.ombudsman.europa.eu/en/decision/en/115377 [Link]