

## **Decision in case 723/2018/AMF on how the European Union Agency for Network and Information Security handled a procurement procedure for organising an event**

Decision

**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 procurement procedure that was carried out by the European Union Agency for Network and Information Security (ENISA) for the organisation of an event. ENISA failed to reply to questions submitted by the complainant while it was preparing its tender, but 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 unfair and constituted maladministration. She therefore made a recommendation that ENISA compensate the complainant for the time and resources invested in preparing its tender. ENISA accepted the Ombudsman's recommendation and offered the complainant an 'ex gratia' payment of EUR 2500, with which the complainant was satisfied. The Ombudsman welcomes the fact that ENISA has settled the complaint and has closed the case.

### **Background to the complaint**

1. The complainant, a Spanish company, led a consortium that participated in a procurement procedure carried out by the European Union Agency for Network and Information Security (ENISA) for the organisation of an event [1] .
2. The complainant informed ENISA that it intended to submit a tender, and asked for the relevant documents. ENISA sent the documents to the complainant in January 2018. The complainant then asked ENISA to clarify some technical aspects of project.
3. ENISA did not reply to the complainant's questions. It did, however, forward to the complainant 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 tender "*did not provide the best value for money for the proposals which were submitted*".

5. The complainant asked ENISA to cancel the procurement procedure as ENISA had discriminated against it by not replying to its questions. ENISA replied to the complainant in May 2018 and acknowledged that it had made an error by not answering its questions. However, ENISA argued that, even if the complainant had received a reply to its questions, this would not have affected its decision to select the other tender, which it "*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 procurement procedure, and the complainant's wish to be compensated for the costs it incurred in preparing the tender.

## The Ombudsman's inquiry

7. In the course of her inquiry, the Ombudsman first made a solution proposal to ENISA, which it did not accept. The Ombudsman then found maladministration and made a recommendation [2] to ENISA.

## The Ombudsman's recommendation

8. The Ombudsman considered that ENISA's failure to reply to the complainant's questions in the context of the procurement procedure constituted maladministration. She therefore made a recommendation [3] that **ENISA should compensate the complainant for the time and resources invested in preparing its tender**. The suggested compensation should not be seen as damages in the strict legal sense, but as a means of remedying the fact that the procurement procedure was not properly handled. The Ombudsman suggested that this could be done by means of an '*ex gratia*' payment [4] .

## The Ombudsman's assessment after the recommendation

9. ENISA replied to the Ombudsman's recommendation stating that it had proposed to the complainant an *ex gratia* payment of EUR 2500. The complainant informed the Ombudsman that it had accepted ENISA's proposal.

10. The Ombudsman welcomes the fact that ENISA has accepted her recommendation.

## Conclusion

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



**The European Union Agency for Network and Information Security has settled the complaint by making an *ex gratia* payment to the complainant.**

The complainant and ENISA will be informed of this decision .

Emily O'Reilly

European Ombudsman

Strasbourg, 04/10/2019

[1] *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]

[2] The recommendation, with the Ombudsman's full assessment of the case, can be found here: <https://www.ombudsman.europa.eu/de/recommendation/en/115901> [Link]

[3] In accordance with Article 3(6) of the Statute of the European Ombudsman.

[4] 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]