

Decision of the European Ombudsman on complaint 466/2000/OV against CEDEFOP (European Centre for the Development of Vocational Training)

Decision

Case 466/2000/OV - Opened on 25/05/2000 - Decision on 24/08/2001

Strasbourg, 24 August 2001

Dear Mrs A.,

On 28 March 2000, you made a complaint to the European Ombudsman on behalf of G. Vergos concerning the discrimination and unfair treatment in the conduct of a tender procedure for "the supply, delivery, installation and maintenance of simultaneous conference interpretation equipment" in CEDEFOP's new premises in Pilea, Greece.

On 25 May 2000, I forwarded the complaint to the Director of CEDEFOP. CEDEFOP sent its opinion on 31 August 2000 and I forwarded it to you with an invitation to make observations, if you so wished. On 28 November 2000, I received your observations on the CEDEFOP 's opinion.

I am writing now to let you know the results of the inquiries that have been made. I apologise for the length of time it has taken to deal with your complaint.

THE COMPLAINT

According to the complainant the relevant facts are as follows:

The complainant, a Greek limited liability company specialised in electronic products, submitted a tender in 1999 further to a call for tender announced by CEDEFOP for "the supply, delivery, installation and maintenance of simultaneous conference interpretation equipment" in CEDEFOP's new premises in Pilea, Greece. There were six criteria considered for the awarding of the tender : A) delivery and installation conditions, B) technical performance of the equipment proposed, C) conditions and procedures regarding maintenance during and after the guarantee period, D) capacity to liase effectively with the organisations that have undertaken the construction of the new building, E) proximity of the tenderer's customer service centre to the site of the new building and F) price of the tender. The winner of the tender would be the company presenting the most technically and economically advantageous tender.



In the final assessment of the tenders, the complainant's tender was ranked in second place, with a score of four (4) points less than the winner (the company P.) over five of the six award criteria. The complainant considered the assessment to be seriously biased, because it was not the product of sound and unbiased judgement but was dictated by unknown reasons, the only objective of which was to ensure that P. was judged the competition winner. The complainant repeatedly asked CEDEFOP to explain on what grounds P's tender had been considered superior to its own tender.

In its letter of 16 August 1999, CEDEFOP stated four reasons why the complainant's tender fell short of that of the firm that finally obtained the contract: 1) Under criterion B, although the two firms demonstrated equally high quality in terms of technical performance, the contracting firm was awarded one point more because it proposed additional equipment and therefore provided "an integrated solution with no material deficiencies"; 2) Under criterion D, the complainant was awarded two points less since its level of experience in this area was deficient, a fact which rendered its capacity to link effectively with the constructing organisations uncertain; 3) Under criterion E, the contracting firm was considered to be superior in terms of both the number of its manual and white-collar workforce, technical staff and executives, and its organisation; 4) Under criterion F (the price), the winner presented the most economically advantageous tender.

On 19 August 1999, the complainant wrote to CEDEFOP objecting to the decision and requesting the annulment of the decision awarding the contract, the reassessment of its marks and for it to be entrusted with the completion of the contract since it submitted the most economically advantageous tender. Although the objection was received by CEDEFOP on 20 August 1999, the complainant never received a reply.

The complainant rejected the reasoning behind the decision awarding the contract as completely arbitrary on the basis of the following arguments: a) Every tender must be assessed from the view points of quality and reliability, according to the standards set by the relevant invitation to tender and not on the basis of additional elements that may arise from other tenderers. These elements may not become part of the criteria for devaluing the quality of remaining tenders, which meet the specifications of the invitation to tender; b) The complainant's efficiency should not be questioned since its previous collaboration with CEDEFOP had been excellent; c) Under criterion E, the reason the complainant was awarded two points less had nothing to do with the contractor's ease of access. The condition of proximity was definitely fulfilled by the complainant given that its office is no more than 5 kilometres away whereas the winner is located at a distance of more than 20 kilometres; d) Regarding the price, the winner's offer was 4.386.875 drachmas more expensive than the complainant's offer.

On 28 March 2000, the complainant wrote to the Ombudsman alleging that 1) the reasoning given by CEDEFOP as regards criterion B was not acceptable, as it referred to additional equipment, which was not stipulated in the call for tender; 2) the reasoning given by CEDEFOP as regards criterion D was arbitrary given that the capacity of the complainant to link effectively with the organisation which undertook the construction of the new building was certain, proven



and indisputable; 3) the reasoning relating to the failure of the complainant under criterion E, namely that P. was superior both in the number of its manual and white-collar workforce, technical staff and executives and in its organisation, was completely irrelevant to whether the condition of proximity to the place of the contract was fulfilled or not; 4) the complainant's offer was 4.346.875 drachmas less expensive than the winning company's offer, and that 5) CEDEFOP never replied to the complainant's objection letter of 19 August 1999.

THE INQUIRY

CEDEFOP's opinion

CEDEFOP observed that one main objective of the publication of open calls for tender is to ensure the maximum amount of competition between financially sound companies of proven technical and professional experience, in conformity with the Public Procurement Directive. In this regard, CEDEFOP respects the procedures laid down in the vademecum of the European Commission's Advisory Committee on Procurements and Contracts (ACPC). CEDEFOP observed that the audit carried out by the European Court of Auditors on various open calls for tender organised by CEDEFOP (including the present call for tenders AO/001/99) had made no critical remark or observation regarding these calls.

The notification of the award to P. was made in the Supplement to the Official Journal S 162 of 21 August 1999.

CEDEFOP observed that the complainant continuously referred to the concise award criteria descriptions as given in Annex I, Article 6 of the Information Pack. However, the detailed breakdown of these award criteria were given in Annex II.1 of the same Information Pack. They explain thoroughly the breakdown, by criterion, into sub-areas according to which the technical offers would be evaluated. In fact, Annex II.1 contains the technical specifications of this call for tender.

As regards the first allegation concerning criterion B (Technical performance of the equipment), CEDEFOP observed that the tenders were examined against 6 specific sub-criteria under "B" (Annex II.1 of the call for tender, section 1.13, page 9, points 2, 2a to 2f). In CEDEFOP's letter to the complainant of 16 August 1999, it was not stated or implied anywhere that the successful contractor had proposed any *additional items* over and above the equipment stipulated by the technical specifications. CEDEFOP alluded to additional items which the successful tenderer proposed over the complainant's proposal which demonstrated that the successful tenderer offered a more comprehensive solution with nothing essential lacking. The complainant unwittingly or intentionally failed to understand the weaknesses in its proposal compared to the successful tenderer. CEDEFOP gave several technical examples of items within Criterion B where P. had a stronger offer than the complainant and claimed that the complainant did not fully meet the requirements. In the case of section 2.6 (sound and visual management) for instance, the complainant limited its offer to the minimum equipment specified without providing ample justification and addressing quality related criteria that are clearly stipulated in the technical specifications. This weakened its proposal and rendered it inferior to P's proposal in this section. The Evaluation Committee found the complainant's proposal acceptable but that it



displayed distinct shortcomings in terms of quality and thoroughness. These shortcomings did not constitute *per se* a reason for rejecting the proposal as technically insufficient, but they did render the proposal less satisfactory than the proposal of P.

As regards the second allegation concerning criterion D (Capacity to liaise effectively with the organisations charged with the construction of the new building), CEDEFOP observed that P. demonstrated a far better track-record of work specialised in interpretation and audio-visual systems. This was further confirmed by the overall turnover of P., which is 5 times higher than that of the complainant. It is important to note that a number of P's projects are international. The list of reference contracts supplied by the complainant contradicts its contention that they have "undertaken many contracts very similar to the one that is the subject of the disputed competition". As a point of fact, for the bulk of the associated projects given as references, their size and scale was $\frac{1}{4}$ of the project size/scale that the successful tenderer would have to carry out under the call for tender AO/001/99. Also, the majority of these projects were focussed mainly on interpretation systems and covered to a much lesser extent the audio-visual component, one of the essential elements of the subject-matter of the call for tender in question (sections 1.3 and 2.3 of Annex II.1). The *private treaty* between the construction company (GETEM) and the complainant, in a field barely relevant to the subject matter of the call and of comparatively low financial value, could in no way imply a) sufficiency for effective liaison and certainly not b) superiority in comparison to other tenderers. P convincingly demonstrated their ability to liaise more effectively than the complainant with the other organisations actively involved in the project (all the above elements resulted in scores of, respectively, 17 and 19 for the complainant and P).

With regard to criterion E (Proximity of tenderer's service centre to the site location), CEDEFOP observed that the term "proximity to the site location" was conceived in the broad sense and that this is evident from the sub-categorisation. As made clear in Annex II.1, this does not refer only to the physical location or distance from the Centre, but covers all organisational and logistical issues necessary to tackle a major project. The complainant misunderstood the clearly stated requirements in the sense that it only referred to kilometric distances. The Evaluation Committee judged the criterion of proximity to be sufficiently fulfilled in all cases where the company had a credible service centre in the Thessaloniki area. There was no reason to credit kilometric differences within this area to any tenderer and indeed none were credited. The organisation of P, their overall structure and presence in the Thessaloniki area, as well as their staffing, were considered to be far more convincing and pertinent to the requirements. Another important fact that credited P. favourably was the company's warehouse in the Thessaloniki area that offered better guarantees for more efficient technical support and a swift replacement in case of equipment failure. Considering also the rental capabilities of P as an advantage, the Evaluation Committee judged the technical proposal of P to be superior on point E.

As regards the criterion F (value for money - most economically advantageous offer), CEDEFOP observed that the fact that the complainant's offer was cheaper than that of P. was not decisive, as P. gave the best value for money.

As regards the failure to reply to the complainant's objection letter of 19 August 1999,



CEDEFOP observed that there were no legal or substantive grounds justifying the complainant's claim.

The specifications set out in the call for tender were clear and unambiguous and CEDEFOP's Evaluation Committee judged the merits of each tender strictly in accordance with these specifications. During the entire procedure related to the call for tender, CEDEFOP scrupulously kept within its regulatory framework. The project and work to be executed under call for tender AO/001/99 were large-scale, complex and unique for Greece. The Centre could not afford any errors of judgement that would have been costly both financially, operationally and in terms of reputation. It is also interesting to note that, for all the market analysis carried out at the Centre between 1.1.1999 and 31.08.2000, not one single tenderer has indicated dissatisfaction with the Centre's evaluation decisions.

CEDEFOP concluded that the complainant used defamatory and unworthy tactics. It therefore rejected all the claims made by the complainant and refuted the allegations that were not founded. CEDEFOP reserves the right to institute legal proceedings against the complainant and is currently taking advice in that regard.

The complainant's observations

The complainant observed that CEDEFOP was maintaining very regular contacts with P., while avoiding any communication with the complainant, thereby violating its obligation to treat the parties equally.

The complainant observed that it had still not received a reply to its objection letter of 19 August 1999. The complainant stated that the question here is not whether it received a reply to its appeal, but whether a reply was made at all.

As regards criterion B, the complainant observed that, since the precise content of the bid made by P. remains unknown, it is not in a position to make any well-founded judgement or comparison. If CEDEFOP considered the additional equipment necessary, it could also have asked the complainant for technical explanations, in accordance with Article 24 of Directive 93/36/EEC.

As regards criterion D, the complainant observed that its allegations remained essentially unanswered. CEDEFOP's arguments deal only with the audio-visual systems, but these are only of secondary importance in the overall order for simultaneous interpreting equipment. The complainant pointed out that CEDEFOP gave no explanation for its conclusion that P. convincingly showed its capability to establish more effective contacts with the bodies involved in the project.

With regard to criterion E, the complainant stated that CEDEFOP's conclusion that the "organisation, general structure and presence of P. and its employees was much more convincing and more apt to fulfil the preconditions" was a general and vague judgement that did not appear to be based on any specific concrete data. The complainant also referred to a letter from P to the complainant dated 20 July 1999 in which the latter asked for help to complete the project.



The complainant protested in the strongest possible terms against CEDEFOP's defence and requested the Ombudsman to take whatever measures necessary to obtain legal redress.

THE DECISION

1 The alleged reasoning as regards criterion B

1.1 The complainant alleged that CEDEFOP's reasoning as regards criterion B (the technical performance of the equipment proposed) was not acceptable, as it referred to additional equipment, which was not stipulated in the call for tender. CEDEFOP observed that the tenders were examined against 6 specific sub-criteria under "B" (Annex II.1 of the call for tender, section 1.13, page 9, points 2, 2a to 2f). CEDEFOP alluded to additional items which P., the successful tenderer, proposed over and above the complainant's proposal and claimed that these demonstrated that P. offered a more comprehensive solution with nothing essential lacking. CEDEFOP gave several technical examples of items within Criterion B where P. had a stronger offer than the complainant and claimed that the complainant did not fully meet the requirements.

1.2 The Ombudsman notes that, under criterion B, the complainant obtained 17/20 points whereas its competitor P. obtained 18/20 points. CEDEFOP's letter to the complainant, dated 16 August 1999, informed him of the reasons for its competitor's superiority under criterion B, namely that it proposed additional equipment and provided an integrated solution with no material deficiencies. The complainant's tender was considered to offer inferior capacity to handle sound and pictures, because it did not make provision for the additional equipment mentioned above. In its opinion to the Ombudsman, CEDEFOP clarified the meaning of the "additional equipment" and pointed out that P. provided a more comprehensive offer with nothing essential missing. CEDEFOP also gave several technical examples of items within criterion B where P. had a stronger offer than the complainant.

1.3 On basis of the above it appears that CEDEFOP has duly communicated to the complainant the reasons why the Evaluation Committee considered the complainant's competitor's offer under criterion B better than the complainant's one. There is no evidence available to the Ombudsman according to which this reasoning would be based on incorrect information. No instance of maladministration was therefore found with regard to this aspect of the case.

2 The alleged reasoning as regards criterion D

2.1 The complainant alleged that CEDEFOP's reasoning as regards criterion D (the capacity to liaise effectively with the organisations charged with the construction of the new building) was arbitrary given that the complainant's capacity on this point was certain, proven and indisputable. CEDEFOP observed that P. demonstrated a far better track record of work specialised in interpretation and audio-visual systems. This was further confirmed by the overall turnover of P. which was 5 times higher than that of the complainant. CEDEFOP equally stated that the private treaty between the construction company (GETEM) and the complainant, in a field barely relevant to the subject matter of the call and of comparatively low financial value, could in no way imply a) sufficiency for effective liaison and certainly not b) superiority in comparison to other tenderers.



2.2 The Ombudsman notes that, under criterion B, the complainant obtained 17/20 points whereas its competitor P. obtained 19/20 points. In its letter of 16 August 1999, as well as in its opinion, CEDEFOP provided several concrete arguments why P. demonstrated more convincingly its ability to liaise more effectively than the complainant with the other organisations involved in the project.

2.3 The complainant's allegation that CEDEFOP's reasoning was arbitrary can therefore not be sustained. No instance of maladministration was therefore found with regard to this aspect of the case.

3 The alleged reasoning as regards criterion E

3.1 The complainant alleged that the reasoning related to the failure of the complainant under criterion E (proximity of tenderer's service centre to the site location), namely that P. was superior both in the number of its manual and white-collar workforce, technical staff and executives and in its organisation, was completely irrelevant to whether the condition of proximity to the place of the contract was fulfilled or not. In any case, the condition of proximity was definitely fulfilled given that its office is no more than 5 kilometres away whereas the winner is located at a distance of more than 20 kilometres.

3.2 CEDEFOP stated that the term "proximity to the site location" was conceived in the broad sense and that this is evident from the sub-categorisation. As is made clear in Annex II.1, this does not refer only to the physical location or distance to the Centre, but covers all organisational and logistical issues necessary to tackle a major project. The complainant misunderstood the clearly stated requirements in the sense that it only referred to kilometric distances. The Evaluation Committee judged the criterion of proximity to be sufficiently fulfilled in all cases where the company had a credible service centre in the Thessaloniki area. There was no reason to credit kilometric differences within this area to any tenderer and indeed none were credited.

3.3 The Ombudsman notes that criterion E was described in more detail in Annex II.1, point 5 of the tender which stated that a) *"in the form of a report, reference should be made to the organisation of the company with brief descriptions of the functions of its departments and of the individuals with the corresponding skills (.)"*, and that b) *"specific reference must be made to the organisation of the local support (Thessaloniki subsidiary) and to its staff, which the supplier may offer"*.

3.4 Against this background, and considering that the physical distance to the Centre was in fact not the determining element under this criterion, it appears that the reasoning communicated to the complainant with regard to criterion E was consistent with the details of the tender. No instance of maladministration was therefore found with regard to this aspect of the case.

4 The allegation concerning the price of the tenders

4.1 The complainant alleged that its offer was 4.346.875 drachmas less expensive than the winning company's offer. CEDEFOP observed that, as regards the criterion F (value for money - most economically advantageous offer), the fact that the complainant's offer was cheaper than that of P. was not decisive, as P. gave the best value for money.



4.2 With regard to this allegation, the Ombudsman merely notes that point 13 (award criteria) of the tender, published in the Official Journal S 76/34 of 20 April 1999, provided that *"the award will be made on the basis of the offer giving the best value for money"*.

4.3 The Ombudsman notes that the public procurement Directives allow the contracting authority to base the award of the contracts on a) either the lowest price only or b) the most economically advantageous tender (1) . In the present case, CEDEFOP specified in the published tender that it would use the most economically advantageous tender as criterion. It was not, therefore, obliged to award the contract to the tenderer who proposed the lowest price. The Ombudsman therefore found no instance of maladministration with regard to this aspect of the case.

5 The alleged failure to reply to the complainant's letter of 19 August 1999

5.1 The complainant alleged that CEDEFOP never replied its objection letter of 19 August 1999. CEDEFOP observed that there was no legal or substantive grounds justifying the complainant's claim.

5.2 Principles of good administration require that the Community institutions and bodies reply to the letters of citizens (2) . In the present case CEDEFOP did not reply to the complainant's letter of 19 August 1999. Even if CEDEFOP considered that there were no legal or substantive grounds justifying the complainant's claim, it should have replied to the letter. Its failure to reply therefore constitutes an instance of maladministration and the Ombudsman makes the critical remark below.

6 Conclusion

On the basis of the European Ombudsman's inquiries into part 5 of this complaint, it appears necessary to make the following critical remark:

Principles of good administration require that the Community institutions and bodies reply to the letters of citizens. In the present case CEDEFOP did not reply to the complainant's letter of 19 August 1999. Even if CEDEFOP considered that there were no legal or substantive grounds justifying the complainant's claim, it should have replied to the letter. Its failure to reply therefore constitutes an instance of maladministration

Given that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman has therefore decided to close the case.

The Director of CEDEFOP will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN



(1) See for instance Article 26 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ 1993 L 199/1.

(2) See Article 13 of the European Ombudsman's *Code of Good Administrative Behaviour* of 19 July 1999 and Article 13 of CEDEFOP's *Code of Good Administrative Behaviour* of 15 December 1999.