

Decision in case 964/2020/JN on how the European Commission evaluated a tender in a public procurement procedure for the translation of a report on the judicial reform in Cyprus

Decision

Case 964/2020/JN - Opened on 30/06/2020 - Decision on 11/05/2021 - Institution concerned European Commission (No maladministration found) |

The case concerned the European Commission's decision to reject a tender in a public procurement procedure for the translation of a report on the judicial reform in Cyprus. The complainant considered that the Commission had been wrong in rejecting his tender because it considered he did not meet the specifications for the required experience. In the complainant's view, the Commission should have asked him for clarifications.

The Ombudsman found that the Commission acted reasonably, and closed the inquiry finding no maladministration. She trusts that, going forward, the Commission will ensure that unsuccessful tenderers receive an adequate explanation of the reasons why their tender has been rejected, without having to ask for clarification.

Background to the complaint

1. In 2019, the complainant, who is a lawyer, participated in a public procurement procedure organised by the European Commission for the translation of a report on the judicial reform in Cyprus. [1]
2. The call for tenders required the tenderers to prove that they had adequate experience in the translation of legal documents by providing references for two projects they had completed in this field in the previous three years with a minimum value for each project of EUR 5 000. In February 2020, the Commission rejected the complainant's tender because it considered that he did not satisfy this requirement.
3. The complainant considered that he had submitted adequate evidence for two projects fulfilling the above criteria. The Commission said that some of the evidence provided by the complainant related to a third project and concerned non-legal documents. The Commission found that only one of the complainant's projects satisfied the minimum value requirement.



4. The complainant was dissatisfied with the Commission's assessment and with how it had handled the matter. He therefore turned to the Ombudsman in June 2020.

The inquiry

5. The Ombudsman opened an inquiry into the complainant's concern that the Commission:

- 1) was wrong to reject his tender without first allowing him to clarify the evidence;
- 2) failed to provide sufficient reasons for its decision to reject his tender;
- 3) took too long to reply to his request for further clarification.

6. In the course of the inquiry, the Ombudsman received the reply of the Commission on the complaint.

Arguments presented to the Ombudsman

7. The complainant considered that the Commission was wrong to deem that the evidence he submitted to demonstrate his experience was insufficient. In his view, the Commission should have asked him for clarifications on the evidence he had provided. Furthermore, he claimed that the time taken by the Commission to process his request for clarification prevented him from bringing a legal challenge against the Commission's decision.

8. The Commission argued that, in accordance with the relevant rules [2], it requested the complainant to provide supporting evidence.

9. The complainant submitted two sets of invoices for what he referred to as two different projects with two different names and reference numbers. However, the evaluators considered that the evidence for one of the projects was inadequate for two reasons. First, although all the invoices had the same project reference number, two of the invoices referred to a legal case with a different name than that referred to by the complainant. These two invoices could therefore not be taken into account. Second, two of the invoices referred to the translation of a "list of documents" and a "financial report", which is not translation of legal documents, as required by the tender specifications. These two invoices could not be taken into account either. As some of the invoices submitted by the complainant thus could not be taken into account, one of the projects referred to by the complainant did not reach the minimum threshold of EUR 5 000.

10. The decision to reject the tender contained the same reasons as set out in the 'evaluation report' on the complainant's tender. In line with its internal guidelines, the Commission cannot add other reasons in its subsequent decision. The decision mentioned the selection criterion



that was not fulfilled. The Commission also informed the complainant that he could request additional information. The complainant did so and the Commission provided additional information.

11. Regarding the time it took to reply, the Commission said that, when the complainant made his request for additional information on 19 February 2020, it immediately started to process it. The Commission acknowledged receipt on 28 February 2020 and sent the reply on 2 April 2020. The reply required coordination between the operational unit in charge of the file, the financial unit and the legal teams. Moreover, the reply was prepared just at the beginning of the COVID-19 pandemic, which disrupted the Commission's operations.

12. The Commission maintained constant communication with the complainant both while it was processing the request for additional information and after. It answered his reminders and further correspondence.

13. The Commission respected fully its Code of Good Administrative Behaviour by sending a "holding reply" within 15 working days and by replying to the complainant's reminders.

14. The Commission argued that the time it took to reply had no impact on the possibility for the complainant to legally challenge its decision. The complainant had all elements needed. The Commission had also advised the complainant of his right to bring a legal challenge against the decision.

The Ombudsman's assessment

The decision to reject the tender without asking for clarification

15. The relevant selection criterion [3] required the complainant to demonstrate adequate experience in the field of translation of legal documents by providing references for two projects delivered in this field in the previous three years with a minimum value for each project of EUR 5 000.

16. The question in this case is about the project references provided by the complainant. Although the term "project" is open to a degree of interpretation, it is clear that it must mean translation services that are clearly linked. Both case numbers and case names can be relevant for identifying a project, but must be referred to in a consistent manner.

17. It is for the tenderer to demonstrate that all selection criteria are satisfied. As a result, tenderers must act diligently and submit clear and unambiguous evidence. In a case like this, where there is a discrepancy between the project number(s) and the case name(s), it is reasonable to require the tenderer to clarify this at their own initiative when they submit the evidence. At the evaluation stage, to ensure equal treatment, the Commission may contact tenderers only exceptionally.

18. Against this background, the Ombudsman considers that there was no maladministration by the Commission in not requesting additional clarification from the complainant regarding his



experience.

Explanation of the reasons for the Commission's decision

19. The Ombudsman notes that the Commission's decision of 11 February 2020 merely stated:

" You did not pass the following selection criterion: 3.2.4.A1.

These are all the details that we can provide on the grounds for our decision:

The evidence provided upon request does not demonstrate compliance with the selection criterion 3.2.4.A1."

20. The Ombudsman considers that this statement did not adequately explain the reasons why the complainant's tender was rejected.

21. It is a fundamental principle of good administration that the decisions adopted by EU institutions and bodies contain an adequate 'statement of reasons'. [4] Doing so enables the person concerned to ascertain the reasons for the decision and, should they challenge the decision, it further enables the Court of Justice to exercise its powers of review. [5]

22. Moreover, according to EU case law, the statement of reasons must be "*adapted to the nature of the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution*". [6] Thus, the statement of reasons should "*provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged*". [7] Accordingly, the statement of reasons "*must, in principle, be notified to the person concerned at the same time as the decision adversely affecting him*". [8]

23. In the Ombudsman's view, the Commission's decision of 11 February 2020 did not allow the complainant to understand which element of selection criterion 3.2.4.A1 [9] the experience listed in his tender did not comply with, nor why the Commission had reached its conclusion.

24. However, the Ombudsman acknowledges that the Commission provided additional reasons for its decision on 2 April 2020. Since these reasons gave an adequate explanation for the decision, the Ombudsman considers that the Commission took appropriate steps to rectify the initial lack of sufficient information and therefore does not find maladministration.

25. That being said, the Ombudsman believes that it is good administrative practice for the Commission to provide adequate reasons already in its initial decision rejecting a tender. Doing so enables the tenderer to understand precisely why the Commission decided to reject their tender. She trusts that, going forward, the Commission will ensure that unsuccessful tenderers receive an adequate explanation of the reasons why their tender has been rejected, without having to ask for clarification.

The time it took the Commission to provide clarification



26. The Ombudsman notes that, following the complainant's request, the Commission needed just over a month to provide clarification. This appears reasonable considering all the specific circumstances.

27. In addition, the Ombudsman considers that the time taken had no bearing on the possibility for the complainant to take legal action.

28. In its decision of 11 February 2020, the Commission specifically informed the complainant that any "request", any "reply" from the Commission or any "complaint for maladministration" will not suspend the time limit for lodging an action for annulment of the decision.

29. Moreover, according to EU case law, the failure to state reasons is, in itself, grounds for annulment [10] . The complainant could thus have challenged the Commission's decision of 11 February 2020 without awaiting the Commission's response.

30. On the basis of the above, the Ombudsman does not consider the time taken by the Commission to reply to constitute maladministration.

Conclusion

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

There was no maladministration by the Commission.

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

Tina Nilsson Head of the Case-handling Unit

Strasbourg, 11/05/2021

[1] Procedure SRSS/C2019/039 - " *Enhancing the current Reform of the Court System and the implementation process, as well as the efficiency of justice Cyprus* "

[2] The Commission referred to its internal guidance and to Article 151 of the Financial Regulation (Regulation 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union):
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1046&qid=1616150245754>
[Link]

Article 151 provides, in relevant part:



“ ... Where a participant fails to submit evidence or to make statements, the evaluation committee or, where appropriate, the authorising officer responsible shall, except in duly justified cases, ask the participant to provide the missing information or to clarify supporting documents. ... ”

[3] Criterion 3.2.4.A reads as follows:

“ 3.2.4. Technical and professional capacity criteria and evidence

A. Criteria relating to tenderers

Tenderers ... must comply with the criteria listed below. The evidence must be provided only on request.

The project references indicated below consist in a list of relevant services provided in the past three years, with the sums, dates and clients, public or private, accompanied by statements issued by the clients.

- Criterion A1 : *The tenderer must prove experience in the field of translation of legal documents especially in the Cypriot legal context.*

Evidence A1 : the tenderer must provide references for two projects delivered in these fields in the last three years, from the date of submission of the tender, with a minimum value for each project of € 5.000. ”

[4] Article 296 TFEU provides that: *“ Legal acts shall state the reasons on which they are based ... ”*

Article 41(2)(c) of the Charter of Fundamental Rights of the European Union provides that the right to good administration includes *“ the obligation of the administration to give reasons for its decisions ”*.

[5] See the Ombudsman’s recommendation in case 1183/2012/MMN, paragraph 24-28, with further references.

[6] See, e.g., C-159/01 *Netherlands v. Commission* , judgment of 29 April 2004, paragraph 65.

[7] See C-521/09 *Elf Aquitaine SA v. Commission* , judgment of 29 September 2011, paragraph 148.

[8] See C-521/09 *Elf Aquitaine SA v. Commission* , judgment of 29 September 2011, paragraph 149.

[9] The experience had to be for (i) translation services of (ii) legal documents in the (iii) Cypriot



legal context from (iv) at least two projects (v) in the previous three years, (vi) with a minimum value of EUR 5 000 each).

[10] See, for instance, C-367/95P *Commission v Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL*, judgment of 2 April 1998, paragraph 67.