

Decision of the European Ombudsman on complaint 1043/2000/GG against the European Commission

Decision

Case 1043/2000/GG - Opened on 31/08/2000 - Decision on 22/10/2001

Strasbourg, 22 October 2001

Dear Mr P.,

In your letter of 22 July 2000, sent on behalf of Dr. T. Trouwborst, managing director of EHCON B.V, you asked me to re-open my inquiry into complaint 199/97/PD that concerned the award of a contract for the performance of services in relation to the Drinking Water Directive 80/778/EEC. That complaint had been rejected in my letter to the complainant of 3 December 1997.

On 31 August 2000, I informed you that in view of the lapse of time and the fact that new allegations and fresh evidence had been submitted, I had decided to treat your letter of 22 July 2000 as a new complaint.

On 31 August 2000, I forwarded those allegations in the complaint in respect of which I considered an inquiry to be justified to the Commission for its comments.

The Commission sent its opinion on these allegations on 28 November 2000. I forwarded the Commission's opinion to you on 5 December 2000 with an invitation to make observations, if you so wished. On 17 January 2001, you sent me your observations on the Commission's opinion.

On 15 February 2001, I asked the Commission to provide me with further information in relation to your case. The Commission replied on 27 April 2001, and I forwarded this reply to you on 8 May 2001 with an invitation to make observations, if you so wished. On 18 June 2001, you sent me your observations on the Commission's reply.

I am now writing to you to let you know the results of the inquiries that have been made.

THE COMPLAINT

Background

The background to the present complaint may be summarised as follows:



The complainant is the managing director of a Dutch company active in the environmental field.

In 1996, the Commission invited tenders for a contract for the performance of consultancy services in the field of drinking water, particularly in relation to the Drinking Water Directive 80/778/EEC. In point 4 of the Technical Annex it was specified that the contractor to be chosen needed to have "a wide breadth of knowledge and expertise, and a proven track record in the field of water science, including microbiology, toxicology, water and sanitary engineering". An in-depth knowledge of the directive and the proposal for its revision was also required. One of the selection criteria set out at point 5 of the Technical Annex provided that tenderers had to show that they had "the necessary experience and record in the water research field". The complainant submitted a tender. On 7 January 1997, the Commission informed the complainant that his firm's proposal had not been accepted. In letters sent on 13 January, 31 January and 15 February 1997, the complainant asked for explanations.

On 13 March 1997 the Commission informed the complainant that his firm had not been awarded the contract because it lacked the necessary experience in the water research field. The Commission claimed that it had been particularly looking for a firm that had "experience of research and development and design of water treatment works". In a further letter of 10 April 1997, the Commission pointed out that it had been looking for a firm with "*hands on experience of the design of water treatment works*".

In the meantime, the complainant had turned to the Ombudsman (complaint 199/97/PD). The complaint was sent to the Commission. In its opinion, the Commission claimed that it should have been clear that tenderers ought to have demonstrated the necessary technical experience in sanitary and water engineering related to the draft directive. According to the Commission, this meant that the tenderers for example had to show the level of expertise necessary to develop engineering-based standards for trihalomethanes in drinking water which did not compromise disinfection.

In his decision of 3 December 1997, the Ombudsman dealt with three allegations that he had identified:

(1)The Commission had misconstrued the selection criteria by taking into account experience in the field of water and sanitary engineering : The Ombudsman considered that the Commission's interpretation of the selection criteria was acceptable.

(2)The Commission had been wrong in assuming that the complainant did not have the necessary experience : The Ombudsman held that there were no indications to show that the Commission's assessment had not been carried out properly.

(3)The Commission had failed to observe the time-limit laid down by Directive 92/50 : The Ombudsman took the view that the directive was not applicable in the present case.

The complaint was therefore rejected.



On 7 December 1997 and 20 February 1998, the complainant wrote to ask the Ombudsman to review his position. In his reply of 24 March 1998, the Ombudsman rejected the complainant's arguments in relation to the interpretation of the selection criteria. He accepted, however, that Directive 92/50 did apply and that the Commission had failed to comply with the time-limit set by it. In his view, this did nevertheless not justify re-opening the case.

On 30 March 1998 and 12 January 1999, the complainant again wrote to ask the Ombudsman to review his position. The Ombudsman rejected this request on 6 May 1999.

The complaint

In his new complaint, the complainant renewed his request that the Ombudsman should re-open the case. He made the following allegations:

- (1) The application of the selection criteria by the Commission was illegal
- (2) The selection procedure was not transparent
- (3) Tenderers were treated unequally
- (4) The Commission failed to observe the time limit set out in Article 12 of Directive 92/50

The complainant claimed that the relevant expert at the firm to which the contract had been awarded had a good personal relationship with at least one of the Commission officials responsible for the contract. He further took the view that the selection and award criteria used by the Commission for the award of such contracts were often insufficiently clear and transparent, and were moreover applied in an arbitrary and intransparent manner. The complainant also provided a copy of the tender that EDC, one of the competitors of his firm, had submitted to the Commission which had considered that this tender fulfilled the selection criteria. He claimed that the document showed that EDC did not have the experience the alleged absence of which had led to the exclusion of his own bid. The complainant further claimed that the same held true for another competitor, EUNICE and invited the Ombudsman to obtain a copy of the tender of this firm.

The Ombudsman's approach

In his letter of 31 August 2000, the Ombudsman informed the complainant of the results of his preliminary examination of the complaint which were as follows:

Allegation (1) had already been examined by the Ombudsman in the context of his inquiry into complaint 199/97/PD. In the Ombudsman's view the complainant had not put forward new evidence that would have forced him to review this position. There were therefore no grounds to re-examine this issue.

Allegation (4) had also been examined by the Ombudsman in his decision on complaint 199/97/PD. The Ombudsman had made further comments on this allegation in his letter to the complainant of 24 March 1998. He thus considered that there were no grounds to open an inquiry in so far as this allegation was concerned.



The Ombudsman did however consider an inquiry to be justified in so far as allegations (2) and (3) contained in the complaint were concerned.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission took the view that the complainant had not submitted any evidence for his suggestion that the procedure had not been transparent. The Commission referred to the relevant sections in the Technical Annex and pointed out that its application of the selection criteria had been subject to scrutiny and approval by the ACPC (Advisory Committee on Procurements and Contracts). The Commission thus was of the opinion that it had acted in accordance with the criteria set out and within the limits of its discretion in assessing the relevant factors.

Regarding the complainant's claim that tenderers were treated unequally, the Commission claimed that the complainant had not submitted any evidence to support his allegation that there was a good personal relationship between persons working for the successful tenderer and Commission staff or to show the impact that this would have had on the equal treatment of tenderers. The Commission also specified the reasons why it had considered that the tender submitted by the complainant's firm did not fulfil the selection criteria.

With respect to the tender submitted by EDC, the Commission claimed that it had arrived at the conclusion that the expert proposed by this firm presented knowledge and experience across the range of items required, including the technical areas of water and sanitary engineering. According to the Commission, this conclusion had been based on the evaluation of the expert's knowledge, experience and professional career description. The Commission stressed that EDC's tender had to a distinctly greater extent referred to experience in technical areas such as water treatment including studies performed on river pollution and drinking water supplies taken from such rivers, evaluating the options of controlling the pollutions sources and of more sophisticated water treatment technology.

It further claimed that this had led it, after carefully considering all parts of the tender, to conclude that EDC's tender would fulfil the requirements of the selection criteria.

The Commission stressed that the same conclusion applied in so far as the tender submitted by Eunice was concerned. The considerations submitted by the Commission in this regard were practically identical to those it provided with regard to EDC's tender.

The complainant's observations

In his observations, the complainant took the view that the Commission's opinion showed that the selection criteria had not been applied in a transparent, uniform, consistent and non-discriminatory manner. According to the complainant, it had been clearly stated in his firm's tender that during his 20 years experience as an expert on drinking water supply, he had had, inter alia, to judge and approve treatment systems, to audit drinking water suppliers etc. In the complainant's view, these were exactly the kind of activities that required technical and



engineering experience and expertise.

The complainant further claimed that the Commission's argument according to which the qualifications of his firm did not match those of two other tenderers was flawed, given that the qualitative selection criteria were not meant to establish a ranking between tenderers but simply to establish minimum standards that had to be met in order to qualify for the contract.

In the complainant's view, it appeared from the tender submitted by EDC that the expert proposed by this firm did not have any engineering experience himself. The complainant argued that when one compared his experience and expertise to that of the said expert, one could not understand why the Commission had concluded that EDC's tender met the criteria whilst the bid lodged by the complainant's firm did not.

The complainant therefore asked the Ombudsman to reject the Commission's reply and to conclude that there had been maladministration. In the alternative, the complainant asked the Ombudsman to carry out an in-depth investigation into the way in which the Commission had assessed all the bids it had received, both from a procedural and a substantive point of view.

Further inquiries *Request for further information*

In view of the above, the Ombudsman concluded that he needed further information in order to deal with the complaint. He therefore asked the Commission (1) to confirm that successful bidders had to have a "hands on experience of the design of water treatment facilities" and (2) to specify, on the basis of precise references to the relevant parts of the tenders, the grounds which led it to believe that EDC and Eunice fulfilled this condition.

The Commission's reply

In its reply, the Commission confirmed that successful bidders had to have a "hands on experience of the design of water treatment facilities".

The Commission further quoted the parts of the tenders of EDC and Eunice on the basis of which it had considered that these two firms fulfilled the said condition. These read as follows:

EDC

- "[person A] worked for 10 years in [company X] in research and technical liaison where food contamination and safety and raw material (including water) quality was a critical factor"
- "The laboratory also established an emergency service to provide advice to the water supply companies on contamination accidents"
- "[person A] also became familiar with the treatment processes used for drinking water ."
- "The technical feasibility of treating water to remove pesticides, .etc."

Eunice

- "Giving technical advice on the implementation of a number of water quality directives."



- "Assisting in the preparation of the Conference on Drinking Water held in Brussels on 23 and 24 September 1993, attending the conference and evaluating the proceedings."
- "Preparing the technical annexes for inclusion in a proposal to revise the drinking water Directive 80/778/EEC."
- "Providing scientific and technical advice during the presentation of that proposal to the ESC and CR."
- "Preparation of the technical negotiating brief for the 'Urban Waste Water' Directive 91/271/EEC"
- "Advising on autorizations for the discharge of sewage to surface water."

The Commission informed the Ombudsman that having re-examined the complainant's curriculum vitae, it had found no evidence of a track record of experience relating specifically to water or sanitary engineering. Neither had it found any evidence confirming the claim that during his 20 years experience as an expert on drinking water supply, the complainant had had, inter alia, to judge and approve treatment systems, to audit drinking water suppliers etc. According to the Commission, the complainant's CV states as tasks the "national co-ordination and supervision on hygienic problems".

The complainant's observations

In his observations, the complainant claimed that it was clear from the Commission's reply that neither EDC nor Eunice had any hands-on experience with the design of water treatment plants.

THE DECISION

1 Scope of the decision

1.1 The complaint concerns the award of a contract for the performance of consultancy services in relation to the Drinking Water Directive 80/778/EEC for which the complainant's firm submitted an offer. However, the contract was finally awarded to a competitor of the complainant's firm. The Ombudsman already considered aspects of this case in his decision of 3 December 1997 on complaint 199/97/PD.

1.2 The complainant made the following allegations: (1) The application of the selection criteria by the Commission was illegal, (2) the selection procedure was not transparent, (3) tenderers were treated unequally and (4) the Commission failed to observe the time limit set out in Article 12 of Directive 92/50.

1.3 The Ombudsman considered that allegation (1) had already been examined by him in the context of his inquiry into complaint 199/97/PD. In the Ombudsman's view the complainant had not put forward new evidence that would have led him to review this position. There were therefore no grounds to re-examine this issue.



1.4 Allegation (4) had also been examined by the Ombudsman in his decision on complaint 199/97/PD. The Ombudsman had made further comments on this allegation in his letter to the complainant of 24 March 1998. He thus considered that there were no grounds to open an inquiry in so far as this allegation was concerned.

1.5 The present inquiry thus concerns only allegations (2) and (3) contained in the complaint.

2 Lack of transparency of selection procedure

2.1 The complainant claims that the selection procedure was not transparent, given that the selection criteria had required the applicant firms to have "the necessary experience and record in the water research field" whereas the bid lodged by the complainant's firm had been rejected by the Commission on the grounds that it did not have "hands on experience of the design of water treatment facilities".

2.2 The Commission takes the view that it acted in accordance with the criteria set out and within the limits of its discretion in assessing the relevant factors.

2.3 Tender procedures need to be transparent. It is therefore good administrative practice in such procedures for the administration to set out the conditions that applicants have to fulfil as clearly as possible. In the present case, the decisive criterion was that applicants had to have "hands on experience of the design of water treatment facilities". This requirement is nowhere expressly mentioned in the invitation for tenders. Nor was it obvious that this was to be the decisive criterion for applicants. By omitting clearly to spell out this criterion, the Commission has thus failed to render the selection procedure as transparent as it could and ought to have been. This constitutes an instance of maladministration. The Ombudsman therefore considers it necessary to make a critical remark in this regard.

3 Unequal treatment of tenderers

3.1 The complainant claims that the Commission treated tenderers unequally. In this context, he puts forward three arguments: (1) The relevant expert at the firm to which the contract was awarded had a good personal relationship with at least one of the Commission officials responsible for the contract; (2) the complainant's firm did have the necessary experience to fulfil the Commission's requirement that applicants needed to have "hands on experience of the design of water treatment facilities" and (3) neither EDC nor Eunice fulfilled the said requirement.

3.2 The Commission rejects these allegations. It takes the view that there is no evidence to support the complainant's first argument. The Commission further denies that the complainant's claim that his firm fulfilled the relevant criterion is correct. Finally, the Commission takes the view that both EDC and Eunice complied with that criterion. It also stresses that the contract was awarded to neither of these two firms.

3.3 It is good administrative practice for the administration to treat tenderers equally. The Ombudsman notes that the complainant has not put forward any evidence to support his claim that the relevant expert at the firm to which the contract was awarded had a good personal relationship with at least one of the Commission officials responsible for the contract. This allegation thus cannot be regarded as having been established.



3.4 The complainant's claim that his firm fulfilled the relevant criterion is based on a passage in the tender submitted by that firm in which it was said, according to him, that he had experience in judging and approving treatment systems. The Commission denies that the relevant passage shows that the complainant's firm fulfilled the requirement that firms had to have "hands on experience of the design of water treatment facilities". The Ombudsman considers that the Commission's interpretation of the tender submitted by the complainant's firm does not appear to be unreasonable.

3.5 In so far as EDC and Eunice are concerned, it is true that the contract was not awarded to either of them. However, the offers of both firms were considered by the Commission as having fulfilled the relevant criterion. If this should not have been the case, the Commission would thus have treated tenderers unequally as the complainant claims.

3.6 It is of course in the first place for the administration organising a call for tenders to assess whether the applicants fulfil the conditions laid down in this call. The Ombudsman must not substitute this assessment by his own but only check whether the administration's assessment is manifestly unreasonable. However, the Ombudsman considers that this is indeed the case here. In the Ombudsman's view, none of the excerpts from the tenders submitted by EDC and Eunice shows that these firms had "hands on experience of the design of water treatment facilities". The Ombudsman notes that the design of water treatment facilities is not even referred to in these excerpts. In these circumstances, the Ombudsman considers that the evidence on which the Commission relied manifestly does not warrant the conclusion that these two firms fulfilled the relevant condition. The Ombudsman thus concludes that the Commission appears to have treated tenderers unequally. This constitutes an instance of maladministration, and the Ombudsman considers it necessary to make a critical remark in this regard.

4 Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, it is necessary to make the following critical remarks:

Tender procedures need to be transparent. It is therefore good administrative practice in such procedures for the administration to set out the conditions that applicants have to fulfil as clearly as possible. In the present case, the decisive criterion was that applicants had to have "hands on experience of the design of water treatment facilities". This requirement is nowhere expressly mentioned in the invitation for tenders. Nor was it obvious that this was to be the decisive criterion for applicants. By omitting clearly to spell out this criterion, the Commission has thus failed to render the selection procedure as transparent as it could and ought to have been. This constitutes an instance of maladministration.

It is good administrative practice for the administration to treat tenderers equally. In the Ombudsman's view, none of the excerpts from the tenders submitted by EDC and Eunice shows that these firms had "hands on experience of the design of water treatment facilities". In these circumstances, the Ombudsman considers that the evidence on which the Commission relied manifestly does not warrant the conclusion that these two firms fulfilled the relevant condition. The Ombudsman thus concludes that the Commission appears to have treated



tenderers unequally. This constitutes an instance of maladministration.

Given that these aspects of the case concern procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

The President of the European Commission will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN