

Decision of the European Ombudsman on complaint 118/2001/OV against the European Commission

Decision

Case 118/2001/OV - Opened on 06/02/2001 - Decision on 26/09/2001

Strasbourg, 26 September 2001

Dear Mr C. and Mr B.,

On 25 January 2001, you made a complaint to the European Ombudsman on behalf of Alstom Power against the DG Enlargement of the European Commission concerning the open tender procedure for the Phare Project PL 9912.02/01/02/03 "Podhale Geothermal Project" launched by a Polish awarding authority.

On 6 February 2001, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 3 May 2001. I forwarded it to you with an invitation to make observations, which you sent on 23 May 2001.

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

THE COMPLAINT

According to the complainant, the relevant facts were as follows:

The complaint is made on behalf of the company ALSTOM POWER (hereafter "the complainant") which participated in the open tender procedure Phare Project PL 9912.02/01/02/03 "Podhale Geothermal Project" launched by a Polish awarding authority (NF : National Fund for Environmental Protection and Water Management). The final decision of the awarding authority was endorsed by the Commission Representation in the framework of the Phare Programme.

The Polish Evaluation Committee decided not to award lots 1 and 2 to the complainant, but to its competitor. In its letter of 3 November 2000, the Commission Delegation in Poland informed the complainant that there was no reason to reject the recommendation of the Polish Evaluation Committee. On 30 November 2000, the Commission in Brussels (DG Enlargement) confirmed again to the complainant that there was no reason to revoke the Commission's endorsement of the recommendations of the Polish Evaluation Committee.



According to the complainant the bid of its competitor was inadmissible and should have been excluded during the capacity selection phase of the tender procedure, for the following reasons:

The tender procedure took place in two phases, namely 1) the capacity selection of the bidders and 2) the evaluation of the bidders. One of the capacity selection criteria was that the minimum required annual construction work volume for the successful bidder "in any of the last five years" shall be two times greater than the contract value (according to the English version of the tender). However, the Polish version of the tender spoke about the construction work volume in "each of the last 5 years".

It is only during the evaluation of the bids, namely in the second phase of the tender procedure, that the awarding authority finally pointed out that "any" had to be interpreted as "only one of the required 5 years and not each as indicated in the Polish version", which always remained unchanged. This interpretation was accepted by the Commission, as the tender specified that the English version prevailed. The complainant's competitor met the capacity selection criterion of \approx 6M only in 1999, i.e. the last year out of the 5 years.

The complainant considers this as a discriminatory interpretation which constitutes an infringement of the fundamental public procurement rule of equal treatment of competitors, which must apply to Phare contracts. The complainant states that the final interpretation retained by the awarding authority and the Commission was against the purpose of all existing public procurement rules, which is to render possible the selection of suitable tenderers with sufficient consolidated capacity thresholds for a certain number of years. The complainant alleges that the literal interpretation of "any" would logically mean to accept also contractors with a turnover in descending line.

According to the complainant, the Polish version was to be the only valid. The Commission should have immediately cleared out the ambiguity in the selection criteria, by indicating clearly which was the correct version. In its answer to the complainant of 30 November 2000, the Commission referred to the interpretation as understood by the majority of the tenderers. However, tender documents should be clear and that their signification cannot depend on how the tenderers interpret them.

The complainant also draws the attention to the judgement of the Court of Justice of 20 September 1988 in the Beentjes case (31/87), according to which the examination of the suitability of contractors to carry out the contract to be awarded, and the awarding of the contract are two different operations in the procedure for the award of a public works contract. The Court added that the awarding authorities can check the suitability of the contractors only on the basis of the criteria relating to their economic and financial standing. The complainant also refers to the Community rules on public work contracts according to which "when examining tenders, contracting authorities may not, for example, allow themselves to be influenced by the tenderer's financial capacity or give a tenderer who has not satisfied the pre-established selection criteria a second chance because they deem this tender advantageous. The complainant alleges that the selection of its competitor was in contradiction



with this case-law. The complainant alleges that, if the rules would have been respected, it would have won the first two lots.

On 25 January 2001 the complainant wrote to the Ombudsman alleging that the lowest bidder for lots 1 and 2, namely the complainant's competitor, was inadmissible and should have been excluded from the tender procedure during the capacity selection phase. The complainant more particularly complains against the Commission's decisions of 3 and 30 November 2000 which endorsed the decision of the Polish awarding authority.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission first recalled the background of the case: The tender related to work and supplies for main district heating pipelines in 3 different lots in Poland. The tender procedure and contract award was managed by the Polish National Fund for Environmental Protection and Water Management acting on behalf of the Ministry of Environment. In different letters addressed to the Commission, the complainant contested the recommendations of the evaluation committee according to which lots 1 and 2 should be attributed to the Polish Consortium lead by Energoterm Sp Z.o.o. for a total amount of \approx 5.8 million, whereas only one lot of approximately \approx 2.8 million would go to the complainant.

As regards the contested criterion for determining the suitability of contractors \approx an annual turnover in "each" (Polish version) versus "any" (English version) of the last 5 years) \approx the Commission observed that there were discrepancies in defining the requirement of volume of constructions in various sections of the tender documents. Given these discrepancies, clarification and amendment to bidding documents were issued by the Contracting Authority and distributed to all the bidding companies on 2 August 2000. The amendment stipulated that *"the minimum required annual volume of construction work for the successful bidder in any of the last 5 years shall be 2 times greater than the contract value"*. The Polish version refers to *"each of the last 5 years"*, rather than *"any of the last years"*. It is clearly defined in the tender documents (invitation for bids, point 2 and 4, instructions to bidders, point 11) that the English version prevails. It is therefore binding. The Commission enclosed copies of the relevant pages.

The admissibility criterion on turnover during the last 5 years was interpreted by the evaluation committee and endorsed by the Commission as limited to any single year of the 5 years. They considered adequate to have one year with an annual turnover as requested to be qualified and to fulfil the object of the contract. The basic underlying principle was to assure that the selected companies had a satisfactory level of economical and financial standing, at the time of being awarded the tender, without being too restrictive, and to allow for a sufficiently wide and fair competition.

The evaluation committee followed this line and verified all the bids submitted against this criterion. In case of the complainant's competitor, it was found that in 1999 the annual turnover (\approx 17,401,115.40) exceeded 5 times the contract value and hence the company met the minimum requirement.



Both the complainant and its competitor (as a consortium) met the minimum technical requirements for the 3 lots. According to the procedure rules under the Phare programme, once the technical evaluation has been completed, the evaluation committee checks the financial offers. If the tender procedure contains several lots, financial offers are compared for each lot. The financial evaluation will have to identify the technically compliant tender with the lowest price for each lot.

For lots 1 and 2, the complainant's competitor's offer was the lowest and therefore the evaluation committee concluded that the "most economically advantageous" tender, i.e. the least expensive tender classified as "technically compliant" during the technical evaluation, was submitted by the consortium of the complainant's competitor. For lot 3, the complainant was considered the "most economically advantageous".

The Commission further observed that it has defined strict procedural rules governing the way in which contracts are awarded. These rules ensure that suitably qualified contractors are chosen without bias and that the best value for money is obtained, with the full transparency appropriate to the use of public funds. For this project, the Commission has nominated 2 independent experts as full committee members of the evaluation committee. Both experts were present during the whole evaluation process and they did not report any irregularities in the tendering proceedings. There was no discrepancy among evaluators and the final recommendations were formulated unanimously. In this case, the commission considered that: the contested criterion was clearly defined, the English version was prevailing, the complainant's competitor met the contested criterion and had to be retained on equal terms with the other tenderers. The Commission therefore endorsed the conclusions of the evaluation committee appointed by the Polish authorities.

The Commission concluded that 1) no technical or procedural grounds could justify the exclusion of the complainant's competitor, 2) the rules of fair competition and transparency have been respected and applied in conformity by the Polish authorities and 3) excluding the complainant's competitor could be considered as a breach of equal treatment in the rules of public procurement awarding procedure.

The complainant's observations

The complainant observed that the Commission's opinion did not contain any new information compared to the previous letters it had sent.

The complainant observed that the main legal point is the correct interpretation (historical, teleological and literal) of the applicable selection criteria, but the Commission failed to address this matter in its opinion. The Commission was sticking to a narrow formal and literal interpretation.

The complainant alleged that by considering only one year (and not 5 years), the consolidated capacity requirement had no sense, since normally a one-year lacking of the requested capacity level leads automatically to exclusion. This is also confirmed by the fact that two new tenders launched by the same Polish Authority in February and May 2001 clearly specify annual



turnover capacity selection criteria covering 3 years. The application of the Commission's position could lead to selecting an incapable contractor not having any longer the required capacity at the time of being awarded the tender.

THE DECISION

1 The alleged inadmissibility of the complainant's competitor in the tender procedure

1.1 The complainant alleges that its competitor who was the lowest bidder for lots 1 and 2 was inadmissible and should have been excluded from the tender procedure during the capacity selection phase. The complainant observes that the Polish version of the tender documents was the only valid one containing the right interpretation. The complainant's competitor met the capacity selection criterion of \approx 6M only in 1999, i.e. the last year out of the 5 years specified in the tender documents. The complainant therefore complains against the Commission's decisions of 3 and 30 November 2000 which endorsed the decision of the Polish awarding authority.

1.2 The Commission observed that there were discrepancies in defining the requirement of volume of constructions in various sections of the tender documents. However, clarification and amendment to bidding documents were issued by the Contracting Authority and distributed to all the bidding companies on 2 August 2000. The amendment stipulated that *"the minimum required annual volume of construction work for the successful bidder in any of the last 5 years shall be 2 times greater than the contract value"*. The Polish version refers to *"each of the last 5 years"*, rather than *"any of the last years"*. It was clearly defined in the tender documents that the English version prevails. It was therefore binding. The Commission concluded that 1) no technical or procedural grounds could justify the exclusion of the complainant's competitor, 2) the rules of fair competition and transparency had been respected by the Polish authorities and 3) excluding the complainant's competitor could be considered as a breach of equal treatment.

1.3 The Ombudsman notes that the tender procedure in question was launched and supervised by the Polish National Fund for Environmental Protection and Water Management acting on behalf of the Polish Ministry of Environment. Given however that the tender was launched within the framework of a PHARE Programme financed by the European Union, the Commission had to endorse the recommendations of the Polish Evaluation Committee. These recommendations were not to award lots 1 and 2 to the complainant, but to its competitor. On 3 and 30 November 2000, the Commission informed the complainant that it found no reason to revoke its endorsement of the recommendations of the Polish Evaluation Committee. On 12 December 2000, the awarding authority itself informed the complainant that its bids for lots 1 and 2 had not been selected and that this decision was final.

1.4 Point 2 of the Invitation for Bids stated that the English version of the bidding dossier prevailed. Point 4.2 of the instruction to bidders provided that *"the minimum required annual volume of construction work for the successful bidder in any of the last five years shall be two times greater than the contract value"*. This was also confirmed in the clarification and amendment of bidding documents sent on 2 August 2000 to all competitors.



1.5 It appears thus that, according to the prevailing English version of this capacity selection criterion, the annual construction volume of the tenderers in any of the last 5 years (1995-1999) had to be two times greater than the contract value. In 1999, the last of the 5 years, the complainant's competitor had an annual turnover of 17,401,115.40 which exceeded 5 times the contract value. It appears thus that both the complainant and its competitor met the minimum technical requirements necessary before the Evaluation Committee could check their financial offers.

1.6 On the basis of the above, the Ombudsman considers that the Commission was entitled to take the view that the Polish Evaluation Committee had correctly interpreted the tender documents in the capacity selection phase. The fact that the complainant's competitor was admitted to the evaluation phase does not therefore constitute an instance of maladministration.

2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the case.

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

Yours sincerely,

Jacob SÖDERMAN