

Decision of the European Ombudsman on complaint 866/2001/GG against the European Commission

Decision

Case 866/2001/GG - Opened on 18/06/2001 - Decision on 16/11/2001

Strasbourg, 16 November 2001

Dear Mr Z.,

On 11 June 2001, you made a complaint concerning the handling of tender 2000/S 144-094468 (Translations into German) by the European Commission. You claimed that the Commission had wrongly excluded you from this tender.

On 18 June 2001, I forwarded the complaint to the Commission for its comments.

The Commission sent its opinion on your complaint on 6 August 2001. I forwarded the Commission's opinion to you on 21 August 2001 with an invitation to make observations, if you so wished, by 30 September 2001 at the latest. No such observations were received from you.

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

THE COMPLAINT

The complainant is a translator who submitted an offer in reply to a call for tenders (reference 2000/S 144-094468 - Translations into German) published by the European Commission.

Point 2.1 of the 'Cahiers des charges' required bidders to submit an "amtliche Bescheinigung" (official document) showing that they had paid their taxes and social security contributions in their member state. The complainant approached his tax consultant who advised him that he was unable to issue an "official" document. The complainant then turned to the tax authority at his place of residence in Germany, which informed him that it was unable to issue such documents to self-employed persons like the complainant. The tax authority did however provide the complainant with a document confirming this fact. The complainant submitted this document with his tender.

On 29 March 2001, the complainant was informed that his bid had been rejected since he had failed to submit the necessary document. On 4 April 2001, the complainant appealed against



this decision, arguing that he had been unable to provide the official document required through no fault of his own, since the tax authority had been unable to issue such document and since there was no other authority that could issue such attestations. He declared on his honour that he had always complied with his obligations to pay taxes and social security contributions. The complainant further pointed out that he had been working for the Commission and the translation centre of the EU as a translator for a number of years. The Commission rejected the complaint on 30 May 2001, arguing that it had not insisted on a certificate from the tax authority 'but expressly pointed out that other documents (e.g. a declaration by your tax consultant) were possible'.

In his complaint to the Ombudsman lodged in June 2001, the complainant denied that such information had been given to him. He added that the relevant service had informed him over the telephone that the German translation of the call for tenders appeared to have been 'unfortunate' and had encouraged him to go to the Ombudsman.

The complainant claimed that he had been wrongly excluded from the tender.

THE INQUIRY

The complaint was sent to the Commission for its opinion.

The Commission's opinion

In its opinion, the Commission made the following comments:

In July 2000, the Commission's translation service had launched a total of eleven tenders with a view to setting up new lists of external translators. The tender concerning the German language had been published in the Official Journal on 29 July 2000 under reference 2000/S 144-094468 (1). The relevant documentation - the call for tenders, the technical specifications ('Cahiers des charges') and a draft contract - had been made available to the public in electronic form through the *Europa* server of the Commission. A letter inviting addressees to submit offers had furthermore been sent to those persons (including the complainant) whose names had been registered in the database of free-lance translators working for the Commission. Offers had to be received by 2 October 2000.

A total of 117 offers were received in reply to the tender concerned. These offers were evaluated in a two-stage procedure. In a first stage, compliance with certain formal requirements was checked. The remaining applications were then examined by a selection board composed of experienced civil servants as to whether they fulfilled the criteria and conditions set out in the call for tenders and the 'Cahiers des charges'.

Article 2 (1) of the 'Cahiers des charges' set out the five criteria that led to the exclusion of applications. In respect of four of these criteria, it was sufficient for tenderers to provide a declaration. Regarding the fifth criterion, the 'Cahiers des charges' provided that applicants had to submit an "official document" ("amtliche Bescheinigung") to show that they had complied with their obligations to pay taxes and social security contributions in the relevant member state. The



expression "official document" thus had to be juxtaposed to the term "declaration". It signified that an attestation by a competent body was necessary to show that the relevant obligations had been fulfilled. There was however no precise indication as to which body was meant. Given that the call for tenders was addressed to applicants from 15 member states, it was necessary to leave some latitude to applicants in this regard.

The call for tenders published in the OJ, which was the only legally binding text in case of a dispute, furthermore added to the possibilities offered to applicants in this respect by providing that an applicant had "to submit proof to show that he had fulfilled his obligations regarding taxes and social security contributions in accordance with the legislation of the country where he is established" (point 14 b).

The selection board had considered that despite having addressed himself to the tax authority, the complainant had not submitted evidence to show that he had paid his taxes. The complainant had been informed on 29 March 2001 that his application had been rejected. At the same time, however, he had been advised that he could appeal against this decision until 30 April 2001.

The complainant had then telephoned the competent service of the Commission to ask for explanations and to mark his disagreement. The Commission's services had given him the information necessary for submitting a request to re-examine his application. The complainant subsequently lodged an appeal by letter dated 4 April 2001 that was rejected by the Commission.

The Commission took the view that the complainant had interpreted the expression "official document" too narrowly. The document emanating from the German tax authority that had been submitted to it by the complainant confirmed that this authority was unable to issue an "amtliche Bescheinigung". However, this did not mean that no other authority could have provided such a document. In the Commission's view, the complainant ought to have tried to obtain this document elsewhere. In this context, the Commission noted that a survey of 57 out of the 84 offers accepted by it showed that the successful applicants had produced an attestation of their tax consultant, an attestation of a lawyer or a "Lohnsteuerkarte" (tax sheet). The Commission also considered that the complainant had become active too late, given that he had addressed himself to the tax authority only on 2 October 2000, that is to say the closing day for applications. Furthermore, the Commission took the view that the complainant had failed to consult the relevant service that was best placed to help him. In this context, the Commission pointed out that the letter inviting addressees to submit offers had indicated that the service concerned was available to provide supplementary information on technical aspects of the tender.

The complainant's observations

No observations were received from the complainant.

THE DECISION

1 Wrongful exclusion from tender



1.1 The complainant submitted an offer in reply to a call for tenders published by the Commission (reference 2000/S 144-094468 - Translations into German). Point 2.1 of the 'Cahiers des charges' required bidders to submit an "amtliche Bescheinigung" (official document) showing that they had paid their taxes and social security contributions in their member state. The complainant approached his tax consultant who advised him that he was unable to issue an "official" document. The complainant then turned to the tax authority at his place of residence in Germany, which informed him that it was unable to issue such documents to self-employed persons like the complainant. The tax authority did however provide the complainant with a document confirming this fact. The complainant added this document to his application. The Commission rejected the application on the grounds that the complainant had failed to submit the necessary document. The complainant claims that his exclusion from the tender was incorrect.

1.2 The Commission takes the view that the complainant interpreted the expression "official document" too narrowly. It also considers that the complainant had become active too late, given that he addressed himself to the tax authority only on 2 October 2000, that is to say the closing day for applications. Furthermore, the Commission takes the view that the complainant had failed to consult the relevant service that was best placed to help him. In this context, the Commission points out that the letter inviting addressees to submit offers indicated that the service concerned was available to provide supplementary information on technical aspects of the tender.

1.3 The complainant did not comment on the Commission's opinion.

1.4 Before turning to the merits of the case, it should be noted that the Ombudsman had asked the Commission to submit an opinion on the complaint within a period of three months. The Commission's very detailed opinion was in effect already sent little more than a month after the Commission had received the complaint. A comprehensive set of all relevant documents was attached to this opinion. The Ombudsman would like to stress that he appreciates the considerable effort undertaken by the Commission to speed up the treatment of this complaint.

1.5 The Ombudsman notes that according to the 'Cahiers des charges', applicants had to submit an "amtliche Bescheinigung" (official document) showing that they fulfilled the relevant obligations. Although the person or body who could issue such document was not specified, the expression used clearly implies that a public authority or a person or body vested with public authority was meant. The Commission appears to accept that the document emanating from the German tax authority that was submitted to it by the complainant confirms that this authority was unable to issue such an "amtliche Bescheinigung". It claims, however, that this did not mean that no other authority could have provided such a document. In the Commission's view, the complainant ought to have tried to obtain this document elsewhere. In this context, the Commission refers to other applicants who had produced an attestation of their tax consultant, an attestation of a lawyer or a "Lohnsteuerkarte" (tax sheet). However, neither an attestation by a tax consultant nor an attestation by a lawyer can be qualified as constituting an "amtliche Bescheinigung" within the accepted meaning of the expression in the German language. It appears, furthermore, that a "Lohnsteuerkarte" is only available to employed persons. However,



the complainant is self-employed. The Ombudsman concludes, therefore, that the Commission has been unable to refute the complainant's allegation that he was unable to provide an "amtliche Bescheinigung", as Article 2 (1) of the 'Cahiers des charges' appeared to require.

1.6 It is true that the call for tenders published in the OJ, which was the only legally binding text in case of a dispute, did not require such document but only provided that an applicant had "to submit proof to show that he had fulfilled his obligations regarding taxes and social security contributions in accordance with the legislation of the country where he is established" (point 14 b) without specifying the type of evidence that was expected. However, in its letter of 29 March 2001 the Commission based the rejection of the complainant's application on the failure to submit the "amtliche Bescheinigung" foreseen in Article 2 (1) of the 'Cahiers des charges'. For the sake of completeness, it should be added that there is nothing to confirm the Commission's claim, in its letter of 30 May 2001, that it had not insisted on a certificate from the tax authority 'but expressly pointed out that other documents (e.g. a declaration by your tax consultant) were possible' (2).

1.7 The Ombudsman notes that the complainant did not submit a document to show that he had complied with his obligations to pay taxes and social security contributions in his member state. However, the Ombudsman considers that this failure was due to the misleading wording of the relevant condition in Article 2 (1) of the 'Cahiers des charges'. The Commission itself notes in its opinion that six applications (including the complainant's) were rejected for failure to provide the "amtliche Bescheinigung". It is therefore quite likely that the complainant was not the only applicant to whom the misleading wording of the relevant condition caused problems.

1.8 It is good administrative practice in tender procedures for the administration clearly to set out the conditions that applicants have to fulfil. In the present case, the Commission required applicants to submit an "amtliche Bescheinigung" (official document) showing that they had paid their taxes and social security contributions in their member state. It seems that for a person such as the complainant it was impossible to obtain such a document from a public authority or a person or body vested with public authority as the wording of the term implied. The Commission has failed to clarify that an attestation by other persons or bodies, e.g. a tax consultant or a lawyer, would be regarded as sufficient. The exclusion of the complainant for failure to submit such a document thus constitutes an instance of maladministration. The Ombudsman therefore considers it necessary to make a critical remark in this regard.

2 Conclusion

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

It is good administrative practice in tender procedures for the administration clearly to set out the conditions that applicants have to fulfil. In the present case, the Commission required applicants to submit an "amtliche Bescheinigung" (official document) showing that they had paid their taxes and social security contributions in their member state. It seems that for the complainant it was impossible to obtain such a document from a public authority or a person or body vested with public authority as the wording of the term implied. The Commission has failed to clarify that an attestation by other persons or bodies, for example a tax consultant or a



lawyer, would be regarded as sufficient. The exclusion of the complainant for failure to submit such a document thus 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

(1) OJ 2000 S 144.

(2) The Commission has also provided a French version of this letter in which the relevant passage reads as follows: "Cependant, nous ne demandions pas nécessairement un document délivré par le Finanzamt; d'autres moyens de preuve étaient possibles en ce qui concerne votre situation fiscale, et notamment une déclaration de votre Steuerberater." If the French version should be the original and the letter sent to the complainant a translation thereof, the Commission's efforts to set up a list of competent external translators is most understandable.