

Decision of the European Ombudsman on complaint 1396/2001/SM against the European Commission

Decision

Case 1396/2001/SM - Opened on 13/11/2001 - Decision on 04/09/2002

Strasbourg, 4 September 2002

Dear Mr B.,

On 24 September 2001, you made a complaint to the European Ombudsman on behalf of your company, Oceanic Development s.a., concerning a tender award procedure for the project "SADC Regional Monitoring, Control and Surveillance (MCS) of Fishing Activities".

On 13 November 2001, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 28 February 2002 and I forwarded it to you with an invitation to make observations, if you so wished by 30 April 2002. No observations were received from you.

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

THE COMPLAINT

The complainant is a company, which participated in a call for tender (project "SADC Regional Monitoring, Control and Surveillance (MCS) of Fishing Activities") and was part of a consortium managed by a Danish company. The complainant questions the way the Commission handled the tender award procedure, alleging that the winning bid's technical qualities were insufficient. By letter of 14 May 2001, the complainant asked the Commission's DG Development for an explanation. The latter answered that following the recent re-organisation of its External Relations' Department its letter was forwarded to the responsible unit within the EuropeAid Co-operation Office (AIDCO/C/7). The complainant had however not received a reply from the latter as at the date of the complaint.

The complainant alleges that there was a delay in replying to its letter of 14 May 2001 by AIDCO. He also alleges that the Commission services failed to apply correctly the award criteria when awarding the contract to its competitor.

The complainant claims that the tender procedure should be cancelled and the award of



contract declared void. He also claims that the Commission should pay damages.

The complainant's arguments relating to the award criteria concerned the winning bid's technical qualities which it considered insufficient. The Commission dealt with this in its opinion.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments.

The complainant was part of a consortium, which applied for a restricted call for tender concerning the project "Southern African Development Community (SADC) Regional Monitoring, Control and Surveillance (MCS) of Fishing Activities" financed by the European Development Fund (EDF) in Namibia. Four consortia were on the restricted tender list including the complainant. The tender applications were opened on 12 May 2000 and evaluated in Namibia by a committee consisting of representatives from five countries assigned by the Contracting Regional Authority, the Ministry of Fisheries and Marine Resources of the Republic of Namibia. On 27 December 2000, the Regional Contracting Authority (Contracting Authority) informed the tenderers of the winning bid.

The Commission explains that in the context of EDF funding, the ACP State and its Contracting Authority are responsible for preparing, negotiating and concluding contracts in accordance with the Lomé Convention and the EDF. The ACP state is moreover responsible for the decisions regarding the award of the contract whilst the Commission's role is limited to assessing whether the financing conditions under the EDF are met or not.

The Commission expresses regret that the complainant's letter of 14 May 2001 was not replied to despite the fact that the Commission's services (AIDCO) forwarded it to the Contracting Authority in Namibia in charge of the tender procedure. It also acknowledges that its services should have informed the complainant regarding its letter of 14 May 2001 that in case of queries the correct interlocutor was Namibia's Contracting Authority and not the Commission services.

As far as the allegation regarding the incorrect application of the tender award criteria is concerned, the Commission considers that this was not the case. It moreover notes that this allegation relating to the award criteria concern the winning bid's technical qualities, which were considered insufficient by the complainant, and explains as follows.

First, the Contracting Authority awarded the contract to the technically and financially most advantageous tender in accordance with Articles 34 and 36 of the General Conditions of the EDF (1). Under these provisions, the tender applications fulfilling the tender dossier requirements are technically evaluated and ranked accordingly. The technically qualified applications are thereafter financially evaluated whereby the tenderer whose offer contains the best price, technical qualities and conditions for performing the contract wins the bid.

Second, the EC Delegation in Namibia, whose delegate under the EDF provisions approves the



Contracting Authority's contract proposal, informed by letter of 1 June 2000 the Commission service in charge at the time, DG Development, that the evaluation exercise had been carried out in a correct and fair way. The evaluators reached a consensus on the scoring and ranking of the tenderers on the basis of the pre-established EDF criteria. The complainant's tender application, having qualified for the technically required tender level, was rejected in the financial evaluation as its price exceeded the maximum budget ceiling stipulated in the tender dossier. The maximum budget price stipulated amounted to EUR6,560,000.- compared to the complainant's offer, which amounted to EUR6,694,865.-.

Lastly, the Commission expresses regret that the complainant was not awarded the contract but rejects the complainant's claims. The Commission considers that its role is limited to financing EDF contracts and that it therefore cannot reply on behalf of Namibia's Contracting Authority which was in charge of the tender procedure in Namibia.

The complainant's observations

The Commission's opinion was forwarded to the complainant for observations. No observations were received by the Ombudsman.

THE DECISION

1 Failure to reply within a reasonable period to the letter of 14 May 2001

1.1 The complainant alleges that there was a delay in replying to its letter of 14 May 2001 by AIDCO. In this letter, the complainant informed AIDCO, the Commission's service, that it considered that the tender award procedure for an ACP project in Namibia was incorrectly run.

1.2 The Commission expresses regret that its services did not reply to the complainant's letter 14 May 2001. They nevertheless forwarded the letter to the Contracting Authority in Namibia, the correct interlocutor. The Commission also acknowledges that its services should have informed the complainant that its letter of 14 May 2001 should have been directly addressed to Namibia's Contracting Authority and not to the Commission services.

1.3 The Ombudsman notes that the Commission should have replied to the letter of 14 May 2001. However, he notes that the Commission expresses regret for not having done so and that it acknowledges that its services did not answer the letter of the complainant. In these circumstances, the Ombudsman considers that it is not necessary to pursue the inquiry any further with regard to this allegation.

2 Incorrect application of the award criteria in the tender procedure

2.1 The complainant alleges that the Commission services failed to apply correctly the award criteria when awarding the contract to the complainant's competitor.

2.2 The Commission considers that the criteria as set out in the General Conditions of the EDF were correctly applied and that the evaluation exercise was correctly and fairly carried out. The Commission stated that the Contracting Authority awards the contract to the tenderer whose tender dossier offers the most advantageous offer from a financial, technical and organisational point of view under Article 36 of the General Conditions of the EDF. The Commission moreover explained that the complainant's consortium technically qualified but that its offer exceeded the



tender's maximum budget ceiling with EUR134,865.-. The Contracting Authority's evaluation committee rejected the complainant's offer, as it was not considered to be the most advantageous tender.

2.3 In view of the above, the evidence available to the Ombudsman does not support the complainant's allegation that the Commission applied the contract award procedure incorrectly. In these circumstances, the Ombudsman finds no maladministration as regards this aspect of the complaint.

3 Claim for cancellation of the tender procedure and damages

3.1 The complainant claims that the tender procedure should be cancelled and that the Commission should pay it damages.

3.2 The Commission expresses regret that the complainant was not awarded the contract but rejects the complainant's claims. The Commission considers that its role is limited to financing EDF contracts and that it therefore cannot reply on behalf of Namibia's Contracting Authority, which was in charge of the tender procedure in question.

3.3 The Ombudsman notes on the basis of the evidence available that the tender award procedure appears to have been run correctly. Thus, there are no grounds for the claims. In these circumstances, there appears to be no maladministration on the part of the Commission.

4 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

(1) Réglementation générale relative aux marchés de travaux, fournitures et services financés par le Fonds européen de développement (FED), JO L 382 du 31.12.1990, pp. 20-21