



## Decision on how the European Commission handled concerns about a call for tenders for a project to support agriculture and rural development reforms in Ukraine (case 1047/2021/TM)

Decision

**Case 1047/2021/TM - Opened on 08/12/2021 - Decision on 22/11/2022 - Institution concerned** European Commission ( No maladministration found ) |

The case concerned how the European Commission investigated the complainant's concerns about an alleged conflict of interest. The EU Delegation to Ukraine organised a call for tenders to support policy and institutional reforms in agriculture in Ukraine. The complainant, the head of a consortium that submitted a tender, argued that the successful tenderer had a competitive advantage as its leading expert participated in meetings, where he might have obtained information on the project that was not available to the other bidders. The complainant contended that this was in breach of the principle of equal treatment.

The Ombudsman found that the Commission took the allegations seriously and thoroughly investigated the matter in line with the applicable rules and EU case-law. The Ombudsman therefore closed the inquiry with a finding of no maladministration.

Background to the complaint

**1.** In 2020, the EU Delegation to Ukraine ('the Delegation') organised a call for tenders for a project ('the project') to support policy and institutional reforms in agriculture in Ukraine [1]. The aim of the project was to support the Ukrainian Ministry of Agriculture in enacting new policies in the agriculture sector. The project was a follow-up to two previous parallel technical projects [2].

**2.** The complainant is the head of a consortium that implemented one of the previous projects and that submitted a tender in this case which ranked second best. The complainant argued that the successful tenderer had a competitive advantage and that it should have been excluded from the procurement procedure in accordance with the applicable rules [3]. More specifically, the complainant argued that the leading expert put forward by the successful tenderer participated in meetings where the project was discussed before the call for tenders was published.

**3.** The Delegation contracted a team of experts to provide technical assistance to help draft the specifications of the call for tenders. Its role was to take stock and draw up recommendations based on the implementation of two previous projects. [4] In addition,



the team also had to propose follow-up actions for the extension of one of these projects. The team of experts produced a report, which the Delegation shared with all tenderers in a timely manner.

**4.** The leading expert of the successful tenderer was the team leader of the project that was to be extended. In this capacity, he participated in meetings organised by the team of experts with stakeholders. In the complainant's view, during these meetings the leading expert had access to information concerning not only the project to be extended, but also the project concerned by the call for tenders. This gave the successful tenderer an unfair competitive advantage over other tenderers.

**5.** In December 2020, the complainant turned to the Delegation. It provided evidence that the leading expert participated in meetings together with the team of experts at which the project was discussed. The Delegation replied that it was solely responsible for drafting the terms of reference. The Delegation clarified the role of the team of experts and the purpose of some of the meetings. It also explained that it took measures to ensure equal treatment of all tenderers and avoid any distortion of competition. [5] In particular, it shared with all tenderers the relevant information concerning the implementation of the previous projects. It also gave them sufficient and reasonable time to take this information into account. The Delegation also said that the complainant, which had carried out one of the previous projects, might have had exactly the same advantage. However, it informed the complainant that it had suspended the signature of the contract in order to investigate its allegations.

**6.** Dissatisfied with the Delegations' reply, the complainant turned to the European Commission. [6] In January 2021, the Commission asked the Delegation to investigate the allegations further. The complainant provided further evidence to substantiate its allegations, including statements from national authorities that the project was discussed during meetings, which the leading expert attended with the team of experts.

**7.** In May 2021, the Commission explained that it could not exclude automatically an economic operator from a call for tenders. [7] In order to do, there needs to be evidence that there is an actual risk of distorting competition. Having examined all the relevant information and evidence gathered by the Delegation, the Commission concluded that there was no evidence that the successful tenderer had an unfair competitive advantage. It also found that there was no evidence that the leading expert had participated in the drafting of the terms of reference or that he had influenced unduly the work of the team of experts.

**8.** In its reply, the Commission provided details about the meetings referred to by the complainant. It referred to feedback received from the stakeholders and participants about the purpose and content of the meetings. The complainant disagreed with the Commission and considered that the Commission had failed to address all relevant meetings. In the complainant's view, the Commission failed to carry out an impartial investigation and simply relied on the information that the Delegation had gathered.

**9.** In June 2021, the Commission informed the complainant that it would proceed with the award of the contract to the successful tenderer. Dissatisfied with this outcome, the



complainant turned to the Ombudsman.

The inquiry

**10.** The Ombudsman opened an inquiry into how the Commission investigated the complainant's concern that the successful tenderer had an unfair competitive advantage.

**11.** In the course of the inquiry, the Ombudsman inspected the Commission's file on this case and met with the Commission to obtain further information. The complainant provided comments on the inspection and meeting report.

## Arguments presented to the Ombudsman

**12.** The complainant reiterated its arguments as outlined above. The complainant stated that the leading expert had access to information concerning the project, which gave the successful tenderer an unfair competitive advantage. The complainant believed that the Delegation had failed to investigate the matter with impartiality and that it had provided misleading information to the Commission. The complainant was concerned that a staff member of the Delegation was biased against the complainant.

**13.** During the inquiry, the Commission stated that it had thoroughly investigated the complainant's allegations. It reiterated its view that, in line with EU case-law [8], it may not automatically exclude a tenderer. In order to do so, the Commission is required to prove that an alleged situation of conflict of interest is real and not hypothetical.

## The Ombudsman's assessment

**14.** The documents inspected during the inquiry show that the Commission thoroughly investigated the issue raised by the complainant. Following the concerns raised by the complainant in December 2020, the Commission asked the Delegation to carry out an in-depth investigation. The Delegation suspended the signature of the contract while the investigation was pending. The Commission provided specific and detailed guidance as to how the Delegation should carry out the investigation. Specifically it asked the Delegation to:

- ✎ Collect all the information relevant to the assessment of the complainant's allegations;
- ✎ Carry out further analysis of the documentation of the call for tenders and assess whether the successful tenderer was able to use information that was not available to the other tenderers;
- ✎ Proactively gather evidence on the meetings; and
- ✎ Explain further, how the complainant's allegations were investigated during the evaluation of the tenders.

**15.** The Commission verified the evidence that the Delegation had gathered, and concluded



that all the investigative steps were well documented. Specifically:

▫ The Delegation made a table with the list of all relevant meetings (19 in total), requested minutes of the meetings and gathered a detailed account of what had been discussed (to the extent possible, as for some meetings no official record was kept). The table contains a list of participants for each meeting, the place of the meeting, date, feedback from the participants and from the leader of the team of experts.

▫ The Delegation consulted the national authorities to seek further clarifications. This is also well documented.

▫ The Delegation also sought additional declarations of confidentiality and absence of conflicts of interest from the leader of the team of experts. It also contacted him again to seek clarifications on the purpose of some of the meetings.

▫ The 'evaluation committee', which had evaluated all tenders, reconvened again to examine if the bid of the successful tenderer contained any information that was not in the public domain. It concluded that there was no such information in the bid.

**16.** Throughout the investigation, the Delegation was in close contact and coordinated its different investigation steps with different Commission departments and its legal department, which provided input and followed the investigation closely.

**17.** There is nothing in the information obtained in the course of the inquiry to support the complainant's allegation that the Delegation or specific staff members were biased against the complainant.

**18.** In light of the above, the Ombudsman considers that the Commission complied with its obligations under the relevant rules [9] and case-law [10]. It thoroughly investigated the complainant's allegations and found that appropriate steps had been taken to ensure that there was no distortion of competition and that all tenderers were treated equally. On the basis of the information obtained in the course of the inquiry, the Ombudsman finds no reason to put into question the Commission's conclusion.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion: [11] :

**There was no maladministration by the European Commission.**

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

Tina Nilsson Head of the Case-handling Unit

Strasbourg, 22/11/2022



[1] Institutional and Policy Reform for Smallholder Agriculture ( EuropeAid/140723/DH/SER/UA ).

[2] "Support to Agricultural and Food Policy Implementation in Ukraine" (the SAFPI project) and "Support to the Development of a Geographical Indication System in Ukraine" (the GI project').

[3] Article 141(1)(c) of Regulation 2018/1046 on the financial rules applicable to the general budget of the Union ('the Financial Regulation') in the relevant parts states "*1. The authorising officer responsible shall reject from an award procedure a participant who: [...] (c) was previously involved in the preparation of documents used in the award procedure where this entails a breach of the principle of equality of treatment, including distortion of competition, that cannot be remedied otherwise. [...]*" available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R1046> .

Section 2.5.4.3 of the Commission's 'Contract Procedures for European Union External Action - A Practical Guide' reflects the above provision. The Practical Guide is available at:

<https://wikis.ec.europa.eu/display/ExactExternalWiki/ePRAG> .

[4] In its letter of 18 January 2021, the Delegation referred to the Terms of Reference of the team of experts.

[5] In accordance with Section 2.5.4.3 of the Practical Guide, which states: "*It is up to the contracting authority to prove the distortion of competition and to prove that it has taken all possible measures to avoid the rejection. In particular, these measures must include the communication to the other candidates/tenderers of the relevant information exchanged in the context of or resulting from the involvement of the candidate/tenderer in the preparation of the procurement procedure and the fixing of adequate time-limits for the receipt of tenders.*"

[6] In accordance with Section 2.12.1. of the Practical Guide.

[7] The Commission referred to the judgment in case T-403/12 *Intrasof International v European Commission* , paragraph 83, available at:

<https://curia.europa.eu/juris/document/document.jsf?jsessionid=C5AC2587E2B93D12962C327A6788829>

[8] In accordance with the judgment of the General Court in case T-403/12, *Intrasoft International v*

European Commission, paragraphs 74 and 83, available at:

<https://curia.europa.eu/juris/document/document.jsf?jsessionid=77575677ECF504B96F2FEDA96AFADED>

[9] Article 141(1)(c) of 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.



Paragraph 2.5.4.3 of the Practical Guide on procurement and grants for the EU external actions (the PRAG).

[10] Judgment of the General Court in case T-292/15 , *Vakakis kai Synergate - Symvouloi gia Agrotiki Anaptixi AE Meleton v. European Commission*, para. 99, available at:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=199762&pageIndex=0&doclang=EN&>

[11] This complaint has been dealt with under delegated case handling, in accordance with the Decision of the European Ombudsman adopting Implementing Provisions