

Decision of the European Ombudsman on complaint 379/2003/IP against the European Commission

Decision

Case 379/2003/IP - Opened on 21/03/2003 - Decision on 08/10/2003

Strasbourg, 8 October 2003

Dear X,

On 24 February 2003, I received a complaint that you made to the European Ombudsman on behalf of the Italian Consortium Y. The complaint concerned the Commission's handling of the call for tender EuropeAid/114077/D/S/NI.

On 21 March 2003, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 12 June 2003 and I forwarded it to you with an invitation to make observations, if you so wished, by 31 July 2003. No observations appear to have been received from you. 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 are as follows:

Y presented an offer following the call for tender launched by the Project's Management Unit of "*Proyecto de fortalecimiento del sistema de salud en Nicaragua*" (hereinafter PFSS) on 16 August 2002, in the framework of a financial cooperation agreement between the Government of Nicaragua and the European Union, concerning the acquisition of medical supplies.

On 4 November 2002, Y submitted a bid for each one of the 13 lots which constituted the tender. The total amount of the bid was 1.138.000 €.

On 14 November 2002, Y received a request for complementary technical information from the Project's Management Unit (hereinafter PMU), the contracting authority for the tender. On 19 November 2002, Y forwarded the requested information to the PMU. By fax of 3 December 2002, Y asked the PMU for a copy of the minutes of the opening session which had taken place on 5 November 2002. From the examination of this document, it appeared that the offer made by Y for each of the 13 lots had been admitted to the next stage of the selection procedure



which was to be carried out by the Evaluation Committee.

On 4 February 2003, Y was informed that the Evaluation Committee had decided to discard its offer since it did not comply with the criterion set out at point 16 of the call for tender, i.e. that the annual sales of the last three years should be 5 times superior to the economic value of the bid presented. Since the value of the bid presented by Y was 1.138.000 €, the yearly sales during the last three years should have been at least of 5.690.000 €, which was not the case.

On 7 February 2003, Y wrote to the PFSS alleging irregularities in the tender procedure, and made the following points:

Despite Article 2.4.8 of the Practical Guide to EC external aid contract procedures, which provides that "Selection and Award criteria" must be precise and must not be discriminatory, the terminology used in the Spanish version of the call for tender was ambiguous. It was not clear that the calculation of the sales of the tenderers during the last three years should have referred to each year and not to the whole period, as understood by Y. Furthermore, according to Article 16 of the call for tender, "*Las empresas [...] deben disponer de taller de servicios en la República de Nicaragua aprobado por el fabricante de los suministros*" (tenderers should have after-sale service providers in the Republic of Nicaragua approved by the producer of the supplies). The company which had been awarded the tender did not comply with this requirement. On these grounds, Y asked for the annulment of the whole procedure.

In its reply of 17 February 2003, PFSS stated that the procedure had been carried out in accordance with the relevant rules and maintained its original decision to discard the offer presented by Y.

In his complaint to the Ombudsman, the complainant alleged unfairness by the Commission in the handling of the call for tender EuropeAid/114077/D/S/NI, "*Proyecto de Fortalecimiento del Sistema de Salud en Nicaragua*" and claimed that the Commission should annul the whole procedure.

THE INQUIRY

The Commission's opinion

The Commission first reviewed the facts of the complaint:

On 16 August 2002, the Project's Management Unit (PMU) for the *Proyecto de fortalecimiento del sistema de salud en Nicaragua*, launched an international call for tender concerning the acquisition of medical supplies. The Contracting Authority for this tender was the PMU. Nevertheless, following the procedural rules of the Manual of Instructions and the practical Guide to EC external aid contract procedures for decentralised systems with ex-ante approval, as adopted by the Commission on 10 November 1999, the tender had been thoroughly checked by the Commission's delegation in Nicaragua and amended by the PMU accordingly prior to its publication.



On 11 October 2002, a corrigendum to the Call for Tender was published. The selection criteria had been slightly changed and the deadline for the submission of the offers had been extended to 4 November 2002. The opening session of the bids which had been received took place on 5 November 2002. One of the selection criteria, which was unchanged after the corrigendum, stated that the annual sales of the tenderers of the last three years had to be 5 times superior to the economic value of the bid presented. On 6 November 2002, Y sent an explanatory note to the Evaluation Committee. Y explained that the figures originally indicated referred only to national sales and those indicated in the note included also foreign sales. Since this note had been received after the deadline for the submission of the bids, the information given in it had not been taken into account in order not to alter the competition.

On 4 February 2003, the PMU informed Y that its offer had been discarded since it had not met the criterion requiring that the annual sales of the last three years should be 5 times superior to the economic value of the bid presented.

Concerning the complaint, the Commission made the following comments:

As regards the procedure followed for the selection of the bids, the evaluation process was composed of both the checking of fulfilment of selection and technical criteria. This explained also why it happened that tenderers had been asked, as was the case with Y, to supply further information after the opening session, even though their bids would have been later discarded on different grounds. According to the relevant rules, the tender had to be awarded to the firm which presented the lowest price among those that fulfilled all the evaluation criteria, and Y did not fulfil all the criteria. Contrary to what the complainant alleged, the wording of the above-mentioned criterion could not be considered as ambiguous, since it was clearly stated that they had to take into account the *annual* sales of the last three years and not the sales of the whole period. Having checked the English and the Italian translations of the call for tender, they were consistent with the original Spanish version. Furthermore, it had to be borne in mind that the purpose of this criterion was to guarantee that the successful tendering firm had a sufficient economic size to fulfil the contract awarded to it.

The complainant's point that the company which had been awarded the tender did not comply with the requirement that tenderers should have after-sale service providers in the Republic of Nicaragua approved by the producer of the supplies and that on these grounds the whole procedure should be annulled could not be accepted. Contrary to the complainant's statement, the presence of a local agent was not required, but what was requested was a servicing shop for after-sale services. The Evaluation Committee had carefully selected only tenderers that could guarantee this service. On this basis, the request for annulment of the tender procedure submitted by the complainant could not be accepted. Finally, the fact that Y also met this criterion and could provide after-sales services was not relevant, since its offer had been discarded on the basis of other grounds.

As a conclusion, the Commission underlined that the whole tender procedure had been carried out in accordance with the relevant rules, that no irregularities had taken place and that normal competition had been assured.



The complainant's observations

It appears that no observations were received from the complainant.

THE DECISION

1 The Commission's handling of the tender procedures

1.1 Y made an offer in response to the call for tender EuropeAid/114077/D/S/NI, launched on 16 August 2002 by the Project's Management Unit of the "*Proyecto de Fortalecimiento del Sistema de Salud en Nicaragua*", in the framework of the cooperation agreement between the Government of Nicaragua and the European Union, for the acquisition of medical supplies. The complainant alleged unfairness by the Commission in the handling of the call for tender and claimed that the Commission should annul the whole procedure.

1.2 In its opinion, the Commission stated that, according to the call for tender, the tender had to be awarded to the firm which presented the lowest price among those who fulfilled all the evaluation criteria. Y did not fulfil the criterion requiring that the annual sales of the tenderer of the last three years had to be 5 times superior to the economic value of the bid presented.

1.3 As regards the complainant's point that the company which had been awarded the tender did not comply with the requirement that tenderers should have after-sale service providers in the Republic of Nicaragua approved by the producer of the supplies and that on these grounds the whole procedure should be annulled, it could not be accepted. Contrary to the complainant's statement, the presence of a local agent was not required, but what was requested was a servicing shop for after-sale services. The Evaluation Committee had carefully selected only tenderers that could guarantee this service.

1.4 It is good administration that when evaluating the offers received following a call for tender, the responsible authorities act in accordance with the relevant rules and apply the criteria laid down in that call. The wording of the call has to be clear and precise in order not to be misleading for potential tenderers.

1.5 The Ombudsman notes that the text of the relevant call for tender does not appear to be misleading. Furthermore, on the basis of the information received by the Commission in its opinion, he considers that the Commission has provided a reasonable explanation as to why the offer presented by Y was discarded and why there were no reasons to annul the whole procedure as required by the complainant.

On this basis, there appears to have been no maladministration by the Commission.

2 Conclusion

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

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

Yours sincerely,



P. Nikiforos DIAMANDOUROS