

## **Decision of the European Ombudsman on complaint 1583/2003/GG against the European Commission**

Decision

**Case 1583/2003/GG - Opened on 05/09/2003 - Decision on 26/11/2003**

Strasbourg, 26 November 2003

Dear Mr T.,

On 12 August 2003, you submitted, on behalf of Isothermal Technology Limited, a complaint against the European Commission concerning a tender procedure.

On 5 September 2003, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 7 October 2003. I forwarded it to you on 16 October 2003 with an invitation to make observations which you sent on 21 October 2003.

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

### **THE COMPLAINT**

The complaint concerns a tender in relation to the supply of temperature sensor calibration equipment to Malta in which the complainant, a British company, had wished to take part. According to the complainant, a UK company, only two companies manufacture these products world-wide, a US company and the complainant itself.

The complainant alleged that the tender specifications had basically been copied from the catalogue of the US company, thus precluding the complainant from applying. In the complainant's view, this constituted an irregularity for which the European Commission was to be held responsible.

The complaint had first been submitted to the Ombudsman on 22 July 2003 (complaint 1356/2003/GG). This complaint was rejected by letter of 30 July 2003, given that the complainant had not shown that appropriate prior approaches had been made. Together with the present complaint, the complainant submitted a copy of an e-mail from the Maltese authorities which noted that the matter had been submitted to the EC Delegation in Malta in October/November 2002 and that the latter had taken the view that the issues raised by the complainant should be examined at the evaluation stage.



## THE INQUIRY

### **The Commission's opinion**

In its opinion, the Commission made the following comments:

On 27 September 2002, the Department of Contracts in Malta had launched a tender (EuropeAid/113784/D/S/MT) which concerned the supply of equipment for the setting up of the National Reference Standard Laboratories in Malta and the related verification equipment to be used in the running of the National Metrology Service. The complaint concerned lot n° 3 under the tender (Temperature Metrology equipment to establish the capability for calibrating SPRTs, PRTs, thermocouples, thermistors and LIG thermometers in line with ITS 90, in the temperature range –80 °C to 660 °C).

The source of the financing came from the general budget of the EU and was covered by the Commission's Financing Decision for the 2001 National Pre-accession Programme for Malta. The implementation of the project, including the tender and the award of the contract, was however subject to decentralised management. This meant that the Maltese authorities were in charge of implementing the project. The Commission monitored the implementation through ex-ante control of the tender procedure and award of contract. The Contracting Authority in Malta remained responsible, however, for its decisions towards the companies participating in the tender.

While executing its ex-ante control, the Commission had approved the procurement notice and the tender dossier, including the technical specifications, before the tender could be launched. Based on the information available to the Commission, there had been no reason to believe that the specifications would not give equal access to all eligible operators on the specific market being able to fulfil the needs of the Maltese authorities. On the contrary, the technical specifications had been drawn up by the beneficiary of the project, the Malta Standards Authority, with the support of other European National Metrology Institutes.

Only one offer had been received by the Maltese authorities for lot n° 3, the offer made by the complainant. The offer had been found non-compliant with the technical specifications. The tenderer had been duly informed and consequently the tender for this lot had to be declared unsuccessful and had been cancelled.

The tender for lot n° 3 had been re-launched, with the consent of the Commission, on 18 July 2003, with a submission deadline of 28 August 2003 (tender EuropeAid/116363/D/S/MT). The Commission had not yet received any proposal for the award of the contract from the Maltese authorities following their evaluation of the tenders received (including one from the complainant), which had taken place on 28/29 August 2003.

Once an award of contract was made, the complaint procedure was as follows: In accordance with the Commission's standard procedures for external aid contracts, tenderers believing themselves to be the victims of an error or irregularity during the award process could complain



to the Contracting Authority directly. The Contracting Authority had to reply within 90 days of receipt of the complaint. The Commission had to communicate its opinion to the Contracting Authority and to do all it could to facilitate an amicable solution. If this procedure failed, the tenderer had the possibility to have recourse to procedures established under national law.

The complaint concerned the substance of the tender procedure. As such, it had to be directed towards the Contracting Authority.

#### **The complainant's observations**

In its observations, the complainant pointed out that it had since received information on the new tender (tender EuropeAid/116363/D/S/MT). According to the complainant, bids had been submitted by three companies including the complainant itself. The complainant took the view that it had quoted a fair price whereas the bid from another company (which according to the complainant owns the US company) had been 27 % higher than the complainant's. According to the complainant, this firm had then given a 41.4 % discount, which was 21.4 % higher than usual, to undercut the complainant's bid. The complainant expressed the view that this constituted unfair competition.

## **THE DECISION**

### **1 Introductory remark**

1.1 The original complaint which was submitted by a British company concerned a tender that had been organised by Maltese authorities and financed by the EU (EuropeAid/113784/D/S/MT). This tender was subsequently cancelled and re-launched. In its observations on the Commission's opinion, the complainant pointed out that three companies (including the complainant itself) had submitted bids under the new tender (tender EuropeAid/116363/D/S/MT). According to the complainant, one of these companies had given a 41.4 % discount, which was 21.4 % higher than usual, to undercut the complainant's bid. The complainant expressed the view that this constituted unfair competition.

1.2 Article 195 of the EC Treaty empowers the European Ombudsman to examine instances of maladministration in the activities of the Community institutions and bodies, with the exception of the Community courts acting in their judicial role. The Ombudsman is therefore unable to deal with complaints against any other persons or bodies, such as private companies.

1.3 The present decision thus deals exclusively with the complaint against the Commission.

### **2 Unfairness of tender specifications**

2.1 The complainant alleged that the specifications of tender EuropeAid/113784/D/S/MT had basically been copied from the catalogue of a competitor, thus precluding the complainant from applying. In the complainant's view, this constituted an irregularity for which the European Commission was to be held responsible.

2.2 In its opinion, the Commission explained that whilst the financing had come from the general budget of the EU, the Maltese authorities had been in charge of implementing the project. The Commission had monitored the implementation through ex-ante control of the tender procedure and award of contract. While executing its ex-ante control, the Commission had approved the



procurement notice and the tender dossier, including the technical specifications. According to the Commission, there had been no reason to believe that the specifications would not give equal access to all eligible operators on the specific market being able to fulfil the needs of the Maltese authorities. The Commission further noted that in accordance with the Commission's standard procedures for external aid contracts, tenderers believing themselves to be the victims of an error or irregularity during the award process could complain to the Contracting Authority directly. The Contracting Authority had to reply within 90 days of receipt of the complaint. The Commission took the view that the complaint concerned the substance-matter of the tender procedure and that it had therefore to be directed towards the Contracting Authority, i.e. the Maltese authorities.

2.3 Upon a careful examination of the evidence submitted to him, the Ombudsman considers that the explanations provided by the Commission concerning its responsibilities in the tender procedure appear to be reasonable.

2.4 In these circumstances, there appears to be no maladministration on the part of the European Commission.

### **3 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