

Decision of the European Ombudsman on complaint 2327/2003/TN against the European Commission

Decision

Case 2327/2003/TN - Opened on 17/12/2003 - Decision on 16/07/2004

Strasbourg, 16 July 2004

Dear Mr G.,

On 5 December 2003, you made a complaint to the European Ombudsman concerning the participation of your one-man company Redgate NV in the European Commission's call for tenders 2003/S 076-66794 for translation into Swedish.

On 17 December 2003, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 23 March 2004 and I forwarded it to you with an invitation to make observations, if you so wished. 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

In December 2003, a complaint was made to the Ombudsman by the sole proprietor of the company Redgate NV (hereafter "Redgate") concerning the European Commission's call for tenders 2003/S 076-66794 for translation into Swedish.

According to the complainant, the relevant facts are, in summary, the following:

The complainant participated, through his company, Redgate, in the tender procedure 2003/S 076-66794 for translation into Swedish. On 18 November 2003, he received a letter in which the Commission informed him that his tender had been rejected. The reason was that he had not provided sufficient proof of his professional capacity (points 2.3.3.2. - 2.3.3.4. of the specifications). In particular, the selection committee considered his bid to be insufficient with respect to the details of the organisation chart, the description of procedures for selecting translation staff and the subcontracting procedures.

The complainant contacted the Commission official in charge of the call for tenders in question,



who told him that the reference made in the Commission's letter to points 2.3.3.3. and 2.3.3.4. was not relevant in his case.

In the covering letter submitted with his tender, the complainant had pointed out the following. He has worked as a freelance translator for the Commission almost full-time since 1995, both in his own name and through his company Redgate. Redgate is a one-man business registered at his postal address. All translations carried out by Redgate for the Commission have been done by himself, without help from other translators. He would also provide the services under this tender by working alone and he was therefore not in a position to provide the information required under point 2.3.3.2. of the tender specifications.

However, the Commission has informed the complainant that it cannot find his covering letter in their file, which he considers remarkable.

Even if the covering letter had not been submitted, which the complainant contests, it is apparent from point 2.3.3.2. in the specifications that the supposedly lacking information was not mandatory, since that point states that: "Tenderers must provide, *if relevant* /.../ ". In his case, this information was not relevant since one cannot draw up, for instance, an organisation chart for a company without any employees. Furthermore, it is clear from the balance sheets enclosed with the tender that Redgate's turnover is so low that it has to emanate from only one person.

The complainant has worked eight years, almost full-time, for the Commission, during which time he has proved his capacity. This is clear from the certificate enclosed with the tender and from the Commission's yearly evaluations of freelance translators.

In substance, the complainant alleges that the Commission has:

- i) Lost the covering letter he submitted with his tender, and;
- ii) Wrongly excluded his bid.

The complainant claims that the Commission should admit him as a freelance translator.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission makes the following comments:

As regards the allegation that the Commission lost the covering letter that the complainant asserts was enclosed with the tender, the Commission explains that the envelopes containing the bid were opened by the evaluation committee at the opening session to which the tenderers' representatives were also admitted. The bid was in triplicate (original and two copies) and the original was sealed on the spot by an official from another department. The complainant had also sent a further supporting document under separate cover. Since the opening, all the



documents and envelopes have been kept in locked premises to which only three officials and the evaluation committee have had access.

Following a telephone call during which the complainant put forward his allegation that the Commission had lost the covering letter, the sealed original, the two copies and the two envelopes of the bid, as well as the supporting documents and its envelopes, were re-examined. This re-examination yielded neither any document that had not been seen by the evaluation committee, nor any covering letter as described by the complainant.

As regards the allegation that the Commission wrongly excluded the complainant's bid, it was explained to the complainant that his bid was rejected because the evaluation committee considered it to be insufficient with respect to the tenderer's professional capacity, in particular the organisation chart, the description of procedures for selecting translation staff and the subcontracting procedures. Point 2.3.3.2. of the tender specifications requires the tenderer to provide information on all these points, insofar as they are relevant to the tenderer.

By containing the following statements, the bid submitted by Redgate clearly suggests that the company has translation staff (employees or subcontractors) consisting of several people:

"Larger translation orders are accepted only after the translator who will do the translation has been consulted."

"In case of large translation orders, parts of the translation will be given to the reviser while the translation is ongoing."

"The tenderer has regular contacts with the translators /.../."

"Questions may be passed on within the group /.../."

"Where applicable, the above description applies to the translations that the tenderer does himself."

Statements of this kind inevitably imply that the bid should include information on the organisation chart, the procedures for selecting translation staff and the subcontracting procedures, as indicated in the tender specifications. As the bid submitted by Redgate contained no information to this effect, it was rejected.

Had the bid included the allegedly lost covering letter, which according to the complainant would have made it look as though Redgate has no employees or subcontractors, the evaluation committee and the contracting authority would have had to consider the contradiction between the covering letter and the above statements made by the tenderer in his bid. The evaluation committee would have been obliged to question the truthfulness of one or the other point. Any misrepresentation in supplying the required information results in exclusion from the award procedure.



The tender specifications clearly indicate (point 6.1.2.) that the tender must contain all the information needed to enable the contracting authority to analyse the tender. Bids can only be evaluated on the basis of the criteria set out in the tender documents. The fact that the tenderer has had a framework contract with the Commission in the past is no substitute for the criteria published in the tender specifications.

The Commission concludes by stating that it considers any loss of a part of a bid in triplicate to be extremely unlikely in view of the measures taken. It strongly believes that there has been no loss of any element after its receipt of the tender. In any event, the presence of a covering letter as described by the complainant would not have fundamentally changed the decision to reject the complainant's bid. Only the reasons for the rejection might have been different if the evaluation committee had examined such a letter. The decision to reject the complainant's bid is fully in accordance with the rules on public procurement.

The complainant's observations

The complainant was invited to submit observations on the European Commission's opinion. No observations appear to have been submitted by the complainant.

THE DECISION

1 The allegedly lost covering letter

1.1 The complainant participated, through his company, Redgate, in the tender procedure 2003/S 076-66794 for translation into Swedish. The complainant alleges that the Commission has lost the covering letter submitted with his tender, in which he explained, among other things, that he works alone and therefore cannot provide the information required under point 2.3.3.2. of the tender specifications.

1.2 According to the Commission, the envelopes containing the bid were opened by the committee at an opening session. The bid was in triplicate (original and two copies) and the original was sealed on the spot. The complainant had also sent a further supporting document under separate cover. Since the opening, all the documents and envelopes have been kept in locked premises to which only three officials and the evaluation committee have had access. All documents and envelopes relating to the complainant's bid have been re-examined without any covering letter as described by the complainant being found. In view of the measures taken, the Commission considers any loss of a part of a bid submitted in triplicate to be extremely unlikely and it strongly believes that there has been no loss of any element after its receipt of the tender.

1.3 The Ombudsman has carefully considered the complainant's allegation and the Commission's account of how bids are opened and kept, which has not been rebutted or questioned by the complainant. The Ombudsman considers that the Commission has provided a convincing explanation of the procedures that should prevent loss of any part of a bid and of the checks that it has carried out in this case. Furthermore, the Ombudsman has not found any concrete evidence to support the allegation that the Commission lost the complainant's covering letter. In these circumstances, the Ombudsman concludes that his inquiry has revealed no maladministration by the Commission as regards this aspect of the complaint.

2 The allegedly wrong exclusion of the tender



2.1 The complainant alleges that the Commission wrongly excluded his tender on the basis of point 2.3.3.2. of the tender specifications, which requires the tenderer to submit information on qualifications and organisation, if relevant. The complainant asserts that this information was not relevant in his case, since one cannot draw up, for instance, an organisation chart for a company without any employees. Furthermore, it is clear from the balance sheets enclosed with the tender that Redgate's turnover is so low that it has to emanate from only one person.

The complainant also states that he has worked eight years, almost full-time, for the Commission, during which time he has proved his capacity. He argues that this is clear from the certificate enclosed with the tender and from the Commission's yearly evaluations of the freelance translators.

2.2 According to the Commission, the complainant's bid was rejected because the evaluation committee considered it to be insufficient with respect to the tenderer's professional capacity. The tender specifications require the tenderer to provide certain information relating to professional capacity, insofar as this information is relevant to the tenderer. The bid submitted by Redgate contained several statements which clearly suggested that the company has translation staff (employees or subcontractors) consisting of several people. Statements of this kind inevitably imply that the bid should include certain information as required under point 2.3.3.2. of the tender specifications. As the bid submitted by Redgate contained no information to this effect, it was rejected. The tender must contain all the information needed to enable the contracting authority to analyse the tender. Furthermore, bids can only be evaluated on the basis of the tender documents. The fact that the tenderer has had a framework contract with the Commission in the past is no substitute for the criteria published in the tender specifications.

2.3 The Ombudsman notes that according to point 2.3.3. of the tender specifications, which constitute part of the selection criteria, the tenderers must demonstrate that they have the professional capacity needed to carry out the work assigned to them. In order to demonstrate this, point 2.3.3.2. requires the tenderers to provide, if relevant: a) a detailed staffing chart with information about persons responsible for managing the work and the in-house revisers/translators responsible for carrying out the work; b) a description of the method of selecting the translators; and c) an indication of the proportion of the contract that the tenderer may intend to subcontract and a description of the procedure and criteria for selecting subcontractors.

The Ombudsman further notes that according to point 6.1.2. of the tender specifications, the tender must contain all the information needed to enable the contracting authority to analyse it on the basis of, among other things, the selection criteria.

2.4 On the basis of the available evidence and taking into account the finding in 1.3 above, the Ombudsman considers reasonable the Commission's conclusion that the tender was from a company which should provide relevant information on the organisation chart, the procedures for selecting translation staff and the subcontracting procedures, as indicated in point 2.3.3.2. of the tender specifications. This finding is not changed by the fact that the complainant might have proven his professional capacity under earlier contracts with the Commission, since



tenderers were required to include proof of such capacity as a condition of eligibility for the tender in question. The Ombudsman therefore finds no maladministration by the Commission as regards this aspect of the complaint.

3 The complainant's claim

3.1 In view of the Ombudsman's findings under points 1.3 and 2.4 above, there is no reason for the Ombudsman to pursue the complainant's claim that the Commission should admit him as a freelance translator.

4 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 Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS