

Decision of the European Ombudsman on complaint 36/2004/GG against the European Investment Bank

Decision

Case 36/2004/GG - Opened on 12/01/2004 - Decision on 08/08/2004

Strasbourg, 8 August 2004

Dear Mr X.,

On 23 December 2003, you made a complaint to the European Ombudsman against the European Investment Bank ("EIB") concerning call for tenders 2003/S 79-069641.

On 12 January 2004, I forwarded the complaint to the President of the EIB.

On 12 February 2004, you wrote to ask me to see to it that the EIB should no longer try and contact you. In my reply of 18 February 2004, I explained to you that I had no power to issue mandatory orders to Community institutions or bodies as regards their behaviour. I informed you, however, that I would forward a copy of your letter of 12 February 2004 to the EIB, which I did the same day.

On 2 March 2004, the EIB sent its opinion in English, a copy of which I forwarded to you for your information on 10 March 2004. On 18 March 2004, the EIB provided me with a German translation of its opinion. I forwarded it to you on 29 March 2004 with an invitation to make observations, which you sent on 6 April 2004.

On 22 April 2004, I asked the EIB for further information in relation to your complaint. The EIB replied on 18 May 2004.

Apart from the letter setting out its reply to my question, the EIB sent a further letter (also dated 18 May 2004) in which it provided information on the estimated amount of the fees for the relevant assignments. The EIB asked me to keep this information confidential. In my reply of 27 May 2004, I informed the EIB that I could not accept documents or information from a Community institution or body that I was requested not to pass on to the complainant. I therefore returned the said letter to the EIB.

On 27 May 2004, I forwarded the EIB's reply to my request for further information to you with an invitation to make observations, which you sent on 3 June 2004.



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

THE COMPLAINT *The complaint*

In April 2003, the European Investment Bank ("EIB") published a restricted call for tenders concerning translation and/or revision assignments in the supplement to the Official Journal (2003/S 79-069641). Requests to take part in this tender had to be sent by post by 30 May 2003 at the latest. In point 6 of its notice, the EIB pointed out that 5 to 12 applicants would be preselected and asked to pass translation/revision tests. The complainant submitted a request to take part in the tender via on-line transmission. The EIB's server sent a short message confirming receipt of the request.

In an e-mail sent to the EIB on 18 December 2003, the complainant asked why he had still not received any news concerning his request, seven months after the latter had been submitted. The complainant suggested that there might be a case of nepotism. He further asked whether qualified applicants had been given the chance to pass a translation test and, if this should not have been the case, according to which criteria the contract had been awarded.

On 19 December 2003, Mr A., Deputy director in the EIB's Translation Department, replied to the complainant. He pointed out that the complainant had been informed about the state of the call for tenders via e-mail on 10 July 2003. According to Mr A., this e-mail had stressed that "in order to be eligible, requests to participate had to comply fully with the conditions and modalities set out in the updated version of this call for tenders which was published in the Official Journal of the European Union on 9 July 2003 under reference 2003/S 129-115 194." According to the EIB, such a complete request to participate had never been received and could therefore obviously not be taken into account. The EIB further noted that the call for tenders had been duly processed, in strict respect of the public procurement rules. Any concerns regarding negligent handling of the file or preferential treatment for specific applicants were therefore completely unfounded.

It appears that the call for tenders that was published under reference 2003/S 129-115 194 is very similar to (if not identical with) the first one, apart from the fact that its text points out in point 2 that the present call for tenders "provides for an extension of call for tenders 2003/S 79-069641".

In his reply sent on 19 December 2003, the complainant stressed that he had not been informed about the "updated" version of the call for tenders by either mail or e-mail.

In his complaint to the Ombudsman, the complainant queried why the call for tenders had subsequently been "updated" instead of asking for all the information that had been needed from the very beginning. The complainant submitted that this approach had served the purpose of filtering candidates and of arbitrarily excluding certain candidates. He asked why he had never been informed about the change or about the specific selection criteria. In the complainant's view, there were serious doubts as to whether the call for tenders had been handled properly.



It appeared that the complainant thus in substance made the following two allegations:

- (1) The EIB had failed to inform the complainant about the change as regards the call for tenders;
- (2) The EIB had failed to handle the call for tenders properly.

The complainant noted that his aim was to have the call for tenders declared invalid and to have a new call for tenders organised. He further took the view that the EIB should be asked how many candidates who had submitted their request to participate before the updating of the call for tenders had been unsuccessful because they had failed to submit the information that had subsequently been requested or because they had been unable to do so since they had not been informed about the change.

The Ombudsman's approach

The Ombudsman considered that the complaint was admissible and should be sent to the EIB for its opinion. He informed the complainant, however, that he was not in a position to declare a call for tenders invalid and to order that a new call for tenders be organised. This aspect of the complaint could thus not be examined by the Ombudsman.

In his opening letter to the EIB, the Ombudsman noted that he would appreciate it if the EIB's opinion could include information on how many candidates who had submitted their requests before the updating of the call for tenders had been unsuccessful because they had failed to submit the information that had subsequently been requested or because they had been unable to do so since they had not been informed about the change.

The complainant did not ask for his complaint to be treated confidentially. However, he requested that his identity and his e-mail address should not be disclosed in the Ombudsman's publications. The Ombudsman therefore decided that it would be appropriate to consider the complaint as being confidential.

The complainant's letter of 12 February 2004

In a further e-mail sent on 12 February 2004, the complainant asked the Ombudsman to see to it that the EIB should no longer try and contact him. In his reply of 18 February 2004, the Ombudsman explained that he had no power to issue mandatory orders to Community institutions or bodies as regards their behaviour. The Ombudsman informed the complainant, however, that he would forward a copy of the complainant's letter of 12 February 2004 to the EIB.

THE INQUIRY The European Investment Bank's opinion

In its opinion, the EIB made the following comments:

The relevant call for tenders (2003/S 79-069641) had been published in April 2003. The complainant had submitted an application on 26 May 2003.

On 9 July 2003, due to technical reasons of IT nature (the system had not accepted all necessary information), an updated version of the call for tenders mentioning an extension



of the original deadline had been published in the Official Journal. The day after the publication, the EIB had communicated this extension to all the candidates who had sent an application form for the first call for tenders, asking them to send it again in accordance with the updated version of the call for tenders.

This mail had also been sent to the complainant on 10 July 2003, but unfortunately, due to a misprint of his e-mail address, the complainant had never received the communication sent by the EIB.

The EIB apologised for this incident and stated that it was ready to start discussions with the complainant with a view to finding an acceptable solution.

The complainant's observations

In his observations, the complainant noted that the EIB had not made any proposals so far as to what an "acceptable" solution could be. Given that he no longer trusted the EIB and therefore considered it inappropriate to contact the EIB directly, the complainant asked the Ombudsman to ascertain which concrete ideas the EIB had in this respect.

Further inquiries *The request for further information*

After careful consideration of the EIB's opinion and the complainant's observations, it appeared that further inquiries were necessary. The Ombudsman therefore asked the EIB to inform him as to what the EIB meant by the "acceptable solution" to which it had referred in its opinion and how it proposed to bring such a solution about.

The EIB's reply

In its reply of 18 May 2004, the EIB pointed out that it had decided to issue the relevant call for tenders in a spirit of openness and competition, notwithstanding the fact that the amount involved in the performance of the services in question was well below the threshold stipulated in the EC directive on the procurement of services.

In the EIB's view, the fairest solution to the matter raised by the complainant would be to follow the normal procedure set out in the original call for tenders, allowing the complainant to take part in the selection process on equal terms with the other competitors.

This would involve:

- sending the application form, with a deadline to be stipulated and equivalent, *mutatis mutandis*, to that originally foreseen, in accordance with the updated version of the Official Journal;
- sitting the translation tests already undergone by the other candidates within the framework of the call for tenders;
- preparing a tender in line with the tender specifications within the same time frame as the other candidates, *mutatis mutandis*;
- evaluation of the complainant's tender by the same call for tenders committee of the EIB



using the same criteria as those applied to the other candidates;

- if successful, the complainant would be put on the list of potential service providers in a position corresponding to his bid and the results of his tests. It should be noted that individual assignments would be awarded on a cascade basis in accordance with the criteria and the terms and conditions set out in the technical specifications.

In its reply 18 May 2004, the EIB added that no assignment/contract for the provision of services for the German translation unit based on the call for tenders in question had to date been awarded to successful candidates.

Apart from the letter setting out its reply to the Ombudsman's question, the EIB sent a further letter (also dated 18 May 2004) in which it provided information on the estimated amount of the fees for the relevant assignments. The EIB asked the Ombudsman to keep this information confidential. In his reply of 27 May 2004, the Ombudsman informed the EIB that he could not accept documents or information from a Community institution or body that he was requested not to pass on to the complainant. The Ombudsman therefore returned the said letter to the EIB.

The complainant's observations

In his observations, the complainant noted that he gladly accepted the EIB's suggestion to take part in the call for tenders. However, the complainant expressed the view that in the light of what had happened, an impartial assessment of his application by the responsible persons at the EIB was no longer possible. He therefore suggested that he should first sit the translation tests already undergone by the other candidates. The complainant considered that it should be possible to have access to the corrected examination papers once the tests were over. He added that after having passed this test, he was ready to submit the required documents and a tender. The complainant argued that a different way of carrying out the procedure would not allow a neutral and objective handling of his application by the EIB.

The complainant asked for the Ombudsman's continued assistance in this matter.

THE DECISION 1 Failure to handle call for tenders properly

1.1 In 2003, the European Investment Bank ("EIB") published a restricted call for tenders concerning translation and/or revision assignments in the supplement to the Official Journal (2003/S 79-069641). The complainant applied to take part in this call for tenders. On 10 July 2003, the EIB informed applicants by e-mail that in order to be eligible, requests to participate had to comply fully with the conditions and modalities set out in the updated version of this call for tenders which was published in the Official Journal of the European Union on 9 July 2003 under reference 2003/S 129-115 194. This e-mail was not received by the complainant who only learnt of it when he turned to the EIB in December 2003 with a view to obtaining information on the state of the procedure.

1.2 In his complaint to the Ombudsman, the complainant alleged that the EIB (1) had failed to inform him about the change as regards the call for tenders and (2) had failed to handle the call for tenders properly.



1.3 In its opinion, the EIB pointed out that its e-mail of 10 July 2003 had also been sent to the complainant, but that unfortunately, due to a misprint of his e-mail address, the complainant had never received it. The EIB apologised for this incident and stated that it was ready to start discussions with the complainant in view to find an acceptable solution. In its reply of 18 May 2004 to a question put to it by the Ombudsman, the EIB explained that, in its view, the fairest solution to the matter raised by the complainant would be to follow the normal procedure set out in the original call for tenders, allowing the complainant to take part in the selection process on equal terms with the other competitors. The EIB pointed out that this meant that the complainant should send his application form, sit the translation tests already undergone by the other candidates and then prepare a tender which was to be evaluated using the same criteria as those applied to the other candidates. If successful, the complainant would be put on the list of potential service providers in a position corresponding to his bid and the results of his tests. In its reply of 18 May 2004, the EIB noted that no assignment/contract for the provision of services for the German translation unit based on the call for tenders in question had to date been awarded to successful candidates.

1.4 In his observations, the complainant noted that he gladly accepted the EIB's suggestion to take part in the call for tenders but proposed a different approach. He suggested that he should first sit the translation tests already undergone by the other candidates. He added that after having passed this test, he was ready to submit the required documents and a tender. The complainant asked for the Ombudsman's continued assistance in this matter.

1.5 The Ombudsman considers that the EIB has put forward what appears to be a reasonable proposal to remedy the negative effects of the mistake that was made in July 2003. He notes that the complainant is afraid that this proposal would not allow a neutral and objective handling of the complainant's application by the EIB. In the Ombudsman's view, however, there is nothing to suggest that this fear could be substantiated. It should be noted that the EIB acted quickly and constructively as soon as the problem was brought to its attention by the Ombudsman. As regards the complainant's request for the Ombudsman's continued assistance, it should be pointed out that the Ombudsman's role is to help uncover and put an end to maladministration, which appears to have been achieved in this case.

2 Conclusion

In the light of the above-mentioned circumstances, the Ombudsman concludes that there are no grounds for further inquiries in this case. The Ombudsman therefore closes the case. The complainant is of course free to turn to the Ombudsman again in case he should consider that the EIB has not handled his participation in the call for tenders fairly.

The President of the EIB will also be informed of this decision.

Yours sincerely,



P. Nikiforos DIAMANDOUROS