

Decision of the European Ombudsman on complaint 534/2004/ELB against the European Commission

Decision

Case 534/2004/ELB - Opened on 12/03/2004 - Decision on 11/04/2005

Strasbourg, 11 April 2005

Dear Mr G. and Mrs S.,

On 18 February 2004, you made a complaint to the European Ombudsman, on behalf of a company called ARTRA SPRL. The complaint is against the European Commission and concerns the rejection of your tender in the framework of a call for tenders for French translation services (2003/S 076-66790).

On 12 March 2004, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 11 May 2004. I forwarded the opinion to you on 3 June 2004 with an invitation to make observations, if you so wished by 31 July 2004. No observations appear to have been received from you.

On 22 February 2005, my services contacted you by telephone to inform you that the Ombudsman planned to close your case in the near future. You stated that you took note of this information.

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

THE COMPLAINT

According to the complainants, the facts can be summarised as follows:

The complainants lodged a complaint on behalf of a company called ARTRA SPRL. The company took part in a call for tenders organised by the Commission (2003/S 076-66790) concerning translation services into French.

On 14 November 2003, the complainants were informed that their tender had been rejected because *"the outside or inner envelope was not compliant with the requirements"* (point 6.1.8 of the General Specifications).



On 24 November 2003, the complainants requested clarification from the Commission of its decision.

On 1 December 2003, they received a reply from the Commission, which explained that their tender had been rejected for non-compliance with the conditions of presentation. Their tender was in a self-adhesive envelope, which was not sealed with adhesive tape.

On 5 December 2003, one of the complainants called the Commission (Directorate General for Translation) and was informed that the General Specifications were in accordance with the applicable financial rules contained in Commission Regulation No 2342/2002.

On 12 December 2003, the complainants wrote to the Commission requesting the re-examination of their tender.

On 6 February 2004, the Commission informed the complainants that their request had been rejected. The Commission explained that the requirement mentioned in point 6.1.8 of the General Specifications, i.e. the self-adhesive envelope sealed with adhesive tape, was in accordance with European law. This requirement was not amongst the exclusion criteria but was checked before the evaluation of tenders. Its aim is to ensure that the content of the tender remains secret until the opening of the tenders. Tenders which are not compliant with paragraph 3 of Article 143 of Regulation No 2342/2002 are not opened.

In their complaint to the Ombudsman, the complainants question the Commission's decision to reject their tender for the following reasons:

- 1) the requirements concerning the presentation of the tender are not amongst the criteria for exclusion of tenders as described in point 2.1 of the General Specifications;
- 2) these requirements are not included in the selection criteria mentioned in point 2.3 of the General Specifications;
- 3) the reason for rejecting the complainants' tender is stated in point 6 "Other conditions" of the General Specifications. These requirements are presentational and formal and cannot prevail over conditions concerning the content of a tender, which are stated in points 2.1 and 2.3.

The complainants argue that excluding their tender because it did not comply with a formal requirement is an abuse of power, which leads to discrimination against the complainants.

They question the link between the General Specifications and the Financial Regulation as the latter is not mentioned in the General Specifications.

Article 143, paragraph 3 of Regulation 2342/2002 states that *"in order to maintain secrecy and to avoid any difficulties where tenders are sent by letter, the invitation to tender must include the following provision: '(...) If self adhesive envelopes are used, they must be sealed with adhesive tape and the sender must sign across that tape'."* According to the complainants, this paragraph



does not mean that failure to comply with the provision is a reason for excluding the tender.

Article 145, paragraph 1 of Regulation 2342/2002 states that "*all requests to participate and tenders that satisfy the requirements of Article 143 (1) and (2) shall be opened.*" No reference is made to paragraph 3 of this article, which means, according to the complainants, that paragraph 3 is of only secondary importance. They state also that there is a formal error in Article 145, which refers to Article 43 although the latter Article does not mention exclusion criteria.

The complainants also consider that there is maladministration in their case because tenders were opened on 16 June 2003 and the rejection of their tender was communicated to them on 14 November 2003, which does not seem to be compliant with the deadlines mentioned in Article 149 of Regulation No 2342/2002. If the complainants had been informed earlier, they would have had more time to present their arguments and to take the matter before a court.

The complainants want the new contracts awarded following this call for tenders to be suspended and the procedure for opening tenders to be reopened. The Commission excluded one of its main and best providers of French translations. Working for the Commission represented 80 % of the work of the complainants' company and the rejection of their tender will have serious consequences for the company. The complainants do not exclude the possibility to take the matter before the Court of Justice to request compensation.

In summary, the complainants allege that the Commission failed to provide adequate information about the requirement to seal the envelope containing the tender with adhesive tape. They also allege that it is an abuse of power to reject their tender for failure to comply with this formal requirement. Finally, they allege that the Commission failed to inform them as soon as possible of the rejection of their tender as provided for in Article 149 of Regulation No 2342/2002.

The complainants claim that the new contracts awarded following the call for tenders in question should be suspended and that the procedure for opening tenders should be reopened.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made in summary the following points:

As regards the first allegation, the obligation to seal the offer is contained in heading 6 of the General Specifications (paragraph 6.1), where all details of the application procedure are mentioned. The obligation to seal the offer is also mentioned in the invitation to tender.

As regards the second allegation, according to Article 98 of Council Regulation No 1605/2002 of 25 June 2002 (1) on the Financial Regulation applicable to the general budget of the European Communities, "*the arrangements for submitting tenders shall ensure that there is genuine competition and that the contents of tenders remain confidential until they are all opened simultaneously*". If the offer is not correctly sealed, the opening board cannot ensure that the



offer has not been opened, thereby violating the requirement of secrecy. Article 98 of the above-mentioned Regulation further states that *"any tender declared by the board not to satisfy the conditions laid down shall be rejected."*

Article 145 of Commission Regulation No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (2) states that the minutes of the opening of the offers shall give the grounds on which tenders were rejected for non-compliance, by reference to the methods of submitting tenders referred to in Article 143. These methods are listed in Article 143 of the above-mentioned Regulation, and include the sealing of the offer.

Finally, Article 146 of the same Regulation states that all tenders declared as satisfying the requirements shall be evaluated on the basis of the exclusion, selection and award criteria.

Consequently, tenders which do not satisfy the requirements and which are rejected when tenders are opened are not evaluated. Similarly, exclusion, selection and award criteria refer only to the evaluation of tenders. The methods of submitting tenders should not be included in these criteria.

The decisions taken by the opening board were in accordance with the relevant legal requirements and there is no reason to allege that the rejection of the complainants' tender was wrong.

As regards the allegation that the Commission failed to inform the complainants as soon as possible, Article 148 of Regulation No 2342/2002 states that contact between the contracting authority and tenderers during the contract award procedure may take place, by way of exception, under certain conditions. It further states that if, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may contact the tenderer. This was not the case, therefore the contracting authority was not entitled to contact the tenderer. Consequently, it is only at the end of the procedure that the contracting authority informed tenderers of decisions reached concerning the award of the contract. The absence of information about progress made with the evaluation of the tender is also mentioned in paragraph 1.12 of the General Specifications.

The complainants were informed of the rejection of their tender on 14 November 2003, at the same time as the other tenderers. This decision was explained to the complainants twice at their request on 1 December 2003 and on 6 February 2004. The decision to award the contract was taken on 3 November 2003, the delay in informing the complainants cannot be considered as excessive. Tenders are valid for 12 months from the date their receipt (i.e. 2 June 2003), consequently the contracting authority took a decision within the deadlines.

Moreover, as mentioned in the invitation to tender, tenderers can take part in the opening of the tenders. On this occasion, names of tenderers who submitted a satisfactory tender are publicly



announced. If the complainants had been present, they would have noticed that the same criterion of the sealed envelope was applied to all tenders. There is no reason for alleging that the rejection of their tender was an abuse of power.

In the light of the above, the complainants' request cannot be accepted.

The complainant's observations

No observations were received from the complainants.

THE DECISION

1 Preliminary remark

1.1 The Ombudsman notes that the complainants had announced that they might begin legal proceedings against the Commission. In accordance with Article 2.7 of the Statute of the European Ombudsman, if the complainants had begun legal proceedings, the Ombudsman would have had to terminate his inquiry. However, the Ombudsman is not aware of any such proceedings and therefore concludes his inquiry with substantive findings on the complainants' allegations.

2 Alleged failure to provide adequate information about the requirement to seal the envelope

2.1 The complainants lodged a complaint on behalf of a company called ARTRA SPRL, which took part in a call for tenders organised by the Commission (2003/S 076-66790) concerning translation services into French. The complainants allege that the Commission failed to provide adequate information about the requirement to seal the envelope containing the tender with adhesive tape.

2.2 According to the Commission, the obligation to seal the offer is contained in heading 6 of the General Specifications (paragraph 6.1), where all details of the application procedure are mentioned. The obligation to seal the offer is also mentioned in the invitation to tender.

2.3 The Ombudsman has carefully examined the documents at his disposal. He observes that the invitation to participate in the call for tenders in question provided under point (b) the following: *"offers shall be placed in two sealed envelopes (...) If the envelopes are self-adhesive, they shall be sealed with adhesive tape and the sender must sign across that tape"*. The same obligation is repeated in the General Specifications (paragraph 6.1.8). The Ombudsman considers that since the requirement in question was explicitly set out in the invitation to tender, the Commission provided adequate information about this requirement. Therefore, there appears to be no maladministration as regards this aspect of the complaint.

3 Alleged abuse of power

3.1 The complainants allege that it is an abuse of power to reject their tender for failure to comply with the formal requirement concerning the sealing of the envelope containing the tender. The complainants argue that the requirements concerning the presentation of the tender are not amongst the criteria for exclusion of tenders or the selection criteria and that consequently they cannot prevail over conditions concerning the content of a tender. They also question the link between the General Specifications and the Financial Regulation. The complainants argue that Article 145 of Commission Regulation No 2342/2002 does not refer to



paragraph 3 of Article 143 of the same regulation which means, according to the complainants, that paragraph 3 is of only secondary importance. They state also that there is a formal error in Article 145, which refers to Article 43 although the latter Article does not mention exclusion criteria.

3.2 The Commission argues that, according to Article 98 of Council Regulation No 1605/2002 of 25 June 2002 (3) on the Financial Regulation applicable to the general budget of the European Communities, *"the arrangements for submitting tenders shall ensure that there is genuine competition and that the contents of tenders remain confidential until they are all opened simultaneously"*. If the offer is not correctly sealed, the opening board cannot ensure that the offer has not been opened previously, thereby violating the requirement of secrecy. Article 145 of the Implementing Rules states that the minutes of the opening of the offers shall give the grounds on which tenders were rejected for non compliance, by reference to the methods of submitting tenders. These methods are listed in Article 143 of Regulation 2342/2002 and include the sealing of the offer. Tenders which do not satisfy the requirements and which are rejected when tenders are opened are not evaluated.

3.3 The Ombudsman recalls that, according to Article 7 of the European Code of Good Administrative Behaviour which relates to abuse of power, *"powers shall be exercised solely for the purposes for which they have been conferred by the relevant provisions. The official shall in particular avoid using those powers for purposes which have no basis in the law or which are not motivated by any public interest."*

3.4 The Ombudsman also recalls that the legal basis for procurement procedures organised by the Commission is constituted by the corresponding articles of the Financial Regulation (4) and the implementing rules laid down in Commission Regulation No 2342/2002 (5). The Ombudsman notes that the methods of submitting tenders are provided for by Article 143 of Regulation 2342/2002 and that these methods were included in the General Specifications of the tender (section 6.1). He further notes that the aim of the requirement in question is to maintain secrecy.

3.5 Having reviewed the documents included in the file, the Ombudsman is of the view that the Commission appears to have correctly applied the rules laid down in Articles 143 and 145 of Commission Regulation No 2342/2002 and that there is no evidence of an abuse of power by the Commission in this regard. The Ombudsman considers therefore that there is no instance of maladministration as regards this aspect of the complaint.

3.6 The Ombudsman has reviewed the 11 linguistic versions of Commission Regulation No 2342/2002 which were published in the Official Journal and notes that only the French version of the final paragraph of Article 145 (3) makes reference to Article 43, while the other versions refer to Article 143. The Ombudsman therefore considers that the complainants are correct in stating that there is a formal error in the French version of Article 145 of the Regulation. The Ombudsman considers that this error is regrettable and he will draw it to the attention of the Commission in a further remark below. However, the Ombudsman considers that the error does not affect the duty of the Commission to apply the requirements set out in Articles 143 and 145



of the Regulation, which is the basis of the finding of no maladministration in point 3.5 above.

4 Alleged absence of information about the rejection of the tender

4.1 The complainants allege that the Commission failed to inform them as soon as possible of the rejection of their tender as provided for in Article 149 of Regulation No 2342/2002.

4.2 According to the Commission, Article 148 of Regulation No 2342/2002 states that contact between the contracting authority and tenderers during the contract award procedure may take place, by way of exception, under certain conditions. It further states that if, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may contact the tenderer. This was not the case, therefore the contracting authority was not entitled to contact the tenderer. Consequently, it was only at the end of the procedure that the contracting authority informed tenderers of decisions reached concerning the award of the contract. The absence of information about progress made with the evaluation of the tender is also mentioned in paragraph 1.12 of the General Specifications.

4.3 The Ombudsman notes that the opening of the tenders took place on 16 June 2003, that the selection procedure ended on 3 November 2003 and that the complainants were informed on 14 November 2003 of the rejection of their tender. The Ombudsman recalls that according to Article 148 of Regulation 2342/2002:

"1. Contact between the contracting authority and tenderers during the contract award procedure may take place, by way of exception, under the conditions set out in paragraphs 2 and 3.

(...)

3. If, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may contact the tenderer, although such contact may not lead to any alteration of the terms of the tender (...)".

He also recalls that similar information was provided in paragraph 1.12 of the General Specifications, which states that *"no information of any kind will be given on the stage reached in the evaluation of tenders until the final award of the contract"*. The Ombudsman notes that the opening of the tenders was public and that the complainants had the opportunity to be present. Moreover, the Ombudsman considers that, in accordance with applicable rules, the Commission provided the complainants with timely information on the rejection of their tender. He finds thus no maladministration as regards this aspect of the complaint.

4.4 The Ombudsman would like to recall that following his own-initiative inquiry into the remedies available to unsuccessful bidders in tender procedures organised by the Commission, the Commission adopted a Communication (6), which deals with the procedure for informing candidates and tenderers, after a contract has been awarded and before the actual contract has been signed, in respect of public procurement contracts awarded by the Commission. The



Ombudsman notes that the complainants do not appear to have supplied evidence of failure by the Commission to follow the procedure it adopted as a result of the own-initiative inquiry (7) .

5 Claims

5.1 The complainants claim that the new contracts awarded following the call for tenders in question should be suspended and that the procedure for opening tenders should be reopened.

5.2 In view of the Ombudsman's findings in points 2, 3 and 4 above, the complainants' claims cannot be sustained.

6 Conclusion

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

FURTHER REMARK

The Ombudsman has reviewed the 11 linguistic versions of Regulation No 2342/2002 which were published in the Official Journal and notes that only the French version of the final paragraph of Article 145 (3) makes reference to Article 43, while the other versions refer to Article 143. The Ombudsman therefore considers that the complainants are correct in stating that there is a formal error in the French version of Article 145 of Commission Regulation No 2342/2002. The Ombudsman considers that this error is regrettable and draws it to the attention of the Commission.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ L 248 of 16.9.2002.

(2) OJ L 357 of 31.12.2002.

(3) OJ L 248 of 16.9.2002, p.1.

(4) Council Regulation No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248 of 16.9.2002.

(5) Commission Regulation No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 357 of 31.12.2002.

(6) COM(2003)395 final.



(7) The decision on the own-initiative inquiry into the remedies available to unsuccessful bidders in tender procedures organised by the Commission (OI/2/2002/IJH) is available on the website of the European Ombudsman at the following address:

<http://www.ombudsman.europa.eu/decision/en/02oi2.htm> [Link].