

Decision of the European Ombudsman on own initiative inquiry OI/2/2002/IJH against the European Commission

Decision

Case OI/2/2002/IJH - Opened on 04/07/2002 - Decision on 22/07/2003

Strasbourg, 22 July 2003

Dear Mr President,

On 4 July 2002, the European Ombudsman informed you that he had decided to open an own initiative inquiry into the remedies available to unsuccessful bidders in tender procedures organised by the Commission.

The Commission sent its reply on 7 November 2002. On 10 December 2002, the Ombudsman asked the Commission to provide further information by 31 March 2003. After sending holding replies on 1 and 14 April 2003, the Commission finally sent the further information on 3 July 2003.

I am writing now to let you know the results of the own-initiative inquiry.

THE REASONS FOR THE INQUIRY

The reason for the inquiry was that, in the course of dealing with a complaint made by an unsuccessful bidder in a tender procedure organised by the Commission (1), the Ombudsman became concerned that the remedies available to such persons might not be adequate.

In opening the own-initiative inquiry, the Ombudsman noted that, according to the judgement of the Court of Justice in the *Alcatel* case:

... the Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is, in all cases, open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages. (2)

The Ombudsman also noted that Article 56 of the (subsequently replaced) Financial Regulation provided as follows:



When concluding contracts for which the amount involved is equal to or greater than the threshold provided for by the Council directives on the co-ordination of procedures for the award of public works, supplies and services contracts, each institution shall comply with the same obligations as are imposed upon bodies in the Member States by those directives.

The implementing measures provided for in Article 139 shall include appropriate provisions to that end.

In view of the above, the Ombudsman was concerned that a possible failure by the Commission to provide bidders in its tender procedures with access to a review procedure of the kind foreseen in the *Alcatel* judgement could be an instance of maladministration. The Ombudsman therefore asked the Commission to inform him whether a review procedure exists and, if not, whether the Commission is prepared to introduce such a procedure rapidly.

THE INQUIRY

The Commission's opinion

The Commission's opinion was, in summary, as follows:

In the light of the *Alcatel* judgement the Commission agrees that, prior to contract signature, authorising officers will have to inform without delay all bidders or candidates of the award decision in the public procurement procedures covered by Article 56 of the current Financial Regulation and by Article 105 of the new Financial Regulation, and should provide for a reasonable delay before contract signature in order to enable bidders and candidates to request the reasons for the award decision and, the case being, file a judicial recourse against such a decision.

The Commission will pay particular attention to the practical and organisational aspects of this procedure, in order to ensure a timely management of its activities, taking account of the high number of the Commission's public purchases every year (several hundreds) and the duration of the public procurement procedures. In the light of this, the Commission intends to work out practical arrangements so that the procedure could be in place from the beginning of 2003 and taken into account in the planning of the new public procurement procedures to be launched by then.

The Ombudsman's request for further information

The Ombudsman welcomed the Commission's positive response to the own-initiative inquiry and requested the Commission to provide details of the practical arrangements and procedure mentioned in its opinion.

The Ombudsman also invited the Commission to indicate whether it has any plans to provide a non-judicial remedy that tenderers could use, if they so wish, as an alternative to judicial recourse.

The Commission's reply

After sending holding replies on 1 and 14 April 2003, the Commission sent the following further



comments on 3 July 2003:

The Commission has adopted a Communication (3) setting up a procedure to inform all bidders or candidates of the award decision in the public procurement procedures covered by Article 105 of the new Financial Regulation (4). This Communication provides for a reasonable delay before contract signature in order to enable tenderers to request the detailed grounds for the award decision and where necessary, seek a judicial remedy against such decision. (The Commission enclosed a copy of the Communication with its opinion).

The Commission does not consider it necessary to provide a non-judicial remedy to tenderers, for the following reasons:

- the procedure laid down in the Communication will allow tenderers to seek an effective judicial remedy against the contracting authority's award decision;
- in view of the low number of complaints presently lodged before the Court, the necessity of providing for a non-judicial remedy does not appear to be justified;
- finally, the human and material resources needed for executing the non-judicial remedies tasks, which may in future have an inter-institutional dimension, are not available.

THE DECISION

1 Review procedures available to bidders in tender procedures

1.1 The Ombudsman was concerned that possible failure by the Commission to provide bidders in its tender procedures with a review procedure of the kind foreseen in the *Alcatel* judgement (5) could be maladministration. The Ombudsman therefore began an own-initiative inquiry, asking the Commission to inform him whether a review procedure exists and, if not, whether the Commission is prepared to introduce such a procedure rapidly.

1.2 The Commission agreed that, in the light of the above-mentioned judgement, it should provide for a reasonable delay before contract signature in order to enable bidders and candidates to request the reasons for the award decision and possibly challenge the decision judicially. The Commission stated its intention to work out the practical arrangements to put such a procedure in place from the beginning of 2003.

1.3 The Ombudsman welcomed the Commission's positive response and requested details of the practical arrangements and procedure. He also invited the Commission to indicate whether it has plans to provide a non-judicial remedy that tenderers could use, if they so wish, as an alternative to judicial recourse.

The Commission's reply is analysed in the following sections of the decision.

2 The Commission's Communication of 3 July 2003

2.1 The Commission informed the Ombudsman that it had adopted, on 3 July 2003, a Communication (6) in response to the own-initiative inquiry.



The Ombudsman has carefully examined the Communication, which establishes a procedure to provide information rapidly to unsuccessful tenderers and candidates, so that the latter have the opportunity to bring judicial proceedings to challenge an award decision, before the relevant contract is signed. The procedure applies to contract awards covered by Article 105 of the Financial Regulation. (7)

2.2 The Ombudsman notes the following as the main elements of the procedure:

As soon as possible after the award decision and within the following week at the latest, the contracting authority notifies all unsuccessful tenderers or candidates simultaneously, by mail and fax or e-mail, that their bid or application has not been accepted. Each tenderer or candidate is notified individually and the reasons why the bid or application has not been accepted are specified in each case; for instance by taking up, in a concise but explicit form, details contained in the award decision.

The contracting authority also informs the unsuccessful tenderers or candidates that it will not sign the contract with the successful tenderer until two calendar weeks have elapsed from the day after the simultaneous dispatch of the notification messages. It will also be stated that additional information about the reasons for rejection of the bid or application can be obtained in response to a request sent in writing, by mail, fax or e-mail. For all tenderers who have put in an admissible bid, this information could include the characteristics and relative advantages of the bid accepted and the name of the successful tenderer. Finally, it will be added that if the contract cannot be concluded with the successful tenderer or if the successful tenderer were to pull out, the contracting authority may review the award decision and could then award the contract to another tenderer, close the procedure or decide not to award the contract.

The contracting authority also informs the successful tenderer of the notification sent to the unsuccessful candidates or tenderers and that the contract cannot be signed until two calendar weeks have elapsed from the day after the date of dispatch of the notification. It will also be pointed out that the contracting authority may:

- until the contract has been signed, either abandon the procurement, or cancel the award procedure, without the candidates or tenderers being entitled to claim any compensation;
- suspend signing of the contract for additional examination, if justified by requests or comments made by unsuccessful tenderers during the two calendar weeks mentioned above, or by any other relevant information received during that period.

2.3 The Ombudsman takes the view that the procedure described in the Commission's Communication appears to provide unsuccessful tenderers and candidates with the opportunity to bring judicial proceedings to challenge an award decision and to have that decision set aside before the relevant contract is signed. (8) The Ombudsman therefore considers that the Commission has taken steps to provide bidders in its tender procedures with access to a review procedure of the kind foreseen in the *Alcatel* judgement and so finds no maladministration by



the Commission.

2.4 The Ombudsman notes that the Commission's Communication does not expressly provide that unsuccessful tenderers and candidates shall be informed of the possibility to bring judicial proceedings to challenge an award decision and to have that decision set aside before the relevant contract is signed. The Ombudsman points out that, according to the Commission's Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public (9) , decisions should, where appropriate, refer to the possibility of starting judicial proceedings in accordance with Article 230 EC. The Ombudsman considers that it would be in conformity with the principles of good administration to provide such information to unsuccessful tenderers and candidates. A further remark is therefore made below.

2.5 The Ombudsman considers that the legal basis for the new procedure falls outside the scope of his inquiry. The Ombudsman notes, however, that the Commission refers to Articles 100 (2) and 101 of the Financial Regulation (10) and to Article 149 of the Implementing Rules (11) as the legal basis.

3 Possibility of an additional non-judicial review procedure

3.1 The Ombudsman invited the Commission to indicate whether it has any plans to provide a non-judicial remedy that tenderers could use, if they so wish, as an alternative to judicial recourse.

3.2 The Commission replied that it has not considered it necessary to provide a non-judicial remedy to tenderers, because amongst other reasons, the procedure laid down in its Communication of 3 July 2003 will allow tenderers to seek an effective judicial remedy against the contracting authority's award decision.

3.3 The Ombudsman notes that the relevant judgement of the Court of Justice requires " *a procedure whereby an applicant may have [an award] decision set aside if the relevant conditions are met.* " The Ombudsman recalls the finding in paragraph 2.3 above that the procedure described in the Commission's Communication appears to provide unsuccessful tenderers and candidates with the opportunity to bring judicial proceedings to challenge an award decision and to have that decision set aside before the relevant contract is signed. The Ombudsman takes the view that the Commission is not obliged also to establish a non-judicial remedy and therefore finds no maladministration in the Commission's decision not to do so.

3.4 For the avoidance of doubt, the European Ombudsman points out that an inquiry by the Ombudsman does not have a suspensive effect on administrative procedures, nor can the Ombudsman set aside a decision to award a contract. Complaint to the European Ombudsman is not, therefore, a review procedure of the kind foreseen in the *Alcatel* judgement.

4 Conclusion

The Commission has taken steps to provide bidders in its tender procedures with access to a review procedure of the kind foreseen in the *Alcatel* judgement (12) . The Ombudsman therefore finds no maladministration by the Commission and closes the own-initiative inquiry.



FURTHER REMARK

The Ombudsman notes that the Commission's Communication does not expressly provide that unsuccessful tenderers and candidates shall be informed of the possibility to bring judicial proceedings to challenge an award decision and to have that decision set aside before the relevant contract is signed. The Ombudsman points out that, according to the Commission's Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public, decisions should, where appropriate, refer to the possibility of starting judicial proceedings in accordance with Article 230 EC. The Ombudsman considers that it would be in conformity with the principles of good administration to provide such information to unsuccessful tenderers and candidates.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) 1351/2001/(ME)MF, closed by decision dated 17 February 2003.

(2) Case C-81/98, *Alcatel Austria v Bundesministerium für Wissenschaft und Verkehr*, [1999] ECR I- 7671, paragraph 43.

(3) Communication from the Commission. COM(2003)395 final (03.07.03). 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 under Article 105 of the Financial Regulation.

(4) Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities 2002 OJ L 248/1.

(5) Case C-81/98, *Alcatel Austria v Bundesministerium für Wissenschaft und Verkehr*, [1999] ECR I- 7671.

(6) Communication from the Commission. COM(2003)395 final (03.07.03). 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 under Article 105 of the Financial Regulation.

(7) This Article provides for the Directives on public supply, services and works contracts to establish the thresholds that determine publication arrangements, choice of procedures and corresponding time limits under the Financial Regulation. The Ombudsman therefore understands that the procedure established by the Communication applies to all contract awards that fall within the thresholds of the Directives.



- (8) The Ombudsman notes in this context that the Rules of Procedure of the Court of First Instance (available online at <http://www.curia.europa.eu> [Link]) provide for the possibility of both interim measures and an expedited procedure and that these procedures have been invoked by a tenderer, which later succeeded in obtaining a judgement annulling a Commission decision rejecting its tender: Case T-211/02, *Tideland Signal Ltd v Commission* , [2002] ECR II-03781.
- (9) The Commission's code is annexed to its rules of procedure: 2000 OJ L 308/26. It is also available online at http://www.europa.eu/comm/secretariat_general/code/index_en.htm [Link].
- (10) Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, 2002 OJ L 248/1.
- (11) Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, 2002 OJ L 357/1.
- (12) Case C-81/98, *Alcatel Austria v Bundesministerium für Wissenschaft und Verkehr* , [1999] ECR I- 7671.